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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

TED DANG,

Plaintiff and Appellant,

v.

EMERY UNIFIED SCHOOL DISTRICT,

Defendant and Respondent.

A136351

(Alameda County
Super. Ct. No. RG11598800)

This is an appeal from judgment following the dismissal with prejudice of appellant Ted Dang’s first amended complaint for writ of mandate against respondent Emery Unified School District (School District). Appellant’s complaint purports to set forth a claim based on the School District’s violation of Education Code section 17624 by failing to refund to him a development fee paid by his predecessor-in-interest, Tomorrow Development Company, Inc. (TDC). This fee was charged in connection with a building permit issued by the City of Emeryville (City). The trial court sustained the School District’s demurrer to this cause of action without leave to amend after concluding it was time-barred or, alternatively, without merit. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 5, 2012, appellant filed the first amended complaint for writ of mandate asserting two causes of action against the School District and seeking \$140,651.68 in damages, plus prejudgment interest and reasonable attorney fees and costs. The first cause of action was for violating Education Code section 17624 (section 17624) by

failing to refund the amount paid for a development fee in connection with a construction project that he alleges was never commenced.¹ The second cause of action was for violating Government Code section 66006 by expending the development fee on a project other than the project for which it was collected.

According to the first amended complaint, appellant is the successor-in-interest to TDC, which, in turn, owned real property located at 6150 Christie Street (property) in Emeryville. At least two other entities previously owned the property, to wit, the “Previous Owner” and Primecore Mortgage Trust Inc. (Primecore).

On June 16, 2000, the City issued a building permit for the property after the Previous Owner paid, among other fees, an \$84,742.50 development fee to the School District to offset anticipated impacts of the proposed construction project. Specifically, the permit identified the project as an “Eight story Residential w/ Business tenant spaces. FOUNDATIONS ONLY.” A few months later, the City issued another building permit to the Previous Owner for “mass excavation to 5’04 below existing grade. Soils only,” and, less than two months later, a third permit for work identified as “Indicator Piles.” Under these permits, the Previous Owner undertook certain limited activities on the property, including “installation of temporary walls necessary for laying of the structural foundation and the foundation”

On or about September 26, 2001, Primecore acquired the property from the Previous Owner. According to appellant, in acquiring the property, Primecore received an “entitlement” to a credit for the \$84,742.50 development fee paid by the Previous Owner to the School District in connection with the building permits. Then, in December 2002, TDC purchased the property from Primecore “along with the \$84,742.50 in development permit fees” In doing so, TDC intended to undertake a “brand new project independent of Previous Owner’s project [that] involved a completely different architectural plan and construction purpose.” TDC was thus issued, by the City, building

¹ On March 27, 2012, the trial court sustained with leave to amend the School District’s demurrer to the original complaint filed by appellant on January 23, 2012.

permit number 0411-492D in 2004 to demolish “foundations and slab-on-grade to expose pile caps [and] grade beams,” a project valued at \$49,000 (2004 permit). Months later, in March 2005, TDC obtained building permit number 0403-096B identifying plans for a “new eight story multi-family condominium building with 43 residential units 16 live/work units, one commercial space and a parking garage for 88 cars” (2005 permit). This proposed project was valued at \$13,237,980. TDC paid a \$55,909.18 development fee to the School District to offset anticipated impacts to the School District. In addition, the School District agreed to apply the \$84,742.50 development fee collected from the Previous Owner to the \$55,909.18 fee collected from TDC, so that \$140,651.68 was the total fee collected by the School District in connection with the proposed project on the property. However, this project never came to fruition because, according to appellant, the City would not permit TDC to commence construction until it resolved an easement dispute with the adjacent property owner, a dispute that had been ongoing since the Previous Owner had owned the property. As appellant notes, a handwritten note on the project’s construction drawings states: “No work is authorized under this permit until the City and Developer have entered into a Subdivision Improvement and Reimbursement Agreement.”

