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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

KENNETH D. DeMARTINI,

Plaintiff and Appellant,

v.

JUDITH L. BUTLER, as Trustee, etc.,

Defendant and Respondent.

A132140

(Contra Costa County
Super. Ct. No. P05-01464)

Plaintiff Kenneth D. DeMartini challenges actions taken by his sister, defendant Judith L. Butler, as trustee of trusts holding property they inherited from their father. Plaintiff entered into a settlement agreement with defendant approving her initial accounts as trustee of the trusts. The settlement agreement contained a release of claims related to the trusts, but did not preclude objections to future accountings. Plaintiff initially objected to defendant's subsequent and final accounts, but withdrew those objections. He then petitioned to set aside the settlement agreement and to compel defendant to render a further accounting.

Plaintiff initially appealed from an order sustaining defendant's demurrer to the petition without leave to amend. In a prior opinion (*DeMartini v. Butler* (Aug. 13, 2010, A126288 [nonpub. opn.] (slip. opn.)), we ruled that plaintiff was collaterally estopped by the order from asserting all of the claims he seeks to raise in the petition, except those relating to certain parcels of real property he did not learn of until after the order was entered. We further noted that claims relating to those properties may not necessarily be precluded by the release of claims in the settlement agreement, and that plaintiff should

be granted leave to amend to plead those claims with particularity. We affirmed in part and reversed in part the order sustaining the demurrer without leave to amend.

On remand, plaintiff filed an amended petition which we will explain below. The trial court sustained a demurrer to that amended petition without leave to amend. We shall reverse, for the reasons set forth below.

I. BACKGROUND

We first recite the background of this case from the prior opinion.

“The parties were named by their parents as beneficiaries under the Andrew DeMartini and Eva DeMartini Living Trust, dated February 16, 1998 (the Trust). The Trust provided that upon the death of the first settlor, assets would be divided into a Survivor’s Trust as to the survivor’s share, and into a Marital Deduction Trust and a Tax Savings Trust as to the decedent’s share. Andrew died on March 18, 1998. On August 10, 1998, Eva, as settlor and trustee, executed a first amendment to the Trust naming defendant as the sole successor trustee of any trust created by the agreement. Eva executed a second amendment to the Trust on September 4, 1998, and a third amendment to the Trust on July 8, 1999. The third amendment cancelled the second amendment, disinherited plaintiff from Eva’s Survivor’s Trust, and named defendant the sole beneficiary of that trust. On January 10, 2001, Eva executed a declaration allocating one-half of the Trust’s assets to her Survivor’s Trust, and dividing the other half among the Marital Deduction Trust, which was split into the Andrew DeMartini Exempt Marital Trust and the Andrew DeMartini Nonexempt Marital Trust, and the Andrew DeMartini Tax Saving Trust (collectively the Andrew DeMartini Trusts).

“Eva was diagnosed with Alzheimer’s dementia in March 2002. Her physician determined on July 1, 2002, that she was unable to handle her financial affairs without defendant’s assistance, and defendant as of that date acted as successor trustee of the Andrew DeMartini Trusts. Defendant rendered accounts to plaintiff for the periods July 1, 2002 through December 31, 2002 (first account), January 1, 2003 through June 30, 2003 (second account), and July 1, 2003 through December 31, 2003 (third account). Plaintiff retained counsel and objected to those accounts. The objections were

resolved in a settlement agreement between: defendant, individually and as trustee of the Andrew DeMartini Trusts; Eva, individually and as trustee of those trusts; and plaintiff.

“The agreement recited that plaintiff contested the validity of the first amendment to the Trust naming defendant as sole successor trustee, and that he claimed a trustee fee, which defendant disputed. The agreement provided that The Mechanics Bank would be appointed as successor trustee of the Andrew DeMartini Trusts, and that defendant would transfer the assets of those trusts to the bank. The agreement specified defendant’s trustee’s fee, and provided that plaintiff would receive an equal amount, less the amount he owed on a loan from the Andrew DeMartini Tax Savings Trust. Plaintiff agreed in the settlement ‘to waive and relinquish any right to contest changes Eva may have made as to the disposition of her assets, by amendment of her Survivor’s trust or otherwise. Eva’s disposition of her assets is specifically incorporated by reference into the definition of Released Claims in Paragraph 9 of this agreement.’ In that paragraph, the parties released each other from all claims of any kind ‘as of the effective date of this Agreement that arise from or are in any way related to the Andrew DeMartini Trusts (the Released Claims). . . . Each party understands and expressly waives any rights or benefits available to him or her under California Civil Code § 1542, which provides as follows: “A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.” ’ The agreement stipulated that plaintiff could object to any future accountings rendered by defendant as trustee of the Andrew DeMartini Trusts. The parties represented that they had been advised by counsel and fully understood the agreement.

