

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

OMNEL,

Plaintiff and Appellant,

v.

JOHN TANNER,

Defendant and Respondent.

C070907

(Super. Ct. No. SCV0028456)

Plaintiff OMNEL, a California corporation, appeals from a judgment of dismissal following an order sustaining defendant John Tanner’s demurrer to the negligence claim in OMNEL’s first amended complaint (the amended complaint) against him without leave to amend. This case involves a dispute between OMNEL and Tanner’s two companies, defendants Valpo-LLC and Tanner Industries, over a commercial lease agreement. OMNEL also sued Tanner personally. Tanner demurred to the negligence claim against him, contending that the amended complaint failed to state a cause of action because Tanner did not owe OMNEL a duty of care.

On appeal, OMNEL contends the trial court erred in sustaining Tanner’s demurrer to the amended complaint without leave to amend, arguing that corporate

officers such as Tanner are personally liable for tortious conduct when they personally direct or participate in the conduct that causes economic harm to third parties. Tanner responds that OMNEL failed to allege any duty owed by him to OMNEL and that corporate officers are not personally liable for negligence when they make decisions in the course and scope of their duties to the corporation that incidentally cause economic harm to a third party but do not cause physical harm or property damage.

Thus, the central issue in this case is whether a corporate officer may be held liable for negligent acts performed in the course and scope of his duties to the corporation when those acts cause only economic harm, as opposed to physical harm or property damage. We conclude that the trial court properly sustained the demurrer because the decisions Tanner made in the course and scope of his duties to Valpo-LLC and Tanner Industries caused only incidental economic harm to OMNEL, and such decisions are protected by limited liability for corporate officers. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Facts Alleged in the Amended Complaint

OMNEL filed a complaint against Valpo-LLC, Tanner Industries, and Tanner, which was amended after Tanner's first demurrer was sustained with leave to amend. In the amended complaint, OMNEL alleges the following:

Tanner both owned and was involved in the management and operation of Valpo-LLC and Tanner Industries. Tanner is the chief executive officer, president, and responsible managing officer of Tanner Industries, a California corporation.

On April 10, 2009, OMNEL entered into a lease agreement to lease certain commercial space from Valpo-LLC. OMNEL prepaid \$57,360 in rent and deposits,¹ and the lease required Valpo-LLC to make certain improvements to the leased premises.

¹ The lease is attached to the amended complaint and referenced therein. The term of the lease was to commence on April 1, 2009. The lease provided that OMNEL would

In April or May 2009, Valpo-LLC purportedly contracted with Tanner Industries to construct the required improvements specified in the lease. The parties agreed that “[t]ime is of the essence.” Tanner assured OMNEL that construction would be completed by July 31, 2009. Rent payments were to begin on August 1, 2009.

The lease required that Valpo-LLC complete the improvements “in compliance with all applicable building codes and zoning laws.” However, “[a]t the direction of Tanner and under his direct supervision, Tanner Industries and Valpo-LLC began construction of the improvements, but failed to first apply for the requisite building permits. ¶] When OMNEL inquired about the need for permits for the improvements, Tanner falsely advised OMNEL that no permits were required.”

Under Tanner’s supervision, Tanner Industries continued construction without building permits, the construction “was not completed to code, and short-cuts [*sic*] were taken to save money such that the work was not performed in a good and workman like [*sic*] manner.”

Around January 2010, OMNEL applied for sign permits with the City of Roseville (the City) and was informed that “building permits were indeed required” for the improvements. Accordingly, the City would not issue a certificate of occupancy until Tanner Industries had obtained the required permits and the construction had passed inspection. When OMNEL raised these issues with Tanner, “Tanner responded that he had friends with the City and that he would work it out.”

not pay rent for the first four months -- April, May, June and July of 2009. Commencing on August 1, 2009, when OMNEL alleged the improvements were to be completed, OMNEL would pay Valpo-LLC \$4,000 per month for the first two years (August 1, 2009 to July 31, 2011), with a rent increase on August 1, 2011 and August 1, 2013. The lease specified that prior to the execution of the lease, OMNEL would pay \$4,000 for the first month’s rent (August 2009), \$5,360 for the last month’s rent (July 2014), a \$4,000 security deposit, and prepaid rent of \$44,000 for the remaining 11 months of the first year in order to guarantee the lease, totaling \$57,360 in rents and deposits.