According to appellant, in light of the City’s refusal to allow construction on the property until the easement dispute was resolved, the City granted TDC two one-year automatic extensions on the 2005 permit. Appellant also alleges that, between 2004 and 2006, TDC received “seven six-month building permit extensions.” However, TDC did engage in some limited work on the property, including demolishing the temporary walls constructed by the Previous Owner under the terms of the 2004 permit. TDC also conducted certain construction-related activities on the property “in order to keep the [2005] building permit alive” These activities were as follows: “preparing steel rebar,” installing a pier cap and constructing a wooden box around the pier cap in preparation for a concrete pour. Ultimately, however, appellant alleges that TDC cancelled plans to develop the property in February 2010 and, on or about March 23, 2010, TDC’s last building permit extension expired. According to appellant, the

project's cancellation was attributable to TDC's inability to commence construction due to the City's failure to resolve the easement dispute with the adjacent property owner.² Further, while the City refunded various fees collected for the project upon appellant's request, the School District declined to refund the \$140,651.68 development fee despite his repeated requests. It is this amount that appellant, by this lawsuit, seeks to have refunded to him.

On April 13, 2012, the School District filed a demurrer to the first amended complaint or, alternatively, motion to strike portions thereof, on the grounds that appellant had failed to state facts sufficient to constitute valid causes of action under either section 17624 or Government Code section 66006. With respect to the first cause of action, the School District reasoned that, if construction was not commenced on or before May 14, 2005, appellant could not prevail because the statute of limitations under Code of Civil Procedure section 338 would bar his claim. The School District further reasoned that, if construction *was* commenced on or before May 14, 2005, he still could not prevail because, as a matter of law, he would not be entitled to any refund. (§ 17624, subd. (b) [permit holders are entitled to a development fee refund if the permit expired "without the commencement of construction, as defined in subdivision (c) of Section 65995 of the Government Code"].) Accordingly, the School District argued, under no set of facts would appellant be entitled to the requested refund.

On June 15, 2012, following a hearing, the trial court sustained the School District's demurrer to the first amended complaint without leave to amend as to the first cause of action and with leave to amend as to the second cause of action.³ In doing so,

² It is undisputed the 2001 California Building Code governs TDC's permits. In particular, section 106.4.4 of this Code provides that, subject to a limited number of extensions, building permits are subject to expiration by operation of law 180 days from the date of their issuance unless construction on the identified property has been commenced. (Cal. Code Regs., tit. 24, § 106.4.4 (2001 ed.).)

³ Prior to entry of judgment, appellant waived any further amendment to the complaint as to the second cause of action. We therefore need not consider his second cause of action for purposes of appeal.

the trial court accepted the School District’s reasoning that “it is not possible for a trier of fact to find that [appellant’s] claim both had merit and is timely.” Judgment was thus entered in favor of the School District on July 31, 2012. Appellant timely appealed.

DISCUSSION

Appellant raises the following issues on appeal. First, appellant contends the trial court erred in sustaining the demurrer on statute-of-limitations grounds because he can successfully plead equitable estoppel as a basis for avoiding the statute of limitations. Second, he argues in the alternative that the trial court erred in sustaining the demurrer based upon a finding that TDC did not commence construction within the statutory period because whether construction had commenced is a question of fact not resolvable on demurrer.

An order sustaining a demurrer is reviewed de novo. We “ ‘treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. See also *People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957.)

Here, the trial court sustained the School District’s demurrer to appellant’s first cause of action without leave to amend on two distinct grounds – lack of a statutory right to the refund and the running of the statute of limitations. We address each in turn.

With respect to the trial court’s finding that appellant had no right to the refund, the language of section 17624 is clear: Permit holders are entitled to a refund of the amount paid in development fees only if construction, as defined in Government Code

section 65995, has not yet begun at the building site.⁴ Here, the trial court found appellant could not be refunded the fee because construction had commenced. Appellant disputes this finding, reasoning that while “pre-construction” activities had commenced, actual construction had not. Notwithstanding his attempt to parse the language, we conclude the trial court correctly applied the statute.

