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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DALE SCARBOROUGH et al.,

Plaintiffs and Appellants,

v.

MARILYN KELLAR et al.,

Defendants and Respondents.

2d Civil No. B238315
(Super. Ct. No. 56-2010-00365307-CU-
BC-VTA)
(Ventura County)

First American Title Insurance Company's assignees, Dale Scarborough and Janet Scarborough, appeal the judgment entered after an order granting judgment on the pleadings in this action to recover attorney's fees pursuant to an escrow indemnity provision. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Purchase and the Escrow Provisions

Dale and Janet Scarborough bought a residential property from Marilyn Kellar and John R. Morter, as trustees of the Morter Trust dated August 1, 1994. First American acted as the escrow holder.

The escrow instructions provided that the buyer and seller would indemnify and hold the escrow holder harmless if it filed an action in interpleader based on conflicting claims or demands. The last sentence of paragraph 12 provides, "If an action is brought involving this escrow and/or this Escrow Holder, the parties agree to

indemnify and hold the Escrow Holder harmless against liabilities, damages and costs incurred by Escrow Holder (including reasonable attorney's fees and costs) except to the extent that such liabilities, damages and costs were caused by the gross negligence or willful misconduct of Escrow Holder." Escrow closed without any conflicting instructions or demands on the escrow holder.

Scarborough I

About two years after the sale, a dispute arose between the Scarboroughs and Marilyn Kellar regarding the Scarboroughs' plans to subdivide their property. Kellar and her husband lived on an adjoining parcel.

The Scarboroughs sued Kellar, Morter, a civil engineer, and a surveyor for breach of contract and fraud, alleging that they had misrepresented the size of the property at the time of the sale. (*Scarborough v. Kellar* (Super. Ct. Ventura County, 2007, No. CIV 231562 (*Scarborough I*)).) It is now undisputed that a lot line adjustment, recorded about a month before the property was offered for sale, erroneously described the property as .85 acres although it is actually .56 acres. The error was corrected several months after the sale with another recorded lot line adjustment.

In *Scarborough I*, the Kellars filed a cross-complaint against First American. They alleged that First American "altered" a grant deed to change the grantor from "the Morter Trust" to "Marilyn Kellar," and then "induced Marilyn Kellar and John Morter to execute this deed without disclosing or explaining the purpose and legal effect." The effect of the deed, the Kellars alleged, was to "give the Scarboroughs an argument that the Kellar Trust had granted them a roadway easement over a 60-foot wide strip" of the Kellar's parcel. The Kellars described First American in their cross-complaint as the "escrow." From this, they argued, First American breached the fiduciary duty it owed them

The *Scarborough I* court granted First American summary judgment on Kellar's cross-complaint. The court found that the deeds in question were not false, there was no evidence that First American failed to comply with escrow instructions, and there was no evidence that First American knowingly participated in a scheme to defraud the

Kellars. The court further found, "There was no provision in the purchase agreement, escrow instructions, or amendments thereto, providing that [First American] was to document the Transaction to prevent subdivision; nor did any principal to the escrow - or the Kellars - otherwise instruct [First American] to document the Transaction in that manner."

The Present Action for Contractual Indemnity and Constructive Trust

After prevailing on the cross-complaint, First American assigned to the Scarboroughs its rights (if any) to recover attorneys' fees from Morter and Keller under paragraph 12 of the escrow provisions. The Scarboroughs brought the present action to recover fees against Kellar and Morter, both individually and as trustees, based on causes of action for (1) contractual indemnification and (2) constructive trust. In the cause of action for contractual indemnification, they allege that Kellar's cross-complaint was an action "over the sale and escrow." In the constructive trust cause of action, they allege that Kellar and Morter wrongfully took distributions from the trust, with knowledge of First American's contractual indemnity claim against it.