About two months later, on March 2, 2010, Tanner applied with the City for a building permit. However, Tanner Industries and Valpo-LLC “failed to disclose to the City that a mezzanine had been installed.” During this time, “. . . OMNEL repeatedly inquired about the status and complained to Tanner about Valpo-LLC’s failure to properly complete the build-out so that OMNEL could commence operation of its business.”

In late April 2010, OMNEL began to believe that “the construction process was in such disarray that the promised build-out was not going to be . . . completed in conformity with the applicable laws and regulations in the near future.” Accordingly, on April 23, 2010, OMNEL advised Tanner that it would cancel the lease if the work was not properly completed within 10 days. On behalf of Valpo-LLC, Tanner orally assured OMNEL that the construction would be completed no later than June 1, 2010, and that rent would not commence until a certificate of occupancy issued. These assurances were documented in an April 23, 2010 amendment to the lease.

The improvements were not completed in conformity with the applicable laws by June 1, 2010. OMNEL “demanded that Valpo-LLC provide reasonable written assurances that the build-out would be completed within 10 days.” The City inspectors had advised Tanner that construction had been done without appropriate inspections, and “certain portions would need to be redone or removed for inspection; . . . fire sprinklers would need to be installed, and . . . there remained numerous other problems with the build-out, including the lack of a permit for the mezzanine.” Despite this, Tanner assured OMNEL that it would be able to occupy the premises within two weeks.

When the construction was still not completed “in conformity with the applicable laws by July 2010,” OMNEL again inquired about when it would be able to occupy the premises. On July 22, 2010, Tanner called OMNEL and requested a letter from OMNEL canceling the lease. OMNEL agreed to the request to cancel the lease, provided that

Valpo-LLC refunded the prepaid rent and deposits. On July 29, 2010, OMNEL sent a letter to Valpo-LLC confirming cancellation of the lease, providing notice of Valpo-LLC's default, giving Valpo-LLC an opportunity to cure its default within 10 days, and requesting the return of the prepaid rent and deposits. Valpo-LLC did not cure the default, and the lease was terminated. Valpo-LLC did not return the \$57,360 in prepaid rent and deposits.

The amended complaint alleged two causes of action against Valpo-LLC and one cause of action for negligence against Tanner Industries and Tanner personally. In the negligence cause of action, OMNEL alleged that Tanner "authorized, directed, and meaningfully participated in the construction of the build-out and the other actions which delayed timely completion of the build-out and resulted in the build-out not being completed in a good and workman like [*sic*] manner in conformity with applicable laws and regulations and the resultant damage to the leasehold premises." OMNEL alleged that Tanner had a "duty to use ordinary care to prevent OMNEL from being harmed as a result of his individual negligence in making the decisions and personally performing" the alleged harmful acts. OMNEL further alleged that Tanner knew or should have known of the relationship between OMNEL and Valpo-LLC, and that his actions were reasonably likely to cause OMNEL economic harm. As a result of Tanner's decision not to obtain the requisite permits and his other actions, ". . . OMNEL was unable to timely open its business and suffered lost profits and lost business opportunities as a result thereof."

Tanner's Demurrers

Tanner filed a demurrer to OMNEL's original complaint, contending that OMNEL had failed to state facts sufficient to constitute a cause of action against him for negligence. The trial court sustained the demurrer with leave to amend, reasoning that "[a]ny duty owed by [Tanner] regarding the management and operation of Tanner

Industries and Valpo-LLC was owed to those entities, not to [OMNEL].” Thereafter, OMNEL filed the amended complaint. Tanner again demurred on the same grounds.

