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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

QVS BUILDERS, INC.,

Plaintiff and Respondent,

v.

579 BRIDGEWAY, INC. et al.,

Defendants and Appellants.

A138735

(Marin County
Super. Ct. No. CIV1101843)

I.

INTRODUCTION

Respondent QVS Builders, Inc. (QVS), a general contractor, entered into a contract with Georgiou Studio, Inc. (Georgiou Studio) to make tenant improvements in one of Georgiou Studio's shops in Anaheim, California. After the work was completed and Georgiou Studio failed and refused to pay QVS, QVS brought suit in Orange County Superior Court for breach of contract. Judgment was entered by the court against defendant Georgiou Studio in the amount of \$362,972.70, plus accruing interest, in favor of QVS (the Orange County judgment).

After the Orange County judgment was entered, and efforts to satisfy the judgment from Georgiou Studio proved unsuccessful, a separate action was filed in Marin County Superior Court against appellants 579 Bridgeway, Inc. and 925 Bryant Street, Inc. alleging them to be either alter egos or successors in interest to Georgiou Studio, and thus, liable for the judgment amount. Following a bench trial, the Marin County Superior Court filed a statement of decision which ordered QVS's complaint amended on the

court's own motion to conform to proof. That amendment substituted 925 Bryant Street, LLC in as a defendant in place of 925 Bryant Street, Inc. The court then concluded that both it and 579 Bridgeway, Inc. were legally the successors in interest to Georgiou Studio, and thus, liable to QVS. Both defendants have appealed.

During the pendency of this appeal, it was revealed that the Franchise Tax Board had suspended the corporate rights of appellant 925 Bryant Street, LLC. Because appellants' counsel confirms that the rights and powers of 925 Bryant Street, LLC have not been restored as of this time, we order its appeal dismissed, as explained below. (*Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1306 (*Grell*)). We also affirm the judgment as to appellant 579 Bridgeway, Inc.

II.

PROCEDURAL HISTORY

On May 13, 2010, a civil court judgment was entered by the Orange County Superior Court (Case No. 30-2009-00122152-CU-CL-CJC) in favor of QVS and against Georgiou Studio in the amount of \$362,972.70, plus costs.

Thereafter, QVS filed a separate civil action in Marin County Superior Court (Case No. CIV 1101843) naming as defendants George Georgiou, 579 Bridgeway, Inc., 925 Bryant Street, Inc., and Does 1 through 25. The amended complaint for damages alleged four separate causes of action including intentional misrepresentation, false promises, negligent misrepresentation, and successor liability.

The allegations in the amended complaint include that QVS was a licensed general contractor which entered into a contract with Georgiou Studio to provide labor and materials for tenant improvements at a Georgiou Studio shop in Anaheim, California. After the work had been performed, Georgiou Studio defaulted on its promise to pay for the improvements in the amount of \$362,972.70. Suit was then brought against Georgiou Studio which resulted in the aforementioned judgment in Orange County. The first three causes of action pleaded in the amended complaint related only to Georgiou Studio. The fourth cause of action relates to all defendants, including Does 1–25. Only this last cause of action is the subject of this appeal.

The fourth cause of action alleged that, as matters of equity, the defendants were the successors in liability to the debt of Georgiou Studio because: (1) the parties consolidated or merged their respective businesses with Georgiou Studio without adequate consideration; (2) the successor are, in reality, continuations of their predecessor in interest, Georgiou Studio; and (3) the assets of Georgiou Studios were fraudulently conveyed to the defendants for purposes of avoiding or delaying payment of QVS's judgment against Georgiou Studio.

On July 28, 2011, all three named defendants filed an answer generally denying the allegations in the amended complaint, while also asserting six separate affirmative defenses.