“Plaintiff made handwritten changes to the printed settlement agreement before signing it, adding among other things a ‘4th Account’ for the period from January 1, 2002 through January 30, 2002, to the list of accounts he had received from defendant and approved. Defendant signed the interlineated agreement and returned it to plaintiff’s counsel, with a cover letter from her counsel advising that she approved all of plaintiff’s changes except one that would have recited that she began acting as successor trustee of

the Andrew DeMartini Trusts on January 1, rather than July 1, of 2002. Amounts owed to plaintiff and his attorney under the settlement agreement were paid in February 2005, and defendant completed the transfer of trust assets to the bank on September 6, 2005.

“In October 2005, defendant filed her fourth, fifth, sixth, and final accounts for the Andrew DeMartini Trusts for the period from January 1, 2004 through September 6, 2005, and petitioned for their approval. Plaintiff in propria persona filed objections to the accounts in November 2005 and May 2006. Plaintiff accused defendant of ‘deceiving’ him and ‘withholding vital information’ from him with respect to Trust affairs. His objections included several references to the 1999 Trust amendment. Plaintiff complained at one point, ‘still to this day Oct. 15, 2005. I am still receiving information I was not aware of. September 1998 Amendment, July 1999 Amendment’ Plaintiff said he did not learn that Eva suffered from Alzheimer’s until November of 2004, and that he did not see Eva’s division of the Trust assets between her Survivor’s Trust, and the Andrew DeMartini Trusts, until October of 2005. The Trust assets included an interest in a property known as the Lone Tree Ranch; plaintiff stated, ‘Sale of Lone Tree Ranch in which my parents owned 1/3 interest in started in 1999 August without my knowledge. I never found out about the sale until May 2002. Proceeds of land started in 2000, 2001, final 2002. . . . [Defendant] is only showing in 2002 final distribution. I have asked for the early distribution but she or Mr. Hartog [defendant’s counsel] refuse.’ Plaintiff said that, ‘[b]ecause of [defendant’s] past practice on handling Andrew DeMartini Trust,’ he was ‘asking the court to take jurisdiction over the Andrew G. DeMartini Trust settlement agreement.’

“Eva died on June 1, 2006. On June 7, 2006, plaintiff signed a pleading withdrawing his objections to the petition for approval of defendant’s accounts. On June 9, 2006, defendant’s counsel sent plaintiff copies of the Trust and the first, second, and third amendments to the Trust, along with a cover letter stating: ‘Probate Code section 16061.7 requires that you be given a copy of the trust documents as an heir-at-law of your mother. You are not entitled to any further information regarding your mother’s trust because you are not a beneficiary of that trust.’ There were no appearances at the

June 26, 2006 hearing on defendant's petition, and the petition was approved in an order filed on June 29, 2006.

“The order referred extensively to the parties’ settlement agreement, noting that: the agreement had resolved plaintiff’s objections to defendant’s first three accounts; defendant had identified which of plaintiff’s interlineations to the agreement she accepted; plaintiff had approved financial information he received from defendant concerning the Trust for the months of January through June of 2002 (plaintiff had claimed that defendant acted as trustee during this period); plaintiff had received consideration under the agreement; and defendant had fulfilled her obligations under the agreement.

“Then in October 2008, plaintiff petitioned to set aside the settlement agreement and to compel defendant ‘to render an accurate account.’ Plaintiff alleged that he entered into the settlement in reliance on ‘numerous concealments and misrepresentations of material facts. . . .’ Those concealments and misrepresentations are as follows:

‘a. Misrepresentation: That [plaintiff] had been provided all Trust documents and attachments. [¶] Fact: The Second and Third Amendments to the Trust and the allocation of assets after Andrew DeMartini’s death were not provided, particularly the Amendment that disinherited [plaintiff] from the survivor’s trust.

‘b. Misrepresentation: That [plaintiff’s] mother, Eva DeMartini was fine mentally and that Eva had signed the Agreement with full understanding and wanted her son to also sign, and that Eva had prepared the accountings. [¶] Fact: Eva had been diagnosed with Alzheimer’s disease at least as early as 2002. She had not been acting as sole Trustee since her husband’s death. Eva was incapable of preparing Trust accountings.

