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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

ELIZABETH GRIFFITH et al.,

Plaintiffs and Appellants,

v.

PACIFIC COAST BUILDERS, INC., et al.,

Defendants and Respondents.

C072123

(Super. Ct. No. S-CV-0024987)

The trial court sustained the demurrer of defendants Pacific Coast Builders, Inc., and Edward Britt Gregurich (its managing employee) without leave to amend. The trial court eventually entered a judgment of dismissal in August 2012 from which plaintiffs Elizabeth, John, and Royel Griffith timely appealed in September 2012.¹ Respectively,

¹ In their notice of appeal, plaintiffs attempted to include an additional defendant, Allstar Financial Services, Inc. (Allstar), which had successfully demurred earlier. However, we granted Allstar's motion to dismiss the appeal as to Allstar because it had filed its notice of entry of the judgment of dismissal as to Allstar in March 2012.

they are mother, son, and daughter-in-law; we will refer to them collectively as plaintiffs, although it does not appear from the allegations that any cause of action invades the primary rights of the latter two. Briefing was completed in October 2013.

Plaintiffs have proceeded through the course of this litigation in propria persona. As a matter of fairness to their opponents (and others with business in this court), those who choose to proceed without an attorney are not entitled to any greater degree of consideration and are expected to meet the same appellate obligations as the attorneys who appear before us. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.) This is true even where the proceedings involve a demurrer. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 946(5), pp. 359-360 (Witkin).) We will thus apply the usual principles relevant to a review of an order sustaining a demurrer and, to the extent plaintiffs provide any argument that helps illuminate the application of these principles to their pleading, we will respond to it. We will affirm the judgment.

FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

In an appeal from a demurrer, we assume the truth of well-pleaded factual allegations in the subject pleading (including any attached exhibits), shorn of any legal conclusions. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 959 (*Fuller*); 5 Witkin, *supra*, Pleading, § 948(2), p. 364.) We may also take into consideration any facts that are the proper subject of judicial notice. (*Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 746.)

The subject pleading consists of 15 pages of allegations and 70 pages of attached exhibits. Elizabeth Griffith, born in 1923, was the owner of real property in Roseville on which had been located her primary residence. This was also the primary residence of John and Royel Griffith. In 2006, plaintiffs sought a loan to pay off the existing encumbrance and facilitate the completion of the construction of a 5,800-square-foot

home that was in progress.² A third party (who is not named as a defendant) introduced plaintiffs to the principal of a mortgage broker, who solicited their business. Plaintiffs completed a loan application, which was attached as an exhibit to the subject pleading. Plaintiffs ultimately obtained a loan that Allstar serviced, and executed a deed of trust recorded in February 2007 in favor of a consortium of lenders, including Allstar. In connection with the loan application, the third party and the mortgage broker made unspecified misrepresentations.

In June 2007, plaintiffs engaged the services of defendants to demolish the existing house and garage on the property and clear the debris for a sum of \$9,000 (rounded), the invoice attached as an exhibit. (Their brief represents that there had also been a 2006 contract for framing the new residence.) Defendants generated a 560-cubic-yard pile of construction rubble, a photograph of which was attached as an exhibit. On June 22, 2007, plaintiffs terminated their contract with defendants. (Although it is not material to any cause of action, plaintiffs note in their brief that defendants filed a mechanic's lien in December 2007, which they allege was false.) Placer County officials thereafter cited plaintiffs for maintaining construction debris on their property, with the citation attached as an exhibit to the subject pleading. Plaintiffs spent \$20,000 over the next two months clearing the debris.

Allstar filed a notice of default in April 2008, a fact of which the trial court took judicial notice. On July 14, 2008, an agent for Allstar filed a notice of trustee's sale scheduled for August 6, 2008, a fact of which the trial court took judicial notice.

On July 28, 2008, plaintiffs and Allstar entered into a contract (attached as an exhibit) under which the lenders would forebear from pursuing remedies for the default

² Plaintiffs assert in their brief the encumbrance was a 2006 construction loan that would not release any further funds.

on the loan in order to allow the completion of the construction of the new residence (which had apparently been taking place after plaintiffs fired defendants, as indicated in a photograph attached as an exhibit),³ so that the property could be sold or refinanced. In this agreement, plaintiffs explicitly attested that they had “never intended to, and [do] not now intend to, occupy the Property and that the Property is being built solely as a speculative venture.” The agreement excused them from making any further payments while construction proceeded promptly, and obligated them to hire a new general contractor immediately. An attorney certified that he had explained the agreement’s terms and conditions to plaintiffs and they appeared to understand them.

