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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

MARK HANNUM et al.,

Plaintiffs and Appellants,

v.

VERYL KUCHAR,

Defendant and Respondent.

C065568

(Super. Ct. No.
SCV 24886)

MARK HANNUM et al.,

Petitioners,

v.

THE SUPERIOR COURT OF PLACER COUNTY,

Respondent;

VERYL KUCHAR,

Real Party in Interest.

C066167

(Super. Ct. No.
SCV 24886)

Plaintiffs Mark and Karen Hannum leased property from defendant Veryl Kuchar with an option to buy the property. The Hannums attempted to exercise the option, but the manner of exercising the option may not have complied with the requirements of the lease agreement. After the Hannums' attempted exercise of the option, Kuchar solicited and received from the Hannums an additional \$50,000 towards the purchase price. Then he began proceedings to evict the Hannums, citing what he claims to be the Hannums' noncompliance with the lease agreement.

The Hannums brought this action for specific performance and declaratory relief. Kuchar moved for summary judgment, claiming that the Hannums did not comply with the lease agreement. The Hannums argued that, even if they did not comply with the lease agreement, Kuchar waived the noncompliance by accepting the \$50,000 towards the purchase price. The court commissioner hearing the motion for summary judgment, however, rejected the Hannums' waiver argument, stating that it was not pleaded in the complaint. The court entered judgment for Kuchar and also granted Kuchar's motion to expunge a lis pendens the Hannums had recorded against the property.

The Hannums appeal from the judgment and, in a separate proceeding, petition for a writ of mandate to reverse the order granting the motion to expunge the lis pendens. We stayed the order granting the motion to expunge the lis pendens, issued an alternative writ of mandate, and consolidated the cases for argument and decision only.

We conclude that the trial court erred in granting the motion for summary judgment because the facts alleged in the complaint raised a triable issue concerning the Hannums' theory that Kuchar waived any noncompliance with the lease by accepting the \$50,000. We therefore reverse the judgment and grant the petition for writ of mandate.

BACKGROUND

The Hannums filed a complaint against Kuchar, alleging causes of action for specific performance and declaratory relief. They alleged that they and Kuchar own adjoining properties and that Kuchar leased his property to the Hannums in November 2002. The lease included an option to buy the property for \$385,000 and required the Hannums to exercise the option by November 7, 2007. The monthly payment under the lease was \$3,500, and the parties agreed that 95 percent of the monthly payments would be credited to the purchase price.

In September 2004, Kuchar had financial difficulties and asked the Hannums to increase the monthly payments by \$1,000, still with 95 percent going to the purchase price. The Hannums orally agreed.

According to the complaint, the Hannums "exercised the option by delivering the prescribed notice . . . on November 7, 2007. [¶] . . . Also in November 2007, defendant Kuchar represented to [the Hannums] that he was undergoing financial difficulties and asked [the Hannums] if they would be willing to make an advance of \$100,000 against the purchase price. [The

Hannums] were not able to make such an advance, but did advance to [Kuchar] \$50,000 . . . on or about November 20, 2007."

Despite the Hannums being at least \$49,000 ahead of the payment schedule, Kuchar began proceedings to evict the Hannums from the property.

The complaint alleged that the Hannums "performed all conditions, covenants, and promises required of them except as have been prevented by [Kuchar]" and Kuchar "falsely contended [the Hannums] were required to surrender possession of the premises despite timely exercising their option and complying, in all respects, with the contract."

After Kuchar's answer and the parties' discovery, Kuchar filed a motion for summary judgment. He presented evidence of three ways in which the Hannums did not comply with the contract, justifying his refusal to recognize the Hannums' exercise of the option: (1) the manner of exercising the option, (2) failure to get a building permit, and (3) failure to get a business license.

On the subject of exercising the option, the contract stated: "If tenants are not in breach of this lease, they may exercise the option by delivering to owners, in writing, their exercise of the option according to the terms of this lease" And later: "Time is of the essence of this option; if tenants fail to exercise this option in accordance with its terms and within the option period, then this option and the rights of tenants will automatically and immediately terminate without notice" And finally, concerning

notice: "Notice is considered given either (a) when delivered in person . . . or (b) when deposited in the United States Mail in a sealed envelope or container, either registered or certified mail"

The Hannums neither personally delivered the notice exercising the option nor did they send it by registered or certified mail. Instead, Karen Hannum placed a copy of the notice exercising the option in Kuchar's mailbox on November 7, 2007, the last day to exercise the option. Kuchar personally received the notice on November 13, six days later.