‘c. Concealed from [plaintiff]: That the 37.5 acres in Brentwood in which the Trust had an interest was sold. [¶] Fact: That the above-mentioned real property was sold for \$4,100,000.00. Payments from the sale were made, but [defendant] failed to place them into the Trust and did not inform [plaintiff] of this significant fact.

‘d. [Defendant] and/or her counsel, John Hartog, inflated the value of certain assets so that it caused [plaintiff] to pay taxes on assets that he did not receive.

‘e. [Defendant’s] Accountings did not reveal a true list of Trust assets, made inaccurate valuations, and did not disclose the true amount of her compensation. When Mechanics Bank assumed the role of Trustee, only then did [plaintiff] learn that assets were missing from [defendant’s] accounting, provided to [plaintiff] through her attorney John Hartog.’

“Plaintiff elaborated on the petition’s allegations in declarations in opposition to defendant’s demurrer. The allegation with respect to the Brentwood property involved defendant’s failure to allocate one-half of the \$860,000 advance payments received on the sale of the Lone Tree Ranch to one of the Andrew DeMartini Trusts of which he was a beneficiary. Plaintiff admitted that he had previously objected to his sister’s final accounts on this ground, but said that he withdrew the objection because he erroneously believed that he was a one-half beneficiary of Eva’s Survivor Trust, as well as the Andrew DeMartini Trusts. He explained that ‘it made no sense to force the reallocation of assets between the trusts if I was an equal beneficiary of both trusts. [¶] However, after withdrawing my objections, [defendant] for the first time presented me with . . . the Third Amendment to the Andrew DeMartini and Eva DeMartini Living Trust (signed by my mother in 1999) which was my mother’s exercise of her power of appointment over the Survivor’s Trust in effect disinheriting me as a beneficiary of this Trust. I would not have withdrawn my objections to the accountings had I known of my disinheritance.’

“With respect to the claim that defendant’s accounts did not include all Trust assets, plaintiff attached a June 28, 2007 letter from The Mechanics Bank, which responded to his request for information concerning Eva’s estate tax return. The letter listed three parcels of unimproved property in Oakley valued at \$876,600 (hereafter the Oakley Properties) as assets of the Trust. Plaintiff declared that one-half of the value of the Oakley Properties should have been allocated to one of the Andrew DeMartini Trusts of which he was a beneficiary, but observed that those properties were not included among the Trust assets Eva divided. The letter from the bank showed further, in plaintiff’s view, that he paid an unfair amount of estate taxes because all of the taxes

were paid by the Andrew DeMartini Trusts, and none of them were borne by Survivor's Trust of which defendant was the sole beneficiary.

“As for the allegation that defendant's accounts inaccurately valued assets, plaintiff declared that defendant was unfairly benefited by an unreasonably low value attributed to real property on Rose Avenue in Oakley that was allocated to the Survivor's Trust in the division of Trust assets. The property was valued at \$158,000 when the Trust assets were divided in 2001, but then sold for \$397,000 in 2004.

“Plaintiff argued among other things that no settlement had been reached because defendant did not accept all of his interlineations to the settlement agreement.

“After numerous rounds of briefing and several hearings, the court sustained defendant's demurrer to the petition without leave to amend. The court found that the settlement agreement, including the release of claims, was valid and enforceable, and that plaintiff's claims were barred under the doctrine of res judicata by virtue of the June 2006 order approving defendant's final accounts.”

(DeMartini v .Butler, supra, slip opn. at pp. 2–7.)

II. DISCUSSION

In the prior opinion, we concluded under principles of res judicata defendant's demurrer was correctly sustained without leave to amend as to most of plaintiff's claims, but we reached a different conclusion regarding the allegations involving the Oakley Properties. We concluded that insofar as plaintiff's petition is based on those allegations, the petition does not, as defendant asserts, raise “the identical purported fraud” plaintiff alleged in opposition to her final accounts. We concluded the doctrine of res judicata did not prevent plaintiff from advancing claims based on newly-discovered facts regarding the Oakley Properties. *(DeMartini v .Butler, supra, slip opn. at pp. 10–11.)*

We then discussed the settlement agreement, and faced the question whether relief related to the Oakley Properties is precluded by the release of claims in the settlement agreement. We concluded that question cannot be answered on the existing record because the release applied only to claims that existed as of the effective date of the settlement agreement, and the evidence did not establish when the Oakley Properties

were identified as Trust assets and allocated to the Survivor's Trust. We believed that insofar as it appeared from the record, defendant herself may not have been aware of the Trust's interest in those properties at the time of the settlement. We found that since it was not apparent when the alleged fraud involving those properties occurred, the settlement could not, at the time of the prior appeal, be held to bar recovery for that malfeasance. (*DeMartini v. Butler*, *supra*, slip opn. at pp. 11–12.)