The trial court sustained the demurrer to the amended complaint without leave to amend. The court reasoned that “[t]he only facts alleged against Defendant Turner relate to his actions in operating and managing Defendant Tanner Industries,” and that OMNEL alleged only that Turner’s actions caused it economic harm. Relying on *United States Liability Ins. Co. v. Haidinger-Hayes* (1970) 1 Cal.3d 586, 595 (*Haidinger-Hayes*) and *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 505-506 (*Frances T.*), the court reasoned that Tanner did not owe a duty to OMNEL and was not liable for failing to prevent OMNEL’s economic harm. The court further reasoned that because OMNEL did not own the premises but was merely a prospective tenant, “any property damage to those premises does not constitute harm to [OMNEL].” The court also reasoned that OMNEL’s argument that Tanner should be held personally liable because he was actually involved in the actions that caused OMNEL economic harm, if correct, “would result in imposing individual liability against anyone who incorporated what is essentially a one-man business for economic harm done by the corporation.” The court concluded that such a result would “eviscerate the protection against individual liability that incorporation would otherwise provide.”

DISCUSSION

I. Standard of Review

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to

amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse.” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) The burden of proving a reasonable possibility of amendment is on the plaintiff (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 (*Zelig*)), and the burden can be met for the first time on appeal (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1041-1042).

II. Limited Liability for Corporate Officers

OMNEL contends that the trial court erred in sustaining the demurrer to the amended complaint, arguing that California case law provides that Tanner is jointly liable with the corporation because he personally directed and participated in negligent conduct. Tanner contends that, regardless of any liability on the part of Tanner Industries and Valpo-LLC, he cannot be held personally liable for negligence where, in the ordinary course of his duties to the corporation, he made decisions that caused incidental economic harm to OMNEL.

Corporate directors or officers “may be liable, under the rules of tort and agency, for tortious acts committed on behalf of the corporation [citations].” (*Haidinger-Hayes, supra*, 1 Cal.3d at p. 595.) Corporate directors or officers do not incur personal liability for torts of the corporation merely by reason of their official positions unless they participate in the wrongful conduct or authorize its commission. (*Frances T., supra*, 42 Cal.3d at pp. 503-504.) The California Supreme Court has explained that corporate officers and directors are “not responsible to third persons for negligence amounting merely to nonfeasance, to a breach of duty owing to the corporation alone; the act must also constitute a breach of duty owed to [a] third person. [Citation.] *Liability imposed upon agents for active participation in tortious acts of the principal have been mostly restricted to cases involving physical injury, not pecuniary harm, to third persons* [citations].” (*Haidinger-Hayes, supra*, 1 Cal.3d at p. 595, italics added.)

In *Haidinger-Hayes*, plaintiff, an insurance company, entered into a general agency contract with the defendant corporation, Haidinger-Hayes, to underwrite proposals for insurance, determine premium rates, and to issue contracts of insurance. (*Haidinger-Hayes*, *supra*, 1 Cal.3d at p. 590.) The corporation’s president, V.M. Haidinger, negligently computed a premium rate for an insured, which resulted in economic losses to the plaintiff. (*Id.* at pp. 592-593.) The California Supreme Court held that the corporation’s president was not personally liable to the plaintiff for the economic loss. (*Id.* at p. 595.)

In *Frances T.*, the plaintiff was raped and robbed in her condominium. She sued the individual directors on the condominium association board, claiming they had breached a duty of care owed to her by failing to repair lighting and by ordering her to remove the external lighting she had installed. (*Frances T.*, *supra*, 42 Cal.3d at pp. 498, 503.) The Supreme Court reiterated that “directors individually owe a duty of care, independent of the corporate entity’s own duty, to refrain from acting in a manner that creates an unreasonable risk of *personal injury* to third parties.” (*Frances T.*, *supra*, 42 Cal.3d at p. 505, italics added.) As it had in *Haidinger-Hayes*, the court explained that there are “two traditional limitations on a corporate officer’s or director’s personal liability for negligence. First, we concluded that no special agency relationship imposed personal liability on the defendant corporation’s president for failing to prevent economic harm to the plaintiff corporation, a client of his principal. This conclusion reflected the oft-stated disinclination to hold an agent personally liable for economic losses when, in the ordinary course of his duties to his own corporation, the agent incidentally harms the pecuniary interests of a third party. ‘*Liability imposed upon agents for active participation in tortious acts of the principal have been mostly restricted to cases*