Section 17624 incorporates by reference Government Code section 65995, which defines “construction” as “new construction and reconstruction of existing building for residential, commercial, or industrial.” The statute thus does not distinguish between “pre-construction” and “construction” activities, as appellant does. Nor does any other California authority located by this court. However, the California Supreme Court, in resolving an insurance dispute, has looked more closely at the term “construction” in a decision we find helpful. Specifically, the high court identified several expansive definitions of construction, all of which are similar to the Government Code definition: “ ‘Construction’ means ‘the act of putting parts together to form a complete integrated object’ (Webster’s 3d New Internat. Dict. (2002) p. 489); ‘[t]he creation of something new, as distinguished from the repair or improvement of something already existing’ (Black’s Law Dict. (6th ed. 1990) p. 312); ‘[t]he act of building by combining or arranging parts or elements’ (Black’s Law Dict. (8th ed. 2004) p. 332); and ‘[t]he action of framing, devising, or forming, by the putting together of parts; erection, building’ (3 Oxford English Dict. (2d ed. 1989) p. 794). . . . [T]he ‘plain meaning’ of [‘construction’] would not seem to exclude . . . building endeavors short of erecting a new structure, such

⁴ Section 17624 states:

“(a) Any school district that has imposed or, subsequent to the operative date of this section, imposes, any fee, charge, dedication, or other requirement under Section 17620 against any development project that subsequently meets the description set forth in subdivision (b), shall repay or reconvey, as appropriate, that fee, charge, dedication, or other requirement to the person or persons from whom that fee, charge, dedication, or other requirement was collected, less the amount of the administrative costs incurred in collecting and repaying the fee, charge, dedication, or other requirement.

“(b) This section applies to any development project for which the building permit, including any extensions, expires on or after January 1, 1990, without the commencement of construction, as defined in subdivision (c) of Section 65995 of the Government Code.”

as substantial improvements or modifications to an existing structure, including projects that transform a hovel into a mansion, raze and replace the entire interior of a structure, or otherwise fundamentally transform a building. Under certain circumstances, such endeavors may be seen as comprising an ‘act of putting parts together to form a complete integrated object’ or ‘building by combining or arranging parts or elements’ as much as the erection of a new structure. [¶] Indeed, the Legislature, in defining the term ‘construction’ in various contexts, has recognized that the term may have a broad meaning encompassing a spectrum of building endeavors. For example, the Legislature has defined the ‘construction’ of state buildings as ‘includ[ing] the extension, enlargement, repair, renovation, restoration, improvement, furnishing, and equipping of any public building.’ (Gov. Code., § 15802, subd. (b); see also *id.*, § 53800, subd. (d) [providing an identical definition of ‘construction’].) Certain administrative regulations likewise define ‘construction’ as including substantial renovation, repair, or alteration efforts. (Cal. Code Regs., tit. 2, § 8102 [defining ‘construction’ as ‘the process of building, altering, repairing, improving, or demolishing any public structure or building It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property’]; Cal. Code Regs., tit. 5, § 57152 [defining ‘construction project’ as ‘includ[ing] new construction, alteration, and extension or betterment of existing structures’]; Cal. Code Regs., tit. 8, § 11160 [defining ‘construction occupations’ as ‘all job classifications associated with construction, including but not limited to, work involving alteration, demolition, building, excavation, renovation, remodeling, maintenance, improvement, and repair work’].) These definitions suggest that laypersons do not limit the phrase ‘under construction’ to the erection of completely new buildings.” (*TRB Investments, Inc. v. Fireman’s Fund Ins. Co.* (2006) 40 Cal.4th 19, 28-29.)

Providing additional guidance is the 2001 Building Code, which applies to TDC’s permits. As the trial court noted, while this Code does not specifically define “construction,” it does provide that “no building or structure shall be erected, constructed, enlarged, altered, repaired, moved, improved, removed, converted or demolished unless a

separate permit for each building or structure has first been obtained from the building official.” (Cal. Code Regs., tit. 24, § 106.1.) According to the trial court, this language implies that, similar to Government Code section 65995, construction means “the erection, construction, enlargement, alteration, repair, movement, improvement, removal, conversion or demolition of any building or structure.” Appellant does not challenge the trial court’s reasoning on this point.

Having considered these various definitions, which frankly are quite similar, we reach the conclusion that, as a matter of law, TDC’s activities on the property under the 2004 and 2005 permits constituted commencement of construction, such that the corporation was no longer entitled under section 17624 to receive a refund of its development fee. As mentioned above, these activities include demolishing the Previous Owner’s structures, preparing a steel rebar, installing a pier cap, and then constructing a wooden box around the pier cap to prepare for a concrete pour. As such, they qualify as “new construction” for a residential or commercial purpose (Gov. Code, § 65995), “building, altering, repairing, improving, or demolishing” an existing structure or building (Cal. Code Regs., tit. 2, § 8102), or “new construction, alteration, [or] extension or betterment of existing structures” (Cal. Code Regs., tit. 5, § 57152). In addition, these activities undoubtedly involved so-called “construction occupations,” requiring, among other things, the on-site presence of work crews and equipment “associated with construction, including but not limited to, work involving alteration, demolition, building, excavation . . . improvement, and repair work” (Cal. Code Regs., tit. 8, § 11160). Appellant’s protestations to the contrary are simply not valid and, in any event, do not create a question of fact. (*Lewis v. City of Los Angeles* (1982) 137 Cal.App.3d 518, 521 [“construction of a statute . . . and its applicability is solely a question of law”].)

