JERROLD BOSCOE et al., Plaintiffs and Appellants, v. PORT LUDLOW ASSOCIATES LLC, Defendant and Respondent.

A109018

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

2006 Cal. App. Unpub. LEXIS 3025

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PRIOR HISTORY: San Francisco County Super. Ct. No. 411531.

JUDGES: Margulies, J.; Stein, Acting P.J., Swager, J. concurred.

OPINION BY: Margulies

OPINION

Plaintiff Jerrold Boscoe served as a real estate consultant to HCV Pacific Partners LLC (HCV), a defendant that is not a party to this appeal. Their consulting agreement provided that, in addition to a monthly retainer, Boscoe would receive a "success fee" if HCV purchased certain real properties. Approximately a year after HCV terminated Boscoe's agreement, defendant Port Ludlow Associates LLC (PLA), a company formed by HCV, purchased one of the designated properties. When HCV refused to pay the success fee to Boscoe, he sued HCV, PLA, and HCV's president. PLA obtained summary adjudication on six of Boscoe's claims against it, while the remainder were dismissed either on motion to strike or demurrer. We affirm.

I. BACKGROUND

[*2] The second amended complaint was filed against HCV, PLA, and Randall Verrue, the president and CEO of HCV. It alleged that in July 1999, Boscoe entered into a written agreement with "defendants" to provide real estate consulting services in connection with real property located in the State of Washington. [1] In fact, the consulting agreement, a copy of which is attached to the complaint, was between Boscoe's company, Western Pacific Consulting, Inc. (Western), and HCV. Western later assigned the agreement to Boscoe. Under the agreement, Western was entitled to receive from HCV a monthly retainer of $10,000 for an initial term of six months, plus a "success fee" upon the closing of a real estate transaction. The complaint further alleged that PLA was formed by HCV for the express purpose of purchasing and developing a property owned by Pope Resources (Pope), referred to as the "Port Ludlow Property," and was "the successor[]-in-interest of HCV as to the Port Ludlow Property . . ., including with respect to any activities of or obligations owed to plaintiffs as herein alleged."

1 The second amended complaint included as plaintiffs Boscoe's brother Jerome and a fictitious business name associated with Jerome. Because the brother is not a party to this appeal, we omit discussion of the claims asserted by Jerome M. Boscoe, individually, and doing business as The Haskell Company.

[*3] According to the complaint, the consulting agreement was initially extended to run through June 30, 2000, during which time Boscoe was consulting with respect to a potential real estate transaction with Pope. HCV did not extend the consulting agreement further after negotiations between HCV and Pope stalled in mid-2000. In May 2000, the defendants nonetheless orally agreed to pay Boscoe [2] the success fee if a transaction was thereafter concluded, and Boscoe continued to render services without payment. The defendants are alleged to have concluded an agreement to purchase the Port Ludlow Property from Pope in August 2001, but they refused to pay the success fee. [3] The complaint asserts claims against PLA and the other defendants for breach of the consulting agreement (first cause of action), breach of the oral promise to pay the success fee despite termination of the consulting agreement (second cause of action), a declaratory judgment as to Boscoe's right to the payments (third cause of action), fraud (fourth, fifth and sixth causes of action), and interference with prospective economic advantage (seventh and eighth causes of action).

2 Because the interests of Boscoe and his fictitious business names or companies are entirely aligned in this appeal, we hereafter refer to all appellants jointly as "Boscoe."

[*4]

3 Despite this allegation, there is no dispute that it was PLA alone that purchased the property, rather than any of the other defendants.

