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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BRUSKIN INTERNATIONAL, LLC,

Plaintiff and Appellant,

v.

UNIVERSAL MARBLE & GRANITE
GROUP, LTD., et al.,

Defendants and Respondents.

B259891

(Los Angeles County
Super. Ct. No. LC096011)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Frank J. Johnson, Judge. Affirmed.

Law Offices of John A. Belcher, John A. Belcher and Nicholas W. Song for
Plaintiff and Appellant.

Robert J. Spitz for Defendants and Respondents.

INTRODUCTION

Bruskin International, LLC appeals from a judgment of nonsuit on its complaint for actual and constructive fraudulent transfer against respondents Universal Marble & Granite Group, Ltd. and Universal Marble (H.K.) Company Limited. Appellant had obtained a judgment against Universal Marble & Granite Group (U.S.A.) (Universal U.S.A.) in a prior action. After Universal U.S.A. was dissolved, appellant filed the instant action against respondents. On the day of trial, appellant sought leave to amend the complaint to allege that respondents were jointly and severally liable for the judgment in the prior action as alter egos of Universal U.S.A. The trial court denied the motion. After appellant stated it would present no evidence on its fraudulent transfer claims, the court granted respondents' motion for directed verdict. Appellant's sole contention on appeal is that the trial court erred in denying it the "ability to proceed on [its] alter ego claim" against respondents. For the reasons set forth below, we find no error and, accordingly, affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Prior Action

On October 23, 2006, Universal U.S.A. filed an action against appellant, seeking to collect on alleged unpaid invoices for products delivered from July 2003 to July 2004. Appellant filed a cross-complaint for damages, alleging that it had been supplied defective products. Pursuant to a mandatory contractual arbitration provision, the dispute was arbitrated. The arbitrator found appellant owed Universal U.S.A. no damages, and awarded appellant \$298,316, consisting of direct and consequential damages, attorney fees, and interest. The arbitration award was confirmed on October 7, 2008.

Respondents were not named as defendants in the action. On April 8, 2010, the judgment was amended to add Universal Marble & Granite Group, Ltd. (Universal Limited) as a judgment debtor, jointly and severally liable for the judgment entered against Universal U.S.A. On June 9, 2011, the superior court granted Universal Limited's motion to set aside the order amending the judgment, on the ground that it had not received notice.

On August 20, 2011, appellant filed a second motion to amend the judgment to add both respondents as judgment debtors, but the superior court denied the motion.

B. *Instant Action*

On January 10, 2012, appellant filed a complaint against respondents asserting two causes of action: (1) actual fraudulent transfer, and (2) constructive fraudulent transfer. The complaint alleged that in the prior action, Universal Limited used its American subsidiary, Universal U.S.A., to sue appellant. It further alleged that appellant never was able to collect on the judgment because Universal Limited caused Universal U.S.A. to be dissolved and fraudulently conveyed all assets to itself or its related entity, Universal Marble (H.K.) Group, Limited. No other cause of action, legal or equitable, was asserted in the complaint.

The court set a trial date of July 28, 2014, with a final status conference on July 21. On June 19, 2014, respondents filed a motion in limine to exclude the deposition testimony of Jimmy Chu, taken in January 2008 in the prior action. Chu's testimony purportedly showed that Universal U.S.A. and respondents are related entities. Respondents argued the deposition testimony was irrelevant and/or inadmissible hearsay. The motion in limine was set for hearing at the final status conference.

Appellant opposed the motion, arguing that the deposition testimony was admissible under Code of Civil Procedure section 2025.620, subdivision (b), as a deposition of an officer or director of a party to the action. Appellant further argued that the testimony was admissible under subdivision (g) of that section, as the instant action involved the same subject matter and the same parties (or their representatives or successors) as the prior action. Respondents countered they were neither parties to, nor represented in, the prior action.

In their trial brief, respondents argued that “[p]laintiff has acknowledged and admitted that it has no evidence whatsoever in support of its allegations” that they fraudulently received a transfer of assets from Universal U.S.A.