The trial court granted Kellar and Mortar's motion for judgment on the pleadings after taking judicial notice of the pleadings in *Scarborough I*. The court found that paragraph 12's "intended scope is defining the rights and obligations of the parties in the event that conflicting demands or claims arise *concerning the escrow*," and that the claims against First American in *Scarborough I* "related to the issue of title and an improper description of the property. There was no allegation that the escrow itself was mismanaged."

The Scarboroughs moved for reconsideration. They requested leave to amend to include allegations that Kellar relied on First American's status as escrow in her discovery responses to support her claims against it. The court denied the motion for reconsideration.

DISCUSSION

The standard for granting a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer. The trial court must

determine whether, based on the pleadings and matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law. (Code Civ. Proc., § 438, subd. (d).) We independently review the trial court's determination. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146.) We accept as true properly pleaded allegations of fact, but not contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 .)

Contractual Indemnity

The trial court interpreted the escrow indemnity provision without resort to extrinsic evidence. We therefore exercise our independent judgment concerning its interpretation. (*Campbell v. Scripps* (2000) 78 Cal.App.4th 1328, 1336.)

The intent of the parties to the escrow instructions is controlling. (Civ. Code, § 1639; *Francis v. Eisenmayer* (1959) 171 Cal.App.2d 221, 227.) First American prepared the printed form of escrow provisions. We therefore construe any ambiguities against First American. (Civ. Code, § 1654; *Campbell v. Scripps, supra*, 78 Cal.App.4th at p. 1338.) Our goal is to give effect to the mutual intent of the parties as it existed at the time of contracting. (Civ. Code, § 1636.)

Paragraph 12 provides in full: "12. Conflicting Instructions & Disputes [¶] If Escrow Holder becomes aware of any conflicting demands or claims concerning this escrow, Escrow Holder shall have the right to discontinue all further acts on Escrow Holder's part until the conflict is resolved to Escrow Holder's satisfaction. Escrow Holder has the right at its option to file an action in interpleader requiring the parties to litigate their claims/rights. If such an action is filed, the parties jointly and severally agree (a) to pay Escrow Holder's cancellation charges, costs (including the funds held fees) and reasonable attorney's fees, and (b) that Escrow Holder is fully released and discharged from all further obligations under the escrow. *If an action is brought involving this escrow and/or Escrow Holder, the parties agree to indemnify and hold the Escrow Holder harmless against liabilities, damages and costs incurred by Escrow Holder (including reasonable attorney's fees and costs) except to the extent that such*

liabilities, damages and costs were caused by the gross negligence or willful misconduct of Escrow Holder." (Italics added.)

The Scarboroughs contend that the last sentence authorizes recovery here because Kellar's cross-complaint was "an action . . . brought involving this escrow and/or Escrow Holder." To read this sentence in isolation would allow first American to recover fees in any action, between any parties, arising from any transaction or occurrence whatsoever, because any action to which First American is a party "involve[s] this . . . Escrow Holder." The interpretation is not reasonable. "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." (Civ. Code, § 1648.)

We must interpret the parts of paragraph 12 as a whole, in relation to the entire escrow instructions, to determine the mutual intent of the parties. (*Francis v. Eisenmayer, supra*, 171 Cal.App.2d at p. 227; *Campbell v. Scripps Bank, supra*, 78 Cal.App.4th at p. 1337.) In *Francis* and in *Campbell*, the courts found that similar escrow provisions, although facially broad, only allowed for recovery of fees in (1) actions that arise out of conflicting demands on the escrow holder, (2) an escrow holder's action for breach of the terms of escrow, or (3) an escrow holder's action in interpleader because these were the only things about which it appeared the parties intended to contract. (*Francis*, at p. 226; *Campbell*, at p. 1337.)

In *Francis*, a bank that served as the escrow holder incurred fees defending a buyer's action for misrepresentation. The buyers alleged that a bank employee told them if they purchased through escrow, they would be protected from defects in title. The escrow holder was not entitled to recover its defense fees, although the indemnity provision allowed for recovery of fees incurred "in connection with or arising out of this escrow."¹ (*Francis v. Campbell, supra*, 171 Cal.App.2d at p. 224.)