PLA filed a demurrer and motion for summary adjudication as to each claim of the second amended complaint. The motion for summary adjudication was successful as to the first six causes of action, while the demurrer resulted in dismissal of the remaining claims. As to the first six causes of action, the motion for summary adjudication argued, among other grounds, that PLA was not a successor in interest to HCV and that Boscoe did not have a broker's license, required in the State of Washington for the provision of the type of services called for by the consulting agreement. Although PLA's contention that it was not a successor in interest to HCV was stated in the notice of motion, argued in its memorandum of points and authorities, and addressed several times in the separate statement of undisputed facts, Boscoe's attorneys appear to have overlooked the argument. Although Boscoe's separate statement disputed the facts on which PLA relied in asserting it [*5] was not a successor in interest, his memorandum of points and authorities in opposition to the motion for summary adjudication responded only to the argument regarding his lack of a broker's license. During argument of the motion, Boscoe's counsel stated, "[PLA] never moved for summary judgment [on the ground] that [PLA] is out because it's not a successor. We could have easily met that with evidence." When PLA's counsel insisted that it had, indeed, made this argument and pointed out the presence of the argument in PLA's notice of motion and points and authorities, Boscoe's counsel told the court, "Well, you undisputedly have evidence in the record that contradicts that allegation, and you have the discretion to consider that evidence." Counsel did not identify the "evidence" to which he was referring, other than to claim "PLA [was] formed with the specific purpose of beating this success fee."

The trial court granted summary adjudication to PLA on the first through sixth causes of action. The court's order did not expressly state the grounds on which the ruling was based, but it did note that a triable issue of fact existed as to PLA's argument regarding a broker's license, [*6] implicitly rejecting the argument that summary adjudication should be granted because Boscoe lacked a Washington State broker's license. Given this rejection, the trial court presumably relied on the successor-in-interest argument. Boscoe did not move for reconsideration or request relief under *Code of Civil Procedure section 473* with respect to his failure to address this issue.

PLA's demurrer stated several grounds for dismissal of the seventh and eighth causes of action in the second amended complaint, which purported to state claims for intentional interference with prospective economic advantage, including that the causes of action did not allege the type of independent wrong necessary to such a claim. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal.4th 376, 393*.) In opposing the demurrer, Boscoe asserted that, despite their titles, the seventh and eighth causes of action were actually claims for interference with an existing contract because they alleged that Verrue, PLA, and HCV had engaged in a conspiracy to defraud Boscoe of the proceeds of the consulting agreement. Boscoe sought leave to plead causes of action for [*7] conspiracy to defraud and intentional interference with contract in the event the demurrer was granted for failure to allege an independent wrong. When the trial court sustained PLA's demurrer on this ground, it granted Boscoe "leave to amend those causes of action to allege an independently wrongful act if [he] can do so in good faith." No mention was made of the additional, different causes of action.

Boscoe filed a third amended complaint, adding three claims in place of the two to which the demurrer had been sustained. The seventh cause of action alleged a conspiracy to defraud, the eighth a claim for intentional interference with and inducement of breach of contract, and the ninth a claim for intentional interference with prospective economic advantage. The latter claim alleged, as wrongful conduct, that PLA and Verrue had interfered with the consulting agreement. PLA filed a motion to strike as to the each of the new causes of action on the ground that Boscoe had not been granted leave to add new claims, characterizing the ninth cause of action as a "mislabeled" cause of action for intentional interference with contract. It also demurred to each new claim on the grounds of [*8] failure to state a claim. The trial court granted the motion to strike as to the seventh and eighth causes of action and the demurrer to the ninth cause of action. Because Boscoe elected to stand on his pleading, leave to amend was denied. The claims against PLA having been summarily adjudicated or dismissed, the matter proceeded to trial against HCV, and a substantial judgment was awarded in Boscoe's favor.

Boscoe appeals the trial court's summary adjudication in favor of PLA with respect to the first through sixth causes of action of the second amended complaint and the grant of demurrer regarding the ninth cause of action of the third amended complaint.

II. DISCUSSION

A. First Through Sixth Causes of Action

Notwithstanding the allegations of the complaint, it is undisputed that PLA was not a party to the consulting agreement and could not have been the party with which Boscoe had the discussions underlying his claims of fraud and breach of an oral agreement, since PLA was not formed until a year after those discussions occurred in May 2000. As a result, to prevail against PLA on the first six causes of action Boscoe was required to demonstrate some basis [*9] for PLA's liability for the words and agreements of others. To satisfy this requirement, Boscoe alleged in the second amended complaint that PLA was a "successor-in-interest" to HCV. In moving for summary adjudication, PLA provided evidence intended to demonstrate that this allegation was false. A declaration submitted by Verrue states that (1) HCV is an existing legal entity, with 24 employees and an annual budget of approximately $2 million; (2) HCV has not merged or otherwise consolidated with PLA; (3) HCV has not sold or assigned any real property to PLA; (4) HCV has not entered into any agreement for the purchase of real property in the State of Washington and has not transferred or assigned to PLA any right to purchase real property in Washington; and (5) HCV has not appointed PLA its agent for any purpose.