A bench trial was held on December 4 and 5, 2012, after which a proposed statement of decision was filed and served on counsel. As is most material here, the court including the following finding in its decision: "2. It was also proven that the 'Georgiou' store in Anaheim remains in operation, but that its revenues now go to 925 Bryant Street, LCC[,] not to [Georgiou Studio]. The court notes that 925 Bryant Street, Inc. and 925 Bryant Street, LCC—the latter corporation was not a named defendant in this case—appear to be different entities. However, the evidence clearly showed that *all of the entities* were and are exclusively controlled by Mr. Georgiou. [¶] 3. [Georgiou Studio] no longer has a bank account while 925 Bryant Street, LCC and 579 Bridgeway, Inc. both have bank accounts into which proceeds from the operation of the 'Georgiou' stores, including Anaheim, are regularly deposited." (Original italics, capitalization omitted.)

Based on these findings the court reached the following conclusions and made the following pronouncements: "Accordingly, the court finds that 925 Bryant Street, LCC and 579 Bridgeway, Inc. are the successor corporations to [Georgiou Studio] and are, therefore, liable for [Georgiou Studio's] judgment debt to QVS. The court amends the complaint to conform to the proof that 925 Bryant Street, LCC, not 925 Bryant Street, Inc.,] is the proper defendant and debtor. As Mr. Georgiou controls all of the relevant corporations, there is no issue that 925 Bryant Street, LCC did not have notice of this

proceeding. It would be inequitable to QVS to compel it to take yet more steps to achieve its ability to collect its undeniably valid debt.” (Capitalization omitted.)

Objections were made to the proposed statement of decision by the defendants. As to 925 Bryant Street, LCC, objection was made to amending the complaint to name that entity as a defendant. It argued that substituting it into the action by way of amendment on the court’s own motion would deprive 925 Bryant Street, LLC of the ability to present a defense to show its ownership of Georgiou stores was limited to three stores purchased before Georgiou Studio entered into the contract with QVS, and that its role otherwise was limited to managing the 20–25 Georgiou stores owned by Georgiou Studio. Further, it asserted it would be deprived of a hearing to refute that Georgiou Studio “conveyed the business, inventory and operations” of that company to 925 Bryant Street, LCC.¹

The defendants also objected to the court’s proposed findings that the parties had engaged in fraudulent transfer of assets, noting generally there was no specification as to what acts constituted fraudulent conveyances, no value was ascribed to such transfers, no date specified as to when the transfers occurred, and no description of any consideration exchanged between the parties for such transfers.

On March 15, 2013,² the trial court impliedly overruled the objections by issuing its statement of decision including unchanged the above-quoted paragraphs from the proposed statement of decision.

This appeal was filed on May 24. On September 24, while the appeal was pending, appellants’ counsel wrote this court advising that 925 Bryant Street, LLC was under suspension by the Franchise Tax Board, and requesting a “directive” as to whether counsel was “permitted” to file an appellate brief. An order was issued by this court two

¹ We note that the record before us contains various references to appellant 925 Bryant Street, LLC as Nine Twenty Five Bryant Street, Nine Twenty Five Bryant, LLC, and other similar forms. For consistency, and in conformance with the form used by the trial court in its March 15, 2013 statement of decision, we adopt usage of the form 925 Bryant Street, LLC in the unquoted portions of this opinion.

² All further dates are in the 2013 calendar year, unless otherwise indicated.

days later declining to issue an advisory “directive,” but indicating that the refusal did not preclude 925 Bryant Street, LCC from filing any other motion in connection with its status it deemed appropriate.

A motion for leave to file an opening brief was filed by appellants on October 7. In it, counsel asserted that the appeal raised an issue of whether the trial court exceeded its jurisdiction by ordering appellant 925 Bryant Street, LLC to be substituted into the case as a party, and “that the appellate court should consider these issues as procedural only to be ruled upon without deciding the substantive issues presented by this appeal.” No opposition to the motion was filed by QVS. An order granting appellants’ motion was entered on October 28 allowing appellants’ opening brief to be filed on the same date, and the brief was so filed on that date.³ In the opening brief, no mention was made as to the then-current corporate status of appellant 925 Bryant Street, LLC.

QVS, however, raised the continuing suspended status of 925 Bryant Street, LLC in its brief on appeal. It noted that, because of that status, 925 Bryant Street, LCC was precluded by law from prosecuting this appeal, and requested that we dismiss it.