Appellant’s trial brief, filed the first day of trial, asserted that the sole issue for trial was whether the judgment entered against Universal U.S.A. should be amended to include defendants as additional judgment debtors. Appellant never addressed its fraudulent transfer causes of action.

Concurrently, appellant filed a motion for leave to file an amended complaint to conform to proof, and lodged a proposed amended complaint. The proposed complaint added a third cause of action for “Equitable Relief - Alter Ego.” The complaint prayed that respondents be deemed alter egos of Universal U.S.A., and that the judgment in the prior action be amended to add respondents as defendants and judgment debtors.

That same day, the trial court heard argument on respondents’ motion in limine to exclude Chu’s deposition testimony. The court ruled that the prior testimony was inadmissible hearsay. The court then addressed appellant’s motion filed that morning for leave to amend the complaint. The court expressed surprise, stating, “This is a completely different direction than I thought this case was going

to go.” The court requested additional briefing on whether appellant could amend the complaint, and continued the trial.

In opposing appellant’s motion for leave to file an amended complaint, respondents asserted that no caselaw allowed an alter ego claim to be brought in a new or separate action; appellant was thus limited to filing a motion to amend the judgment in the prior action. Respondents further argued that leave to amend should be denied based on appellant’s unexplained delay in seeking such relief and the resulting prejudice. Respondents noted that prior to filing the instant action, appellant had filed a motion to amend the judgment to add them as additional judgment creditors in the prior action. After that motion was denied, appellant waited nearly two and a half years, until after the close of discovery and the trial was set to begin, before seeking leave to amend the complaint.

In its supplemental brief, appellant argued that it should be allowed to amend its complaint, because (1) judicial policy favors liberal amendment of pleadings, (2) respondents would not be prejudiced because the allegations in the complaint put them on notice that alter ego was an issue, and (3) a judgment may be amended at any time to allege an alter ego theory.

On September 29, 2014, the court denied the motion for leave to amend. The parties then proceeded to trial on the original complaint. After appellant made its opening statement, which was focused on its alter ego claim, respondents moved for a directed verdict. Asked by the court whether appellant would produce any evidence on the issue of fraudulent transfer, appellant’s counsel stated, “None, none.” The court then granted respondents’ motion for directed verdict.

Judgment of nonsuit was entered October 20, 2014. Appellant timely noticed an appeal from the judgment.

DISCUSSION

As an initial matter, we note that appellant does not assign any error to the trial court's granting of respondents' motion for a directed verdict on its causes of action for fraudulent transfer. Thus, appellant has forfeited any challenge to the court's rulings as they relate to those causes of action. (See *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 ["Issues not raised in an appellant's brief are deemed waived or abandoned"].)¹

Appellant challenges (1) the trial court's denial of its motion for leave to file an amended complaint, (2) the court's exclusion of Chu's deposition testimony, and (3) the court's grant of nonsuit on its complaint. We review each of the trial court's rulings under a different standard. Because an affirmance of the court's denial of appellant's motion for leave to file an amended complaint would be dispositive, we address that ruling first.

As the Supreme Court has noted, "When a request to amend has been denied, an appellate court is confronted by two conflicting policies. On the one hand, the trial court's discretion should not be disturbed unless it has been clearly abused; on the other, there is a strong policy in favor of liberal allowance of amendments." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296

¹ At oral argument, appellant's counsel suggested that had the trial court not excluded Chu's deposition testimony, he would have had evidence on which to proceed with the fraudulent transfer causes of action. We disagree. At Chu's 2008 deposition, he testified to money transfers occurring at or near the time the transaction that was the subject of the underlying lawsuit occurred, viz., 2003-2004. Such transfers were well before the October 2008 judgment, and thus were not relevant to the fraudulent transfer causes of action. (See, e.g., *Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13 ["A fraudulent conveyance is a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim"].)