Boscoe argues that the trial court's summary adjudication must be reversed on three alternative grounds: (1) a triable issue existed with respect to the facts on which PLA relied in asserting it was not a successor in interest, (2) PLA was liable to Boscoe under the consulting agreement by operation of *Civil Code section 1589* because PLA obtained the [*10] benefits of HCV's contractual right to purchase the Port Ludlow Property, and (3) PLA is estopped from denying liability under *Citizens Suburban Co. v. Rosemont Dev. Co. (1966) 244 Cal. App. 2d 666, 53 Cal. Rptr. 551*. PLA responds that these arguments were waived when Boscoe failed to raise them in the trial court.

Although it is true that Boscoe disregarded the successor-in-interest argument in his memorandum of points and authorities, his separate statement did dispute the factual foundation for PLA's claim that it was not a successor in interest, a dispute echoed by his counsel at oral argument. In particular, Boscoe's separate statement cites evidence that (1) HCV was involved in the management of PLA and the two entities have officers in common, in particular Verrue; (2) HCV had an agreement to purchase the Port Ludlow Property, which was ultimately purchased by PLA; and (3) in its published literature HCV did not distinguish between assets owned by HCV and PLA.

Boscoe also draws our attention to excerpts from what is claimed to be PLA's "Operating Agreement," although he did not refer to this agreement in the separate statement or at argument on the motion. [*11] Paragraph No. 2.6 of that agreement states that "the purpose of the Company shall be to acquire the buyers' interest in and under the Purchase Agreements, to acquire the Property in accordance with the terms of the Purchase Agreements, [and] to develop, construct, hold, operate and sell the Real Property . . . ." Only a few isolated pages of this document were included in the record on summary adjudication, and the pages of the agreement that would explain the meaning of the terms in this paragraph were not among them. In his brief on appeal, Boscoe assures us that "Company" refers to PLA, "Purchase Agreements" refers to agreements entered into by HCV for the purpose of acquiring the Pope properties, and "Real Property" refers to the Port Ludlow Property. The brief acknowledges, however, that the pages of the agreement containing these definitions was not included in the record before the trial court. [4]

4 In a request for judicial notice filed September 1, 2005, Boscoe requested that the court take judicial notice of the entire agreement. We deferred ruling on that request in an order dated September 28, 2005. While there may be no dispute about the content of this document, its introduction requires proper authentication, and its contents are not "[f]acts [or] propositions" that "are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (*Evid. Code, ß 452, subd. (h)*.) Because the document is not a proper subject of judicial notice, we are required to deny the request. (*Evid. Code, ß 450*.)

[*12] Even if we assume that (1) the trial court should have considered the putative Operating Agreement, despite Boscoe's not having referred to it in the separate statement; and (2) the undefined terms in the Operating Agreement mean what Boscoe claims they mean in his brief on appeal, information not available to the trial court in any form, we cannot find that Boscoe raised a triable issue of fact on the issue of successor in interest. A successor in interest is, generally, a person or entity who comes into possession of the rights of another in a particular tangible or intangible property. As stated in *Perez v. 222 Sutter St. Partners (1990) 222 Cal. App. 3d 938, 272 Cal. Rptr. 119* (*Perez*), " 'Successor in interest' is defined as: 'One who follows another in ownership or control of property. In order to be a "successor in interest," a party must continue to retain the *same rights* as original owner . . . and there must be *change in form only and not in substance*, ...' " (*Perez, at p. 948, fn. 8*, quoting Black's Law Dict. (5th ed. 1979) p. 1283, col. 2, italics added by *Perez*; see also, *Estate of Yates (1994) 25 Cal.App.4th 511, 522*.) [*13] Because the allegation of successor in interest in the complaint is vague and entirely conclusory, stating that PLA is "the successor[]-in-interest of HCV as to the Port Ludlow Property . . ., including with respect to any activities of or obligations owed to plaintiffs as herein alleged," it is unclear what type of succession Boscoe intended to allege. The statement could be construed to mean either that PLA is a corporate successor to HCV or that PLA acquired contractual rights relating to the Port Ludlow Property that formerly belonged to HCV. [5] Verrue's declaration provides competent, affirmative evidence that neither of these is the case, since he states that (1) HCV continues to exist as a separate entity and has not been consolidated with PLA, and (2) HCV has not sold or assigned to PLA any real property or rights to purchase real property located in the State of Washington.