¹ The escrow instructions in *Francis* stated: "Should you before or after close of escrow receive or become aware of any conflicting demands or claims with respect to this escrow or the rights of any of the parties hereto or any money or property deposited herein or affected hereby, you shall have the right to discontinue any or all further acts on your part until such conflict is resolved to your satisfaction, and you shall have the further

In *Campbell v. Scripps*, *supra*, 78 Cal.App.4th 1328, the escrow holder could not recover fees incurred to defend against a buyer's action to enforce escrow instructions, although the escrow indemnity provision allowed for recovery of fees incurred "which arise, result or relate to this escrow."² (*Id.* at pp. 1336-1337.) The *Campbell* court emphasized the need to read the provision as whole in light of the entire instrument, and the need to construe any ambiguity against the drafting party. It concluded, "paragraph 12, read as a whole and in context, is simply an indemnification clause that does not put the principles to the escrow on notice that it is an attorney fees clause providing for an award of fees to a prevailing party in litigation to enforce the escrow instructions." (*Id.* at p. 1337.)

The Scarboroughs point out that neither the provision in *Francis* nor the provision in *Campbell* contained the concluding phrase, "except to the extent that such liabilities, damages and costs were caused by the gross negligence or willful misconduct of Escrow Holder." They contend that this phrase implies a right to recover fees incurred in any tort action against the escrow holder, so long as it does not involve gross negligence or willful misconduct. But the terms of a writing will not be extended by

right to commence or defend any action or proceedings for the determination of such conflict. The parties hereto jointly and severally agree to pay all costs, damages, judgments and expenses including reasonable attorneys' fees suffered or incurred by you *in connection with or arising out of this escrow*, including, but without limiting the generality of the foregoing, a suit in interpleader brought by you." (*Francis v. Eisenmayer*, *supra*, 171 Cal.App.2d at p. 224, italics added.)

² The escrow instructions in *Campbell* stated, at paragraph 12, "All notices, demands and instructions must be in writing. If conflicting demands are made or notice served on you or any dispute or controversy arises between the Principals or with any third person relating to this escrow, you shall have the absolute right, at your election, to withhold and stop all further proceedings in this escrow without liability and without determining the merits of the demands, notices, or litigation; or sue in interpleader; or both. The Principals, jointly and severally, hereby promise and agree to pay promptly on demand as well as to indemnify you and hold you harmless against and in respect of any and all litigation and interpleader costs, claims, losses, damages, recoveries, judgments, and expenses, including, without limitation, *reasonable attorneys fees that you may incur or suffer, which arise, result from or relate to this escrow.*" (*Campbell v. Scripps*, *supra*, 78 Cal.App.4th at p. 1336, italics added.)

implication, in the absence of parol evidence explaining an ambiguity. (*Apra v. Aureguy* (1961) 55 Cal.2d 827.) Paragraph 12, read as a whole in the context of the instrument, did not put Kellar or Morter on notice of an obligation to pay the escrow holder's attorney's fees in litigation unrelated to conflicting demands on the escrow. Construing any ambiguities against the escrow holder, as we must, we decline to extend the indemnity provision beyond the "things concerning which it appears that the parties intended to contract." (Civ. Code, § 1648.)

Amendment

The trial court did not abuse its discretion when it denied leave to amend. The defect would not have been cured by additional allegations that Kellar relied on First American's status as a fiduciary to support her claim against First American.

Individual Liability and Constructive Trust

The Scarboroughs' claim that Kellar and Morter are individually liable under paragraph 12, and the claim for constructive trust falls with our determination that Kellar's cross-complaint against First American in *Scarborough I* does not come within the scope of paragraph 12.

DISPOSITION

The judgment appealed from is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Henry J. Walsh, Judge
Superior Court County of Ventura

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