involving physical injury, not pecuniary harm, to third persons [citations].’ ”²
(*Frances T.*, *supra*, at p. 505, italics added.) The *Frances T.* court distinguished *Haidinger-Hayes* on this basis, reasoning that the actions of the individual association director defendants had caused a personal injury rather than mere economic loss as in *Haidinger-Hayes*; thus, the condominium association directors could be individually liable to the plaintiff for her injuries. (*Frances T.*, *supra*, 42 Cal.3d at pp. 505, 509-512.)

OMNEL relies on *Michaelis v. Benavides* (1998) 61 Cal.App.4th 681 (*Michaelis*), but that reliance is misplaced. In *Michaelis*, the plaintiffs sued Anthony Benavides, the president and a 50 percent stockholder of a corporation, for negligence in constructing a patio and a driveway at the plaintiffs’ home. (*Michaelis*, *supra*, at p. 683.) Plaintiffs alleged physical damage to the property resulted from the negligence. (*Id.* at pp. 683-684.) Based on *Haidinger-Hayes*, the trial court granted the defendant’s motion for nonsuit, concluding that the defendant could not be held personally liable for the damages. (*Michaelis*, *supra*, 61 Cal.App.4th at pp. 684, 686-687.) In reversing the judgment, the *Michaelis* court reasoned, “[I]n contrast to the alleged facts here, the plaintiff in *Haidinger-Hayes* did not experience any personal injury or injury to property, but only pecuniary harm” (*Michaelis*, *supra*, at p. 686.) Further, the court quoted *Haidinger-Hayes* for the proposition that the liability of corporate officers and directors for negligence is “ ‘*mostly restricted to cases involving physical injury, not pecuniary harm, to third persons*[citations].’ ” (*Michaelis*, *supra*, at p. 686, italics added.) Unlike *Haidinger-Hayes*, the defendant in *Michaelis* caused physical damage to property. (*Id.* at p. 687.)

² The second limitation is “the traditional rule that directors are not personally liable to third persons for negligence amounting merely to a breach of duty the officer owes to the corporation alone.” (*Frances T.*, *supra*, 42 Cal.3d at p. 505.)

OMNEL also cites *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, which OMNEL asserts has “remarkable factual similarity” to the instant case. We find *J'Aire* to be remarkably dissimilar in a material way. In *J'Aire Corp.*, the plaintiff sued Craig Gregory, a general contractor who was the sole proprietor of his business, for economic damages resulting from the delay in completion of renovations to the premises leased by plaintiff. (*J'Aire Corp.*, *supra*, 24 Cal.3d at pp. 802-803.) That case is clearly distinguishable. In *J'Aire Corp.*, the defendant’s business was not incorporated and the defendant was not a corporate officer or director. Thus, the court had no occasion to apply the rules announced in *Haidinger-Hayes* regarding the circumstances where a corporate officer or director may be personally liable to third parties for negligent acts.

OMNEL also cites a number of cases for the proposition that corporate officers and directors are personally liable for tortious conduct they personally direct or participate in, even when there is only economic harm. However, all of the cases OMNEL cites involve intentional torts as opposed to negligence and are therefore distinguishable from the reasoning in *Haidinger-Hayes* and *Frances T.* (See, e.g., *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34 [misappropriation of trade secrets]; *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773 [fraud]; *Vujacich v. Southern Commercial Co.* (1913) 21 Cal.App. 439 [conversion].) In *Frances T.*, the court clearly delineates that the “economic loss[]” limitation relates to a “corporate officer’s or director’s personal liability for negligence.” (*Frances T.*, *supra*, 42 Cal.3d at p. 505.) There is no such limitation for intentional torts.