5 No one suggests that PLA was a successor in interest to HCV under the consulting agreement. It is not entirely clear that PLA would be liable on the consulting agreement merely because it was a successor in interest to HCV under a purchase agreement. For purposes of this appeal, we assume that a showing of such successor-in-interest status would be sufficient to create liability, but we do not decide the question.

[*14] Under the familiar rules relating to motions for summary judgment, PLA's evidentiary showing shifted the burden to Boscoe to supply evidence raising a triable issue of fact as to PLA's status as a successor in interest to HCV. (E.g., *Morris v. De La Torre (2005) 36 Cal.4th 260, 264-265*.) The evidence cited by Boscoe simply does not suffice. The facts that the two entities share officers and interests, that PLA purchased a property that HCV once had an agreement to purchase, and that HCV did not distinguish in published literature between assets owned by it and PLA do not demonstrate that PLA was a corporate successor to HCV or that PLA succeeded to any particular contractual rights of HCV. It is entirely possible that PLA purchased the Port Ludlow Property without ever having succeeded to the specific contractual rights to purchase possessed by HCV; indeed, Verrue's declaration would suggest this. Nor does the purported Operating Agreement raise a triable issue. Again presuming that Boscoe correctly characterizes the missing definitions of the terms used in the agreement, it states only that PLA was intended by its promoters to acquire HCV's rights. That does not [*15] demonstrate that PLA actually succeeded in its realizing its intent or, even if it did, that when PLA purchased the property it " 'retain[ed] the *same rights* as original owner' " with " 'a *change in form only and not in substance*,' " as required by *Perez*. (*Perez, supra, 222 Cal. App. 3d at p. 948, fn. 8*.) After an adequate period of discovery, which included time to depose the principal actors, Boscoe was required to supply some evidence that PLA did not simply intend to, but actually did succeed to the contractual rights of HCV. In the absence of such evidence, Verrue's flat denial precludes a triable issue of fact. [6]

In the alternative, Boscoe argues that PLA should be held liable for the agreement and words of HCV pursuant to *Civil Code section 1589*, which states that the acceptance of the benefits of a transaction "is equivalent to a consent to all the obligations arising from it" or under a theory of estoppel under *Citizens Suburban Co. v. Rosemont Dev. Co*. We agree with PLA that Boscoe waived these theories when he failed to raise them in the trial court. "Ordinarily the failure to preserve a point below constitutes [*16] a waiver of the point. [Citation.] This rule is rooted in the fundamental nature of our adversarial system: The parties must call the court's attention to issues they deem relevant." (*North Coast Business Park v. Nielsen Construction Co. (1993) 17 Cal.App.4th 22, 28*; see similarly, *Tudor Ranches, Inc. v. State Comp. Ins. Fund (1998) 65 Cal.App.4th 1422, 1433*.) Where the facts have been fully explored below and are essentially undisputed, the appellate court has discretion to consider what is, in effect, a new issue of law. (*Richmond v. Dart*

Industries, Inc. (1987) 196 Cal. App. 3d 869, 879, 242 Cal. Rptr. 184 (*Richmond*).) "However, 'if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial the opposing party should not be required to defend against it on appeal. [Citations.]' " (*Richmond, at p. 879*; see also *In re Marriage of Moschetta (1994) 25 Cal.App.4th 1218, 1227* [to allow parties to raise a new issue on appeal "is unfair to their opponents who did not have the opportunity to attack that theory factually or [*17] legally in the trial court"].)