(*Mesler*.) Although this conflict is often resolved in favor of permitting amendment, the law is well settled that “[a] long unexcused delay may be the basis for denying permission to amend pleadings [citations], especially where the proposed amendment interjects a new issue [citations], which may require further investigation or discovery procedures [citations].” (*Nelson v. Specialty Records, Inc.* (1970) 11 Cal.App.3d 126, 139.)

For example, in *Moss Estate Co. v. Adler* (1953) 41 Cal.2d 581, our Supreme Court found no abuse of discretion in denying leave to amend, where on the eve of the trial, the defendant sought to file an amended answer alleging a new defense based on different facts more than a year after the original answer was filed and more than two months after she had notice of the date set for trial. As the court observed, “Defendant was aware of the facts at the time the original answer was filed, but she gave no excuse for her delay. The original answer gave no inkling of the facts alleged in the proposed amended answer, and a continuance would have been required had leave to file been granted.” (*Id.* at p. 586; see also *Record v. Reason* (1999) 73 Cal.App.4th 472, 486-487 [no abuse of discretion in denying leave to amend complaint to allege a new cause of action where plaintiff was aware of facts supporting new claim almost three years before seeking leave to amend]; *Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 136 [affirming trial court’s denial of motion to amend cross-complaint to conform to proof where party failed to explain why motion was brought more than three years after cross-complaint was filed and on the fourth day of trial].)

We find additional guidance from this court’s decision in *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471 (*Magpali*). There, the plaintiff brought suit against various insurance companies for breach of contract, misrepresentation, and intentional infliction of emotional distress arising from his

tenure as an insurance agent. (*Id.* at p. 475.) Nearly two years after he filed his complaint, on the eve of trial, the plaintiff sought to add a claim under the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), based on the allegation that he was told to avoid writing policies for Hispanic and Filipino customers. (*Magpali*, at p. 486.) The trial court denied leave to amend, and we affirmed. In finding no abuse of discretion, we observed that the plaintiff provided no explanation for leaving the claim out of the original complaint or for waiting so long to seek leave to amend. In addition, we determined that the defendants would be prejudiced because in preparing for trial, “[defendant] had not discovered or deposed many of the witnesses who would support the new allegations, and had not marshaled evidence to oppose the [new claim].” (*Id.* at p. 487; see also *City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1564 [“A party who waits 18 months before attempting to amend, and then does so only after trial has commenced, and who offers no excuse for the failure, can hardly complain when the request to amend is denied”].)

Here, appellant sought leave to include a cause of action to amend the judgment in the prior action and add respondents as additional judgment debtors under an alter ego theory. Neither below or on appeal has appellant provided an explanation for omitting this claim from its complaint. Appellant has consistently argued that Chu’s testimony from his January 2008 deposition showed that respondents were alter egos of Universal U.S.A. Thus, appellant was aware by no later than 2008 that it could allege an alter ego claim against respondents. Indeed, in 2011, appellant moved to amend the judgment in the prior action to add respondents as additional judgment debtors on an alter ego theory. Appellant’s counsel has represented that he was advised by the superior court to file a separate action to amend the judgment, but he failed to do so. Instead, he elected to file the instant complaint in January 2012, asserting fraudulent transfer claims. Not until

the first day of trial, in July 2014, did appellant seek to add a claim for equitable relief based on alter ego. Even then, appellant provided no explanation for the delay, and no excuse for waiting two and a half years, until after the close of discovery and the commencement of trial, to assert its alter ego claim. Absent some explanation for the delay, we conclude the trial court was under no obligation to grant leave to amend.

Furthermore, respondents would have been prejudiced had appellant been permitted to amend its complaint at the eleventh hour to allege an alter ego claim. The record shows that in preparing for trial, respondents were focused on defending the fraudulent transfer claims. Respondents were not preparing to defend against a claim that they were liable as additional judgment debtors under an alter ego theory. They were not parties to the prior action, and were not present or represented at Chu's deposition. Thus, allowing amendment would have required reopening discovery and continuing the trial. Under these circumstances, we discern no abuse of discretion in the trial court's denial of appellant's request to file an amended complaint.