There is also the evidence regarding TDC’s demolition activities on the property. As the trial court noted and appellant does not dispute, “[d]emolition of any building or structure” is included within the definition of “the commencement of construction.” Appellant counters that there is no actual evidence of TDC’s demolition of any structure on the property. However, he ignores his own contrary allegation in the first amended

complaint: “[Appellant] also removed the temporary walls’s [sic] Previous Owner installed.” Consistent with this allegation, there is evidence TDC obtained a permit for demolition of existing structures on the property (2004 permit) *before* obtaining the 2005 permit a few months later to build its proposed project. Whether additional demolition work was done with respect to the foundation laid by the Previous Owner is not clear. However, given appellant’s acknowledgement that TDC removed the Previous Owner’s temporary walls under the 2004 permit and that TDC began certain construction-related activities on its own project under the 2005 permit, we reject his claim that “nothing in the record” proves “[he] demolished the previous owner’s construction.”

Finally, as the School District notes, there is no real dispute on this record that the Previous Owner, who paid \$84,742.50 of the total fee to the School District, had begun construction by, among other things, preparing and installing the foundation. Thus, while appellant alleges that, in purchasing the property, TDC became “entitle[d]” to this \$84,742.50 fee, TDC could not acquire a legal right from the Previous Owner that the Previous Owner did not in fact possess. Under the clear language of section 17624, the Previous Owner forfeited its right to the refund by commencing construction on the property, and thereby precluded TDC from acquiring any right to the refund when purchasing the property. (§ 17624.)

Thus, given the above-identified undisputed evidence of TDC’s and the Previous Owner’s demolition or other construction efforts, we stand by the trial court’s finding that construction had commenced, barring appellant’s recovery of a development fee refund.

Next, with respect to the trial court’s alternative basis for sustaining the demurrer, it is also undisputed that, had construction not commenced, TDC’s permits would have expired within 180 days of their issuance, subject to only a limited number of extensions, each of limited duration. Accepting this fact, appellant does not challenge the trial court’s finding that the statute of limitations on his Education Code claim had run (which, in turn, was based on its finding that, under section 106.4.4 of the 2001 Building Code, the City could not have extended TDC’s permit beyond two periods of 180 days each, to

May 14, 2005).⁵ Instead, he asserts for the first time on appeal the School District should be equitably estopped from asserting a statute-of-limitations defense. He reasons, without referring to any specific facts in the record, that TDC “relied on the City’s authority to keep the permit alive for several years” and its representations “that it renewed [TDC’s] building permit even though TDC could not commence construction because of the unresolved easement issue.” However, even assuming appellant has not forfeited the right to rely on this previously-unmentioned theory, we would nonetheless conclude it fails as a matter of law given the absence of certain required conditions. (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712 [appellants must affirmatively prove error on appeal].)

“The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury [¶] . . .” (*City & County of San Francisco v. Grant Co.* (1986) 181 Cal.App.3d 1085, 1090-1091 [“The existence of an estoppel is generally a question of fact for the trial court, whose determination is conclusive on appeal unless the opposite conclusion is the only one that can be reasonably drawn from the evidence. In the latter situation, the existence of an estoppel becomes a question of law”].)

⁵ Under § 106.4.4, the applicable Building Code provision, a building permit lapses if construction does not commence within 180 days of the permit’s issuance, which date may be extended no more than once, for a period of 180 days. Accordingly, assuming the 2004 permit, dated May 19, 2004, was subject to the permissible 180-day extension, it would have finally lapsed on May 14, 2005. Moreover, the applicable three-year statute of limitations under Code of Civil Procedure section 338 would have then run from May 14, 2005 to May 14, 2008, before expiring. This lawsuit, however, was not filed until October 5, 2011, a date beyond this limitations period.