6 Because we find that the Operating Agreement does not raise a triable issue of fact, we need not decide whether the trial court had a duty independently to locate the Operating Agreement in Boscoe's evidence. We note, however, that the general trend is away from *Kulesa v. Castleberry (1996) 47 Cal.App.4th 103, 113*, which held that a trial court could not disregard evidence merely because it was not found in a separate statement. (E.g., *Zimmerman, Rosenfeld, Gersh & Leeds v. Larson (2005) 131 Cal.App.4th 1466, 1478, fn. 8*; *San Diego Watercrafts, Inc. v. Wells Fargo Bank (2002) 102 Cal.App.4th 308, 313-315*.) Moreover, because Boscoe failed to introduce the portions of the Operating Agreement that would have explained its obscure terms, the trial court in this case was faced with the doubly difficult task not only of locating the evidence but figuring out what it meant.

Boscoe's new arguments are essentially equitable theories [*18] that depend on the particular facts and circumstances surrounding the relationship between HCV and PLA and the purchase transaction. As in *Richmond,* "we cannot say defendant was reasonably put on notice to present all its evidence surrounding" these issues. (*Richmond, supra, 196 Cal. App. 3d at p. 879.*) Accordingly, they have been waived.

Because we reach this conclusion, we do not address PLA's alternative argument that Boscoe was precluded from recovering under Washington law because he lacked a real estate broker's license. [7]

7 **We also deny as moot Boscoe's supplemental request for judicial notice, which sought to have the court take judicial notice of jury verdict forms in connection with this alternative argument.**

B. Interference with Economic Advantage

Boscoe has also appealed the grant of a demurrer on the ninth cause of action of the third amended complaint. He argues that although this claim was labeled as one for intentional interference for prospective [*19] economic advantage, it was actually a claim for intentional interference with contract and fully satisfied the pleading requirements for such a cause of action, which does not require proof of an independent wrongful act. (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1158*.)

Although characterized as an appeal of the grant of demurrer, Boscoe's claim is actually a challenge to the trial court's limitation of the scope of amendment following its grant of a demurrer regarding the seventh and eighth causes of action in the second amended complaint. In ruling on that demurrer, the trial court's order permitted Boscoe only "to amend those causes of action [for intentional interference with economic advantage] to allege an independently wrongful act if they can do so in good faith." The trial court's subsequent grant of a demurrer on the ninth cause of action was proper under this order. Because the ninth cause of action does not allege the type of independent wrongful act required by a cause of action for intentional interference with business advantage, it fails to state a claim for that cause of action. In arguing that the trial court should have [*20] denied the demurrer because, contrary to the title of the ninth cause of action, it stated a claim for intentional interference with contract, Boscoe is effectively challenging the trial court's earlier order, which denied Boscoe's request for leave to assert new and different causes of action that did not require the pleading of an independent wrongful act.

A trial court's ruling on a request for leave to amend is reviewed for abuse of discretion, and the burden is on the appellant to demonstrate such abuse. (*Emerald Bay Community Assn. v. Golden Eagle Ins. Corp. (2005) 130 Cal.App.4th 1078, 1097*.) Despite the liberality ordinarily afforded in the amendment of pleadings, the trial court is permitted to consider a number of factors in exercising its considerable discretion, including " ' "the conduct of the moving party" ' " and the timing of the request for leave. (*Ibid.*, italics omitted.)

It was Boscoe's choice to plead his claims as intentional interference with business advantage. Although we agree that the factual allegations are better suited to a claim of intentional interference of contract, their suitability for that claim should have been equally [*21] obvious to Boscoe at the time he elected *not* to plead them as intentional interference with contract in drafting the second amended complaint. In light of the fact that the trial court was ruling on the third version of Boscoe's complaint, a relatively advanced stage of the proceedings, we find no abuse of discretion in its

decision to restrict Boscoe's leave to amend the cause of action he originally chose to allege. This is consistent with the normal rule that a party against whom a demurrer is granted will be given leave only to reassert the same cause of action. (E.g., *People ex rel. Dept. Pub. Wks. v. Clausen (1967) 248 Cal. App. 2d 770, 785, 57 Cal. Rptr. 227*.)

III. DISPOSITION

The trial court's orders are affirmed.

Margulies, J.

We concur:

Stein, Acting P.J.

Swager, J.