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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WILLIAM R. BEALL,

Plaintiff and Appellant,

A147496

v.

**(Solano County
Super. Ct. No. FCS044414)**

CITY OF VACAVILLE,

Defendant and Respondent.

_____ /

The trial court sustained the City of Vacaville’s (City) demurrer to plaintiff William R. Beall’s second amended complaint (complaint) without leave to amend. Beall appeals in propria persona, contending the complaint stated claims for breach of contract and fraud, and that the City is not entitled to immunity under Government Code section 818.8. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On an appeal from an order sustaining a demurrer, we “accept as true the properly pleaded material factual allegations of the complaint, together with facts that may properly be judicially noticed.” (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672.)

In 2004, the City entered into a development agreement (agreement) with developers of three subdivision projects: Knoll Creek, Reynolds Ranch, and Rogers

Ranch.¹ The developers intended to build single-family homes in the subdivisions. Certain lots in the subdivisions were located 222 feet above sea level, in a “Zone 2 water service area.” Providing water to those lots required constructing a “new water storage and distribution system[.]” The agreement provided: “[i]ssuance of building permits for the lots above elevation 222 is contingent upon completion of the construction of the booster pump station, distribution system, and reservoir.”

The agreement required the developers to “[p]ay all costs associated with the land acquisition, pre-design, environmental, geotechnical, design, and construction . . . of a Zone 2 reservoir and booster pump and all other water system improvements[.]” The City agreed to “initiate pre-design, design, and construction of the booster pump station and reservoir upon receipt of funding . . . from Developers.” If the Zone 2 reservoir and system had “not been completed and operational by the time the Developer is ready to develop dwellings that will require water service from this reservoir and system, City and Developer will work cooperatively to design and install at the Developers sole expense a feasible interim supply and distribution system[.]”

The agreement also required the developers to “pay the full costs of all on-site infrastructure for the Project Site and all its proportionate share of off-site infrastructure necessary to serve the Project Site, subject to any oversizing requirements deemed appropriate by City.” The City, however, agreed to reimburse the developers for “oversizing . . . in accordance with the provisions of the City’s Benefit District Ordinance (Division 14.15 of the Vacaville Municipal Code)[.]” In 2005, the developers and the City attempted, unsuccessfully, to establish a “Benefit District” and a Benefit District was never formed.

¹ “A development agreement is a statutorily authorized agreement between a municipal government . . . and a property owner for the development of the property.” (*Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 442 (*Mammoth*), quoting Gov. Code, § 65864, subd. (a).) Unless noted, all further statutory references are to the Government Code. Development agreements “allow municipalities to extract promises from the developers concerning financing and construction of necessary infrastructure.” (*Id.* at pp. 443-444, quoting § 65864, subd. (c).)

Sometime in 2006, D.R. Horton (Horton), the developer of Reynolds Ranch, paid for and “complete[d] the . . . pre-design, and design for the Zone 2 system.” Horton “verbally committed” to construct the Zone 2 system. The developers “of Knoll Creek and Rogers Ranch had ratified . . . Horton’s construction of the Zone 2 system[,]” but they did not amend the agreement to transfer the water system design and construction obligations from the City to Horton.

In January 2008, Beall — then a real estate developer — agreed to purchase the Rogers Ranch subdivision. Before escrow closed, Beall and his engineer asked the City’s Director of Public Works, Rod Moresco, whether there was ““anything preventing”” construction of homes at Rogers Ranch. Moresco “mentioned a sewer easement . . . as being the only issue, and *absolutely nothing was said about water as being a problem.*” Beall closed escrow in February 2008. Some time later, Beall learned Horton “had no written obligation to construct the zone 2 system[.]” In 2010, Horton began to “develop a plan” to “eliminate Zone 2 water” and to find an alternate water source for certain subdivision lots. Beall was “never told of the plan” by Horton’s engineering firm or the City. In 2010, the City’s director of public utilities “agreed to investigate alternatives to the Zone 2 system with the City’s water consultant . . . at no cost to [Beall].”

At some point, Moresco told Beall “the City absolutely was not going to construct the Zone 2 Water system.” Without a water system, the value of Rogers Ranch plummeted. Beall was unable to develop the property and in 2011, Rogers Ranch was sold at a “foreclosure sale[.]”