In this case, the most immediate problem with appellant's estoppel argument is his failure to identify any act or omission by the School District, as opposed to the City, that TDC relied upon to its detriment. Appellant argues: "The City's dealings with TDC on its Project and building permits for more than five years establish the elements of equitable estoppel." As the School District notes, however, to prevail on such argument, appellant would have to establish the School District was acting in privity with the City. (*Hartway v. State Board of Control* (1976) 69 Cal.App.3d 502, 504 ["estoppel binds not only the immediate parties to the transaction but those in privity with them"] [superseded by statute on other grounds, *Moore v. State Bd. Of Control* (2003) 112 Cal.App.4th 371, 383].) However, appellant identifies no set of facts in either of his briefs that would suffice to establish estoppel by privity, insisting he "need not prove all the elements of estoppel at this pleading stage." We agree with the School District that is not enough, particularly given the undisputed facts of this case and given appellant's failure to previously raise his theory.

Where, as here, the existence of an estoppel is based on a theory of privity between the party to be estopped and the party upon which the plaintiff relied to his injury, the plaintiff must separately show the party to be estopped " 'so identified in interest with [the relied upon party] that he represent[ed] the same legal right.' [Citation.]" (*Cal. Tahoe Reg'l Planning Agency v. Day & Night Elec.* (1985) 163 Cal.App.3d 898, 904, citing *Lerner v. Los Angeles City Bd. of Educ.* (1963) 59 Cal.2d 382, 397-399.)

On this record, we find no such identity of legal right binding together both the City and the School District with respect to fees collected on TDC's permit. First, it is beyond dispute the fees collected on the property by the two entities did not serve the same purpose. While the City collected a variety of fees when issuing the permits relating to, among other things, electrical, plumbing, traffic and fire impacts, the School District collected the development fee to offset anticipated impacts from the project on the school system. This would include, for example, the increased number of students at a given school generated by the project's construction of additional neighborhood residential housing units. Moreover, and even more demonstrative of the lack of identity

of legal right, as the first amended complaint makes clear, the actions taken by the City and the School District with respect to the fees collected on the property were opposite. Undisputedly, while the City immediately refunded the fees upon appellant's request, the School District has, to date, refused. Had the School District been "dependent upon" and "subordinate to" the City, such that it shared an identity of legal right with the City, it would have been compelled to follow course by refunding the development fee. The School District certainly would not have taken the opposite path by denying appellant's refund requests. (*Cal. Tahoe Reg'l Planning Agency v. Day & Night Elec.*, *supra*, 163 Cal.App.3d at p. 905 [privity lacking where "the [planning agency's] obligation and authority to enforce the land use ordinance was in no way dependent upon action by the city" and "[it] was not subordinate to the position of the city"]. Cf. *Lerner v. Los Angeles City Bd. of Educ.*, *supra*, 59 Cal.2d at pp. 397-399 [finding sufficient identity of legal right to establish privity between city and state school boards where "the city board . . . serve[s] as an agency of the state" and "occupied a totally dependent and subordinate position to the state board, basing its decisions [regarding plaintiff] entirely upon the state board's"]].)

Accordingly, under these circumstances, we conclude the doctrine of estoppel by privity is not applicable to this case as a matter of law. (*Cal. Tahoe Reg'l Planning Agency v. Day & Night Elec.*, *supra*, 163 Cal.App.3d at p. 903 [whether a regional planning agency and municipality are in privity "tenders a question of law [where] the material facts are not in dispute."].) As such, we agree with the trial court's ruling to sustain the demurrer.

And finally, we point out that appellant has made no effort to meet his burden to prove there is a reasonable possibility that he could cure this defect if given another opportunity to amend the complaint. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318; see also *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227 ["Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given"].) Even if we were to assume there were some conceivable set of facts by which to prove estoppel by privity for purposes of this case, appellant has wholly failed to

identify it. “The burden is on the plaintiff to demonstrate how he or she can amend the complaint. It is not up to the judge to figure that out.” (*Lee v. Los Angeles County Metropolitan Transp. Auth.* (2003) 107 Cal.App.4th 848, 854.) Accordingly, we affirm the trial court’s decision to sustain the demurrer without leave to amend. (See *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175 [“ ‘[t]he trial court has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown’ ”].)

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.