The lease required compliance with building permit requirements. However, by November 2007, the Hannums had built a building on the leased property without obtaining a building permit. (JA 250-251)

The lease also required compliance with governmental regulations, such as acquiring necessary business licenses. In November 2007, the Hannums were operating a business, and their business included activities on the leased property. However, the Hannums had not obtained a business license that included authorization to conduct business activities on the leased property.

The motion for summary judgment, which was filed on November 19, 2009, was set for a hearing on February 4, 2010.

In their opposition to the motion for summary judgment, the Hannums' main argument was succinctly stated as follows:

"Having accepted the benefits conferred by way of the Hannums' exercise of the option, [Kuchar] has waived any defenses he may

have once had. As [Kuchar's] waiver is a question of fact, Kuchar's motion for summary adjudication cannot succeed." They asserted that Kuchar had accepted the benefits of their exercise of the option when, before that exercise, he accepted \$1,000 per month more than the lease required and, after the exercise, accepted an additional \$50,000 toward the purchase price. On the \$50,000 check requested and accepted by Kuchar, dated November 20, 2007, one week after Kuchar personally received the notice exercising the option, Mark Hannum wrote: "Towards Purchase of Property."

On January 29, 2010, six days before the date scheduled for the hearing on the motion for summary judgment, Kuchar filed a reply to the Hannums' opposition. He argued that the Hannums' assertion of waiver should be rejected because the issue was outside the scope of the pleadings. Based on this argument, Kuchar objected on relevance grounds to the Hannums' evidence of waiver, including Kuchar's acceptance of \$50,000 after he had received the Hannums' notice exercising the option.

The summary judgment hearing was postponed to March 4, 2010.

On February 12, 2010, the Hannums began attempts to amend the complaint to allege waiver. Counsel for the Hannums contacted the trial court to schedule an ex parte hearing for an order shortening time on a motion to amend the complaint. The clerk, however, advised that the earliest available date for the ex parte hearing was March 2, 2010. Counsel for the Hannums also attempted to contact counsel for Kuchar to request a

stipulation on an order shortening time, but counsel for Kuchar did not return the call.

On February 23, 2010, the Hannums filed a supplemental opposition to the motion. It began: "After reviewing defendant Kuchar's reply papers, [the Hannums] determined that their case would be better stated in an amended complaint. [The Hannums] have sought an ex parte hearing for an order shortening time for hearing their motion for leave to amend, but, due to court furlough days and the recent court holidays, the earliest date that could be obtained from the court for the ex parte application is March 2, 2010." The Hannums cited various authorities stating that, if a pleading is found inadequate when considering a summary judgment motion, the court should allow the plaintiff to amend the complaint. (E.g., *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1257.) The Hannums attached a proposed amended complaint in which they explicitly alleged that Kuchar waived any breach of the lease and any defect in the exercise of the option.

On March 2, 2010, Judge Charles D. Wachob heard and denied the ex parte motion to shorten time. Even though the court, itself, delayed the hearing on the motion for three weeks after the Hannums made the request, the judge said: "This request displays a complete misapprehension by [the Hannums'] counsel of the court's present workload, resources and calendar - it simply is not possible for the court to review the proposed amendment, permit a reasonable opportunity for opposition to be filed, and to hear the motion on such shortened notice."

The hearing on the motion for summary judgment was delayed an additional week. On March 11, 2010, Commissioner Margaret E. Wells heard the motion. She filed a ruling on submitted matter granting the motion. In the ruling, she noted that Judge Wachob had denied the ex parte application for an order shortening time to hear a motion to amend the complaint. She stated that she had "no authority" to set aside that order. She also denied the Hannums' "request to amend the complaint." On the issue of whether to grant the summary judgment motion, she wrote:

"[Kuchar's] motion for summary judgment is granted. [The Hannums] admittedly did not deliver their notice of exercise of option to [Kuchar] in one of the authorized methods provided for in the lease. Thus, [the Hannums] failed to properly and timely exercise the option to purchase. Moreover, [the Hannums] were admittedly in breach of the lease at the time they purported to exercise the option. Under the terms of the option, [the Hannums] could only exercise the option if they were not in breach of the terms of the lease. [The Hannums'] opposition is based solely on theories not alleged in their complaint. The pleadings delimit the issues to be determined on summary judgment. *FPI Development, Inc. v. Nakashima* (1991) 231 [Cal.App.3d] 367. The court therefore cannot consider matters not raised in the complaint." The court also sustained Kuchar's objections to evidence of waiver based on relevance.