The Complaint and the City’s Demurrer

In 2014, Beall sued the City in propria persona. The complaint attached the agreement, alleged claims for breach of contract and fraud, and sought \$1.5 million in damages. The breach of contract cause of action alleged the City breached the agreement by participating in Horton’s “plan” to eliminate the Zone 2 system. Beall alleged he was “excused from providing the necessary funds to the City for a Zone 2 water system, because the City refused verbally and in writing to construct the system as required by the [a]greement” and that he “performed all other obligations” under the agreement. The

fraud cause of action alleged Moresco concealed the City's "approval, participation, and actions in a plan to eliminate the Zone 2 water system" and the City concealed from Beall "acceptable interim water sources [at] Rogers Ranch."

The City demurred. As relevant here, the City argued its obligation to design and construct the Zone 2 water system was "conditioned upon the developers providing funding to the City" and nothing excused Beall from providing funding. According to the City, the complaint failed to state a claim for breach of contract because it did not "allege the occurrence" of the condition precedent to the City's performance. The City also argued "[d]eveloping an alternate plan of providing water to the upper zone lots" did not breach the agreement, and considering "alternate methods of water delivery" did not proximately cause Beall's loss.

Additionally, the City claimed the complaint failed to specifically allege the elements of a fraud cause of action. As the City explained, a fraud claim "requires pleading facts that show how, when, where, to whom, and [by] what means the representations were tendered to [Beall] and the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." Finally, the City argued it was immune under section 818.8 for injuries arising from its employees' misrepresentations or concealment. The City requested judicial notice of the City's benefit district ordinance, Vacaville Municipal Code section 14.15.190.020 (benefit district ordinance), which was "enacted to establish the creation of a funding mechanism to reimburse the City or property owners *who advance the construction of certain public improvements that provide a localized benefit to other adjacent properties.*"

In opposition, Beall argued — among other things — the City breached the development agreement and defrauded him by eliminating the Zone 2 water system in conjunction with Horton, and "by concealing its actions" from him. Beall conceded the City's obligation to design and construct the water system was "conditioned upon the developers providing funding to the City" but argued this condition precedent was "irrelevant to the Complaint." Beall argued he pled the fraud cause of action with

specificity and that the City was not entitled to immunity under section 818.8. Finally, Beall opposed the City's request for judicial notice.

Following a hearing, the court sustained the City's demurrer without leave to amend. The court granted the City's request for judicial notice and determined: (1) the City's obligation to design and construct the Zone 2 system "is conditioned upon the developers providing funding" to the City, and that "[b]y failing to allege performance or an excuse for nonperformance of the condition precedent, [Beall] has failed to sufficiently plead a breach of contract cause of action[;]" and (2) the City was entitled to immunity "from a fraud cause of action" under section 818.8. The court entered judgment for the City.

DISCUSSION

In reviewing a judgment sustaining an order without leave to amend, we "examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory[.]' [Citation.]" (*Requa v. Regents of University of California* (2012) 213 Cal.App.4th 213, 223, fn. omitted.)

I.

The Complaint Fails to State a Claim for Breach of Contract

Beall contends the court erred by sustaining the City's demurrer without leave to amend because the complaint alleged the City breached the agreement by eliminating the Zone 2 water system without amending the agreement, and by concealing its actions from him. We conclude the complaint fails to state a claim for breach of contract.

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388 (*Careau*.) As stated above, the agreement required the City to "initiate pre-design, design, and construction of the booster pump station and reservoir *upon receipt of funding . . . from Developers.*" (Italics added.) As Beall acknowledges, the City had no

obligation to design or construct the water system until the developers provided funding to the City.

“If a condition precedent imposed by the contract is an act to be performed by the plaintiff, the plaintiff may allege performance in general terms. [Citation.] But if the condition is an event that must happen before the defendant’s duty of performance accrues, a specific allegation of the happening of the condition is a necessary part of pleading the defendant’s breach. [Citations.]” (4 Witkin, Cal. Procedure (5th ed. 2008) § 538, p. 665.) Here, the complaint does not allege the satisfaction of this condition precedent: the funding from developers. (See *Careau*, *supra*, 222 Cal.App.3d at p. 1388 [complaint did not “adequately allege the due satisfaction of several conditions precedent” and, as a result, failed to state a breach of contract claim].)