In appellants’ “Closing Brief,” it was confirmed that, as reported in their October 7 motion, appellant 925 Bryant Street, LLC was and is a “suspended entity,” although the appeal as to that entity was limited to the issue of whether the trial court had jurisdiction to amend the complaint to conform to proof by substituting 925 Bryant Street, LLC as a defendant. Appellants’ “procedural” claim is based on the assertion that the substitution and amendment of the complaint was not in conformance with Code of Civil Procedure section 187. They concluded by observing somewhat cryptically “[a]lthough Nine Twenty Five Bryant, LLC has not been reinstated, and, hence, the jurisdictional issue may be held to have become moot, the Judgment should nevertheless be reversed.”

³ The brief was filed on behalf of both 925 Bryant Street, LCC and 579 Bridgeway, Inc.

III. DISCUSSION

QVS contends that an appeal by a corporation whose corporate powers are suspended is subject to a motion to dismiss on ground of legal incapacity. (*Laurel Crest, Inc. v. Vaughn* (1969) 272 Cal.App.2d 363 (*Laurel Crest*).

Revenue and Taxation Code section 23301 (section 23301) provides that “the corporate powers, rights and privileges of a domestic taxpayer may be suspended” if it fails to pay “any tax, penalty, or interest . . . that is due and payable” to the Franchise Tax Board. Except for filing an application for tax-exempt status or amending the articles of incorporation to establish a new corporate name, “a suspended corporation is disqualified from exercising any right, power or privilege. [Citation.]” (*Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1365 (*Timberline*); see also *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 217 [suspended corporation cannot “exercise the powers and privileges of a corporation in good standing”].) Consequently, “[d]uring the period that a corporation is suspended for failure to pay taxes, it may not prosecute or defend an action [citation], *appeal from an adverse judgment* [citation], seek a writ of mandate [citation], or renew a judgment obtained prior to suspension [citation].” (*Grell, supra*, 73 Cal.App.4th at p. 1306, italics added; see also *Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 560 [suspended corporation is “disabled from participating in any litigation activities”].)

The purpose of section 23301 “is to ‘prohibit the delinquent corporation from enjoying the ordinary privileges of a going concern’ [citation], and to pressure it to pay its taxes [citation].” (*Grell, supra*, 73 Cal.App.4th at p. 1306.)

If the corporation’s status comes to light during litigation, the normal practice is for the trial court to permit a short continuance to enable the suspended corporation to effect reinstatement by paying back taxes, interest, and penalties to defend itself in court. (*Timberline, supra*, 54 Cal.App.4th at pp. 1365-1366.)

Here, it is undisputed that 925 Bryant Street, LCC was, and continues to be, a suspended corporation within the meaning of section 23301, and that no steps have been taken during the pendency of this appeal to obtain reinstatement. Furthermore, no request for a continuance to allow appellant to do so has been made. That being the case, 925 Bryant Street, LLC is precluded by law from appealing the underlying judgment.

Appellants imply that because their claim of error is “procedural,” 925 Bryant Street, LLC is exempted from section 23301. No authority for such an exception is cited by appellants, and we have found none. Indeed, case law interpreting section 23301 makes it clear that “a suspended corporation is disqualified from exercising *any* right, power or privilege. [Citation.]” (*Timberline, supra*, 54 Cal.App.4th at p. 1365.) This includes the right to appeal from an adverse judgment without apparent exception. (*Grell, supra*, 73 Cal.App.4th at p. 1306.) Accordingly, we dismiss the appeal by 925 Bryant Street, LCC because it lacks the capacity to prosecute this appeal while being suspended by the Franchise Tax Board for nonpayment of taxes under section 23301. (*Laurel Crest, supra*, 272 Cal.App.2d 363.)