On March 18, 2010, the Hannums moved for reconsideration of the summary judgment ruling and for leave to amend the

complaint. However, Commissioner Wells denied the motions and entered judgment in Kuchar's favor on May 14, 2010.

On June 8, 2010, Kuchar filed a motion to expunge a lis pendens that had been recorded by the Hannums.

The Hannums filed a notice of appeal from the judgment on July 16, 2010. They also opposed Kuchar's motion to expunge the lis pendens. On September 7, 2010, the trial court granted Kuchar's motion to expunge the lis pendens.

On September 24, 2010, the Hannums filed a petition for writ of mandate in this court challenging the trial court's granting of Kuchar's motion to expunge the lis pendens. We stayed the order granting Kuchar's motion and issued an alternative writ of mandate.

DISCUSSION

I

Motion for Summary Judgment

The Hannums argue that the motion for summary judgment was improperly granted because (1) there remain triable issues of fact concerning whether delivery of the notice exercising the option to Kuchar's mailbox on the last day for exercising the option complied with the contract, (2) there remain triable issues of fact concerning whether Kuchar waived the defects in their exercise of the option, (3) the Hannums were entitled to amend the complaint if it did not adequately allege waiver, and (4) allowing Kuchar to keep the money paid for the purchase of the property would constitute a forfeiture as the lease was really a disguised contract of sale.

Kuchar responds that (1) the trial court properly refused to consider whether Kuchar waived the defects in the Hannums' exercise of the option because waiver was not alleged in the complaint, (2) the Hannums failed to exercise the option in the manner specified in the contract, (3) the Hannums' exercise of the option was invalid because the Hannums violated other provisions of the contract, (4) the trial court did not abuse its discretion in denying leave to amend the complaint, and (5) the Hannums did not raise issues of disguised contract or forfeiture in the trial court.

We conclude that the complaint, even without amendment, sufficiently pleaded Kuchar's waiver of the defects in exercising the option and complying with the contract and that there remains a triable issue concerning such waiver. Because of this conclusion, we need not consider whether (1) there remains a triable issue of fact concerning whether the Hannums' exercised the option in the manner required by the contract, (2) the trial court abused its discretion in not allowing the Hannums to amend the complaint, and (3) the lease was a disguised contract of sale.

While the complaint alleged that the Hannums complied with the contract by delivering notice of exercising the option on the day it expired, it also alleged that, after the Hannums gave notice of exercising the option, Kuchar solicited \$100,000 and eventually accepted a lump sum of \$50,000 towards the purchase of the property. The Hannums argue that this allegation, which was supported by evidence in opposition to the motion for

summary judgment, was sufficient to raise a triable issue concerning whether Kuchar waived possible defects in the exercise of the option, including the manner of service and the lack of compliance with other provisions of the contract, such as a building permit and business license. We agree.

"Like any other contractual terms, timeliness provisions are subject to waiver by the party for whose benefit they are made. (See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 767, p. 694 ['A condition may be waived; i.e., the party whose duty is dependent upon the other party's performance of a condition may make his duty independent, binding himself to perform unconditionally. ¶ . . . ¶ Thus, a buyer may waive conditions relating to time and place of delivery'.])" (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1339, fn. and italics omitted.) Waiver of a condition may be express or implied. "To constitute a waiver of a legal right the holder thereof must have intentionally relinquished such right after having knowledge of the facts. [Citation.] Such waiver implies 'the intentional forbearance to enforce a right.' [Citation.] In the absence of an express waiver the only situation in which an implied waiver is found is that in which the party for whom the act in question was to be done permitted his contractee to perform contrary to the contract and accepted the benefits of such performance after default and with knowledge thereof." (*Pitt v. Mallalieu* (1948) 85 Cal.App.2d 77, 85; see also Code Civ. Proc., § 2076 [objection waived if not made at time of tender].)