We are not persuaded by Beall’s contention that “the City’s performance and the condition of Developers’ funding are absolutely irrelevant to the Complaint[.]” Without alleging the developers provided the funding to the City, Beall cannot state a claim for breach of the agreement. “[W]here the condition is an event, as distinguished from an act to be performed by the plaintiff, a specific allegation of the happening of the condition is a necessary part of pleading the defendant’s breach.” (*Careau*, *supra*, 222 Cal.App.3d at pp. 1389, 1390 [there were “no specific allegations of the performance of any of the conditions” in complaint]; *Daum v. Superior Court* (1964) 228 Cal.App.2d 283, 287 (*Daum*) [demurrer properly sustained where plaintiffs “had not alleged the happening of the condition precedent”].) Beall’s complaint alleges he was “excused from providing the necessary funds to the City for a Zone 2 water system, because the City refused verbally and in writing to construct the system as required by the [a]greement.” (*Ibid.* at p. 287 [a plaintiff “must allege either performance of the conditions precedent . . . or an excuse”].) But this conclusory allegation defies logic: the City was under no obligation to construct the water system unless and until the developers provided the necessary funding.

Beall argues the complaint states a claim for breach of contract because it alleged the City eliminated the water system without amending the agreement. We disagree.

The agreement provides: if the water system had “not been completed and operational by the time the Developer is ready to develop dwellings that will require water service from this reservoir and system, City and Developer will work cooperatively to design and install at the Developers sole expense a feasible interim supply and distribution system[.]” The City did not breach the agreement by developing an alternate plan for providing water to the subdivisions. The trial court properly concluded the complaint failed to state a claim for breach of contract.

II.

The Complaint Fails to State a Claim for Fraud

Beall contends the court erred by concluding the City was immune from liability under section 818.8, which provides: “[a] public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional.” According to Beall, section 815.6 negates the immunity provided by section 818.8. Section 815.6 — the mandatory legal duty exception to immunity — provides: “[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.” (See *Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1088 (*Tuthill*).)

To qualify for the mandatory duty exception to immunity, “a plaintiff must establish (1) the existence of an enactment that imposes a mandatory, not discretionary, duty on the public entity and (2) that the enactment is intended to protect against the particular kind of injury the plaintiff suffered. [Citation.] ‘Whether an enactment creates a mandatory duty is a question of law’ [Citation.]” (*Tuthill, supra*, 223 Cal.App.4th at pp. 1089, 1091 [development agreement did not create mandatory duty under section 815.6].) Beall contends section 65864, subdivision (b) created a “mandatory duty” requiring the City to “honor and protect” his entitlements to construct homes on Rogers Ranch.

We disagree. Section 65864, subdivision (b) declares a *legislative finding* that “[a]ssurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.” “[T]he statement of legislative purpose in section 65864 encourages the creation of rights and obligations early in a project in order to promote public and private participation during planning, especially when the scope of a project requires a lengthy process of obtaining regulatory approvals. The statute recognizes that comprehensive planning is important in controlling the economic and environmental costs of development. It should be construed to allow development agreements as soon as the government and developer are required to make significant financial and personnel commitments to a project.” (*Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors* (2000) 84 Cal.App.4th 221, 228.)

“Section 815.6 ‘requires that the enactment at issue be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken. [Citation.]’ [Citation.]” (*Tuthill, supra*, 223 Cal.App.4th at p. 1090.) Development agreements are discretionary (*id.* at p. 1092) and Beall cites no authority establishing section 65854, subdivision (b) imposed a mandatory duty on the City. (See, e.g., *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 969 [section 815.6 does not impose liability on public entity for claim regarding failure to pay wages on public works project].)

The trial court properly concluded section 818.8 barred Beall’s fraud claim. (*Polonsky v. City of South Lake Tahoe* (1981) 121 Cal.App.3d 464, 467 [immunity from fraud claims].)

III.

The Court Did Not Err in Denying Leave to Amend

Beall has the burden to demonstrate “a reasonable possibility to cure any defect[.]’ [Citation.]”² (*Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 432.) ““To satisfy that burden on appeal, a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.’ [Citation.] . . . The plaintiff must clearly and specifically set forth . . . factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary.” [Citation.]” (*Id.* at p. 432.) Here, Beall does not argue how he “would amend [the] complaint to correct the multiple defects noted above.” (*Id.* at p. 443.) We conclude the court did not abuse its discretion in sustaining the City’s demurrer without leave to amend. (*Id.* at p. 443, fn. omitted; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 [“[i]ssues do not have a life of their own: if they are not raised . . . , we consider [them] waived”].)

DISPOSITION

The judgment is affirmed. The City is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278.)

² Beall’s failure to seek leave to amend in the trial court does not forfeit the issue on appeal. Code of Civil Procedure section 472c, subdivision (a) provides: “When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made.” We reject Beall’s contention that the court erred by granting the City’s request for judicial notice of the benefit district ordinance. Beall has not demonstrated the benefit district ordinance was irrelevant, nor how the grant of judicial notice prejudiced him.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.