Parenthetically, we note that even if there were an exception under section 23301 for “procedural” claims of error, we find none here. Code of Civil Procedure section 469 states: “No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just.”⁴

“It is of course settled that the allowance of amendments to conform to the proof rests largely in the discretion of the trial court and its determination will not be disturbed

⁴ The statute cited by 925 Bryant Street, LCC that it claims was misapplied by the trial court is Code of Civil Procedure section 187, which does not govern amendments to conform to proof at trial, but only to the amendment of judgments to add a judgment debtor claimed to be the alter ego of the primary debtor. (*Misik v. D’Arco* (2011) 197 Cal.App.4th 1065.) Here, the challenged action was an amendment of the pleading to conform to proof under Code of Civil Procedure section 469 during the course of a trial, and not action taken under Code of Civil Procedure section 187.

on appeal unless it clearly appears that such discretion has been abused. [Citations.] Such amendments have been allowed with great liberality ‘and no abuse of discretion is shown unless by permitting the amendment new and substantially different issues are introduced in the case or the rights of the adverse party prejudiced [citation].’ (Italics [omitted].) [Citations.]” (*Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31.)

Appellant 925 Bryant Street, LLC has failed to show how it was prejudiced by the court’s amendment to conform to proof at trial, or that the court abused its discretion in ordering the amendment. It made no showing that there was any material difference between it and 925 Bryant Street, Inc., and that the defense of the two entities to QVS’s claim did, or would have, differed substantially. Instead, it appears that the issues 925 Bryant Street, LLC claims would have been raised in defense of QVS’s claim against it were the very same issues raised by 925 Bryant Street, Inc. Also, as the trial court observed in the statement of decision, the two entities were represented by the same counsel (who also represented Mr. Georgiou, Georgiou Studio, and 579 Bridgeway, Inc.) and counsel participated fully and vigorously in the defense to QVS’s fraudulent conveyance claim as to all of them. Therefore, even if 925 Bryant Street, LLC had the capacity to bring this appeal, notwithstanding its suspended status under section 23301, we would affirm on the merits.

Turning to the appeal by 579 Bridgeway Inc., appellants’ opening brief contains only two sentences appearing at the very end of its brief about that party: “The only evidence related to 579 Bridgeway, Inc. was that it was being managed by 925 Bryant LCC There were no acts or transactions that could have formed the basis of successor liability or liability based upon fraudulent transfers.”

QVS notes in its brief on appeal that the proper standard of review as to this claim is substantial evidence. We agree that, although not discussed by 579 Bridgeway, Inc., it is contending there was an absence of evidence to support the court’s finding that 579 Bridgeway, Inc. engaged in conduct that was sufficient to hold it liable as a successor in interest. (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315.) As such, the substantial evidence standard of appellate review applies.

Under the substantial evidence standard of review, “ ‘the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. [Citations.] [¶] When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.’ . . .” (*Scott v. Common Council* (1996) 44 Cal.App.4th 684, 689, quoting *Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 784-785, italics omitted.)

Most importantly here, “[a] party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable. [Citation.]” (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.) This means that an appellant must present a “fair summary” of all the evidence and “ ‘cannot shift this burden onto respondent,’ ” nor can it require the reviewing court to “ ‘undertake an independent examination of the record. . . .’ [Citation.]” (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409-410.) When an appellant fails to set forth all of the material evidence, the claim of insufficient evidence is waived or forfeited. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 749, fn. 1; *Doe v. Roman Catholic Archbishop of Cashel & Emly, supra*, at p. 218.)

We have quoted the entirety of the substantial evidence argument made on behalf of 579 Bridgeway, Inc. in its opening brief. It is abundantly clear from the brevity of these remarks that 579 Bridgeway, Inc. has failed to “set forth, discuss, and analyze all the evidence [bearing on its claim], both favorable and unfavorable. [Citation.]” (*Doe v. Roman Catholic Archbishop of Cashel & Emly, supra*, 177 Cal.App.4th at p. 218.) Therefore, we deem the issue forfeited.

IV.
DISPOSITION

The judgment is affirmed in all respects. Costs on appeal are awarded to QVS.

RUVOLO, P. J.

We concur:

REARDON, J.

HUMES, J.