Here, there was a triable issue concerning whether Kuchar waived the Hannums' compliance with the notice, building permit, and business license provisions because he solicited and accepted a large sum toward the purchase of the property after the Hannums allegedly defaulted on the conditions he now wishes to enforce.

However, Kuchar argues fervently in his respondent's brief that the trial court could not consider waiver because it was not pleaded. While Kuchar is correct that the pleadings delimit the scope of issues considered in a summary judgment motion (*FPI Development, Inc. v. Nakashima, supra*, 231 Cal.App.3d at p. 381), we have already explained why the facts alleged in the complaint support a waiver theory.

"The rules governing a motion for summary judgment are well known and we need not set them out in detail. A defendant seeking summary judgment must either prove an affirmative defense, disprove at least one element of the plaintiff's cause of action, or show that some such element cannot be established. [Citation.] The opposing party need not prove his or her case; it is enough to show that a triable issue of material fact exists. [Citation.] The evidence and affidavits of the moving party are construed strictly, while those of the opponent are liberally read. [Citation.] Our review of the trial court's decision is de novo. [Citation.]" (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 100 (*Government Employees*)). "A defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff

cannot bring up new, unpleaded issues in his or her opposing papers. [Citation.]” (*Id.* at pp. 98-99, fn. 4.)

Quoting this last statement from *Government Employees*, that “the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers,” Kuchar claims that the Hannums cannot raise the issue of waiver. However, Kuchar also states that “[t]o put waiver at issue, the facts constituting waiver must be specifically pleaded. (See 4 Witkin, California Procedure (5th ed. 2008), Pleading, § 533, p. 663.)” (Original underscoring.) As we have explained, the facts alleged in the complaint, specifically, Kuchar’s acceptance of \$50,000 after the Hannums’ allegedly imperfect exercise of the option and compliance with the lease, raised a triable issue of fact concerning waiver. Nothing more is needed. Kuchar neither states, nor provides authority for, the proposition that the complaint must identify those facts as a waiver argument. Instead, the law requires only that the plaintiff allege facts from which waiver may be argued. (*Kohner v. National Surety Co.* (1930) 105 Cal.App. 430, 438.) The Hannums did that.

It also makes no difference that, in addition to the facts supporting a waiver theory, the Hannums alleged that they complied with the provisions of the contract. We know of no rule prohibiting reliance on alternative theories in a pleading, and Kuchar provides no authority for such a rule. Accordingly, it was sufficient that the Hannums alleged facts consistent with waiver of noncompliance.

Because the complaint sufficiently alleged facts supporting a theory that Kuchar waived compliance with the notice, building permit, and business license provisions of the contract, the trial court improperly granted summary judgment. Also, the trial court erred by deeming irrelevant the evidence concerning waiver proffered by the Hannums in opposition to the motion for summary judgment.

II

Petition for Writ of Mandate

Because we find that the summary judgment was improperly granted and, therefore, Kuchar was not entitled to judgment, we also grant the Hannums' petition for writ of mandate to direct the court to deny Kuchar's motion to expunge lis pendens.

"A lis pendens is a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice.' [Citation.]" (*Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 647.) Code of Civil Procedure section 405.32 allows a party to move to expunge the lis pendens. The court must grant the motion if the "claimant [here, the Hannums] has not established by a preponderance of the evidence the probable validity of the real property claim." (Code Civ. Proc., § 405.32.)

We have concluded that summary judgment was improperly granted, which is, in effect, a finding that there may be validity to the Hannums' property claim. Accordingly, we must direct the trial court to vacate its order granting Kuchar's motion to expunge the lis pendens.

DISPOSITION

In case No. C065568, the judgment is reversed, and the action is remanded to the trial court with directions to vacate the order granting summary judgment and to enter a new order denying Kuchar's motion for summary judgment.

In case No. C066167, the Hannums' petition for writ of mandate is granted. Let a peremptory writ issue directing the trial court to vacate its order granting Kuchar's motion to expunge lis pendens and to enter a new order denying Kuchar's motion to expunge lis pendens. The stay will be dissolved when the court vacates its order granting the motion to expunge lis pendens.

The Hannums are awarded their costs on appeal and in the writ proceeding. (Cal. Rules of Court, rules 8.278(a)(2) [appeal], 8.493(a)(1)(A) [writ proceeding].)

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

MAURO, J.