Finally, we ruled as follows: “If it develops that the alleged fraud with respect to the Oakley Properties predated the settlement agreement, then it will be necessary to consider whether the fraud could be found to vitiate the release as to those properties. For the guidance of future proceedings, we briefly note that our answer to that question is ‘yes.’ ‘In general, a written release extinguishes any obligation covered by the release’s terms, provided it has *not been obtained by fraud*, deception, misrepresentation, duress, or undue influence.’ (*Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1366, italics added.) ‘Where an agreement is induced by fraud, the trial court has the equitable power to set aside a provision of the contract in which the parties released all unknown claims.’ (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, [1146]; see also *San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1054 [discussing fraud perpetrated by a fiduciary].) Whether [a] defendant suing for fraud must rescind to void the settlement agreement should be determined from the amended pleadings and subsequent proceedings in the trial court.” At that point, we cited *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913 (*Village Northridge*). (*DeMartini v. Butler*, *supra*, slip opn. at p. 12.)

After we issued the remittitur, plaintiff filed an amended petition on November 12, 2010. In the amended petition, plaintiff sought to set aside the settlement agreement based on “numerous concealments and misrepresentations of material facts.” Plaintiff claimed the Oakley properties were not disclosed or allocated to the sub-trusts. Because of the alleged misrepresentations, plaintiff purported to rescind the settlement agreement pursuant to Civil Code sections 1691–1693. But he did not restore the money he had received under the settlement agreement because he had spent it.

Defendant demurred to the amended petition on the ground it failed to state a cause of action and on the ground of laches. After an unreported hearing, the trial court sustained the demurrer. The court ruled the amended petition alleged fraud predating the settlement agreement, and thus plaintiff had to restore the consideration he had received under that agreement. But because plaintiff had received nonmonetary compensation consisting of defendant's relinquishing her role as trustee to Mechanics Bank, the court found "it is impossible for [plaintiff] to retroactively place [defendant] in the position that she relinquished over five years ago under the Settlement Agreement," but still sustained the demurrer.

The court also found laches because plaintiff delayed in filing his lawsuit while receiving the benefits of the settlement agreement.

In *Village Northridge*, the Supreme Court set forth general rules. "If a party believes it has been fraudulently induced to enter into a contract," that party must rescind in order to escape from its contractual obligations. (*Village Northridge, supra*, 50 Cal.4th at p. 921; see *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415.) "The party's rescission obligations depend on the type of fraud alleged." (*Village Northridge, supra*, at p. 921.) If the fraud is in the inducement, the party seeking to void the contract must rescind it and offer to restore the consideration received. (*Ibid.*) "A settlement agreement is considered presumptively valid, and plaintiffs are bound by an agreement until they actually rescind it." (*Id.* at p. 930.)

The court finally concluded, "[O]ur own statutory scheme is clear. The Legislature has created a fair and equitable remedy to address the alleged fraud problem: rescission of the release, followed by suit." (*Village Northridge, supra*, 50 Cal.4th at p. 931.) Restitution of consideration is generally required.

But there are exceptions to this rule, as explained in 1 Witkin, Summary of California Law (10th ed. 2005) Contracts, section 942, pages 1036–1037. Where, without the plaintiff's fault, restoration has become impossible, the court may adjust the equities between the parties. (1 Witkin, *supra*, § 942, at p. 1036.) Restoration of the

trusteeship to defendant under the circumstances of this case falls within the impossibility exception at the demurrer stage.

Because this case is at the pleading stage, we must assume as true the facts pleaded in the amended petition. And there is authority where a defendant has been guilty of fraud, courts of equity are not so much concerned with mechanically requiring exact restoration, but in ensuring nefarious practices are not rewarded. The inability to restore the precise status quo is not necessarily a bar to rescission. (See, e.g., *Farina v. Bevilacqua* (1961) 192 Cal.App.2d 681, 685.)

Defendant argues plaintiff has been guilty of laches for not bringing his complaint sooner. Modern courts are less inclined to find laches. Laches can only be found if there is a delay which is substantially prejudicial to the adverse party. (1 Witkin, Summary of Cal. Law, *supra*, § 945, at pp. 1038–1039; Civil Code section 1693.) Determining prejudice is a question of fact not resolvable by demurrer under the circumstances alleged.

III. DISPOSITION

The order sustaining without leave to amend the demurrer to the amended petition is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

Marchiano, P.J.

We concur:

Dondero, J.

Banke, J.