OMNEL contended at oral argument that the California Supreme Court’s statement in *Haidinger-Hayes* that the liability of corporate officers and directors for negligence is “mostly restricted to cases involving physical injury” to third persons is “old dicta.” To the contrary, we view the Supreme Court’s statement as a

now well-settled rule. It was repeated by our high court in *Frances T.*, when the court distinguished that case on the ground that the *Frances T.* plaintiff sustained physical injury. (*Frances T.*, *supra*, 42 Cal.3d at pp. 504-505.) And the same rule was repeated in *Michaelis* (*Michaelis*, *supra*, 61 Cal.App.4th at pp. 686-687), when that court distinguished the physical injury to property in that case from the economic harm in *Haidinger-Hayes*. We read our high court's use of the word "mostly" as connoting the potential for exceptions to the rule that corporate officers are not liable to third parties for economic harm resulting from the corporate officer's conduct. One such exception would be intentional torts.³ If, instead, we were to adopt the rule that OMNEL advocates -- one where a corporate officer or director is personally liable to third parties for economic damages his or her conduct causes -- we would, in effect, convert our high court's carefully worded rule that corporate officer or director liability is "mostly restricted to cases involving physical injury" to a rule that states that a corporate officer or director is "always" liable, regardless of whether the officer or director caused physical injury or economic damages. This, we will not do.

OMNEL contends that the amended complaint alleged property damage to the leasehold premises, but the premises were neither owned nor occupied by OMNEL. At oral argument, counsel for OMNEL indicated that for some reason, OMNEL and Tanner shared occupancy at some point. But the amended complaint does not suggest that OMNEL occupied the leasehold premises for any purpose. In fact, OMNEL repeatedly asserted that it was *not* able to occupy the premises, and it was on this basis that OMNEL

³ We find the hypothetical scenario plaintiff's counsel posed during oral argument to be unpersuasive. Indeed, the hypothetical makes the point we make here. Counsel suggested that a corporate officer could direct the dumping of toxic waste next to a school and escape liability. We view such a scenario as an intentional tort resulting in property damage and potential physical injury to persons. Counsel's hypothetical corporate officer would not escape liability.

claimed it was damaged. And as we have already noted, the City never issued a certificate of occupancy. Nowhere in the record, including OMNEL's oppositions to Tanner's two demurrers, is there evidence that OMNEL occupied the leasehold premises for any purpose.

At oral argument, counsel for OMNEL also argued that OMNEL had prepaid rent, the implication being that OMNEL was entitled to occupy the premises. But the term of the lease had not commenced. The amended complaint alleges that after delays in construction, Tanner and OMNEL orally agreed that "rent would not commence until the build-out was completed and a certificate of occupancy was issued." Thus, any damage to the property caused by Tanner was injurious only to Valpo-LLC as the landlord. Indeed, OMNEL does not claim in the amended complaint that it is entitled to relief for property damage. Instead, OMNEL asserts only economic damages related to lost profits and business opportunities.

Because OMNEL cannot allege it suffered personal injury or property damage, we hold that the "traditional limitation[]" identified by our high court in *Haidinger-Hayes* and *Frances T.* applies here. Tanner is not personally liable for economic damages caused by any negligent acts he committed in the course and scope of his corporate duties. To hold otherwise would defeat the purpose of limited liability and unravel the balance our high court has struck between shielding corporate officers from personal liability when their negligent decisions cause economic harm and protecting third parties who suffer physical injuries or property damage.

Based on the facts OMNEL does allege, we conclude there is no reasonable possibility of curing the defects in the amended complaint by yet another amendment. Indeed, OMNEL has the burden in this regard (*Zelig, supra*, 27 Cal.4th at p. 1126), and it does not specify how it could amend the complaint to state a valid cause of action against Tanner.

Accordingly, the trial court properly sustained Tanner's demurrer without leave to amend the complaint.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

MURRAY, J.

We concur:

RAYE, P. J.

HOCH, J.