Appellant contends that respondents were on notice of the alter ego claim, as the instant complaint alleged respondents controlled Universal U.S.A. However, the complaint contained no cause of action to amend the judgment in the prior action, which involved a contract dispute over goods sold to appellant in 2003 and 2004. Rather, the fraudulent transfer claims involved purported transfers of assets after appellant obtained its judgment in 2008. Thus, the factual allegations in the complaint did not put respondents on notice that appellant would seek to amend the judgment in the prior action to add them as additional judgment debtors.

The three cases on which appellant primarily relies are distinguishable. In *Mesler*, the plaintiff sought to amend its complaint to include an alter ego

allegation six weeks before trial. (*Mesler, supra*, 39 Cal.3d at p. 296.) The trial court denied the request because the amendment would ““destroy the plaintiff’s time [for] trial.”” The Supreme Court reversed, finding the trial court had abused its discretion because it was the plaintiff who sought the amendment. Moreover, the defendant could not have been surprised about the alter ego theory because there had been “much discovery” on the issue. (*Id.* at pp. 296, 297.) Here, in contrast, the request to amend was made on the day of trial. More important, no discovery had been taken on the alter ego claim.

In *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558 (*Higgins*), the plaintiff filed a complaint seeking specific performance of a purportedly attached real estate purchase agreement. (*Id.* at p. 560.) However, attached to the complaint were escrow instructions for the real estate purchase, not the actual purchase agreement. On the eve of trial, the plaintiff sought to amend the complaint to substitute the written purchase agreement. The trial court denied the motion, and the appellate court reversed, holding that because the defendant could not have been surprised by the motion to amend, the plaintiff should be permitted to correct her technical mistake in attaching the wrong document. (*Id.* at pp. 564-565.) The requested amendment in *Higgins* did not state a new cause of action; the plaintiff sought the identical relief set forth in the complaint, viz., specific performance of the real estate purchase agreement. In contrast, here, appellant sought to assert a new cause of action different and distinct from its fraudulent transfer causes of action. As explained above, the fraudulent transfer causes of action purportedly related to transactions between Universal U.S.A. and respondents after 2008, whereas the cause of action to amend the judgment in the prior action involved transactions in 2003 and 2004 between Universal U.S.A. and appellant.

Finally, in *Arthur L. Sachs, Inc. v. City of Oceanside* (1984) 151 Cal.App.3d 315, the plaintiff sought leave to file a second amended complaint to add a new cause of action for rescission of a contract based on fraud. (*Id.* at p. 319.) The trial court denied the request because it was brought on the eve of trial and set forth a different theory. The appellate court reversed, finding the plaintiff's delay in seeking to amend was due to the defendant's failure to timely deliver relevant discovery to which the plaintiff was clearly entitled. (*Ibid.*) In contrast, here, nothing suggests that appellant's delay in seeking to assert a new cause of action was the result of respondents' misconduct. In sum, the trial court did not abuse its discretion in denying appellant's day-of-trial request to file a first amended complaint.²

Our determination that the trial court did not err in denying appellant's motion for leave to file a first amended complaint is dispositive of the remaining issues on appeal. In the absence of an alter ego claim, Chu's testimony was not relevant, as it had no bearing on the fraudulent transfer claims. Likewise, in the absence of an amended complaint, the judgment of nonsuit pertained only to the original complaint. As noted above, appellant does not challenge the judgment of nonsuit as it relates to the claims in the original complaint.

² The trial court denied appellant's motion for leave to file a first amended complaint on the ground that no caselaw permits a plaintiff to amend a prior judgment to add additional judgment debtors under an alter ego theory in a new and separate action. We agree with appellant that *Brenelli v Amedeo, S.P.A. v. Bakara Furniture, Inc.* (1994) 29 Cal.App.4th 1828, 1840 and *Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1073, suggest that a plaintiff may do so. However, we may affirm the trial court's order on any theory supported by the record. (*J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16.) Below, respondents argued that appellant's motion for leave to file a first amended complaint should be denied due to appellant's unwarranted delay and the resulting prejudice. As we have explained, the record supports that argument.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.