Allstar engaged the services of defendants on August 8, 2008, to serve as the general contractor without permission of plaintiffs. Allstar and defendants erected a locked fence around the property, excluding plaintiffs. Defendants then removed valuable fixtures from the home under construction and caused structural damage, itemized in an exhibit to the complaint. Plaintiffs allege in their brief that defendants also failed to pay subcontractors, resulting in the filing of mechanics’ liens in excess of \$500,000 against the property. The trustee’s sale did not take place until May 2009.

Premised on these facts, plaintiffs stated six counts (denominated causes of action regardless of whether they represented invasions of independent primary rights (see *Cullen v. Corwin* (2012) 206 Cal.App.4th 1074, 1076, fn. 1)). In the first, they contended defendants committed a trespass and intentional tort in entering onto the property without their permission, excluding them from the property, and damaging or removing fixtures from the structure. In the second, they sought to set aside the trustee sale (as being unlawful and fraudulent in an unspecified manner) under which Allstar conveyed title to

³ A 2010 listing for the property attached as an exhibit indicates the still uncompleted residence is the only existing structure on the property.

the property to the other members of the lending consortium pursuant to a trustee's deed recorded in May 2009 (that was also fraudulent in a manner unspecified), attached as an exhibit, and quiet title in themselves. Plaintiffs neither alleged that they had tendered the entirety of the obligation outstanding on the underlying loan, nor their ability to do so. The third count sought cancellation or rescission of instruments and contracts, specifying only the deed of trust executed in February 2007, on the basis of unspecified fraudulent misrepresentations on the part of the third party and the mortgage broker. They also sought a declaration rescinding "any contracts Plaintiffs have with Defendants." In the next count, they asserted the mortgage broker made intentional misrepresentations (again unspecified) on the loan application, and Allstar made misrepresentations in the forbearance agreement in order to obtain title to the subject property. The fifth count asserted negligence and professional malpractice that was premised on actions or transactions that were not specified except for the processing of the "fraudulent" loan. Finally, in the sixth count, plaintiffs asserted there had been elder financial abuse (Welf. & Inst. Code, § 15610.30) in ejecting plaintiff Elizabeth Griffith from the subject property in August 2008. Their prayer for relief reflected these counts.

The trial court's order sustaining the demurrer without leave to amend specified the defects in each count as follows. In connection with the claim of trespass, plaintiffs had failed to allege that they had a right to possession of the property at the time of the asserted trespass, citing *Nichols v. Drew* (1948) 88 Cal.App.2d 301, 303 (which in fact involves the failure of a complaint to allege that the plaintiff had "performed all or any of the conditions recited in the contract which constituted the basis of plaintiff's right to possession"). The count seeking to set aside the trustee's sale and quiet title in plaintiffs was insufficient because it did not plead any possessory interest in the present defendants and failed to allege tender of the full indebtedness encumbering the property (or ability to tender it). The count seeking cancellation and rescission did not establish any connection

between the present defendants and the deed of trust, and did not allege that plaintiffs had tendered anything of value that they had received in connection with the unspecified contracts with the present defendants. The fourth count failed to allege facts establishing the actionable fraud on the part of the present defendants with the necessary specificity, or justifiable reliance. As for negligence or professional malpractice, the pleading failed to allege facts establishing either a duty on the part of the present defendants to plaintiffs or the breach of that duty. Finally, the pleading failed to establish elder financial abuse because it failed to allege facts that defendants either appropriated or assisted someone else in appropriating the real property without any right to do so, or retained the property in bad faith or with the intent to defraud. As the trial court could not find any suggestion in the pleading that it was capable of amendment, and plaintiffs had not proposed any, it sustained the demurrer without leave to amend.

DISCUSSION

I. The Trial Court Properly Sustained the Demurrer

We review a ruling on a demurrer de novo. (*Fuller, supra*, 216 Cal.App.4th at p. 962.) For this reason, the concern plaintiffs express about the trial court's failure to supply a court reporter for the hearing is immaterial. We also note for the benefit of defendants that on appeal from a ruling that sustained a demurrer without leave to amend, it is not only proper to reach other grounds for *sustaining* a demurrer not raised below, it is also proper to consider new theories *challenging* the demurrer, and proper for a plaintiff to propose new allegations. (*Id.* at pp. 966-967; *B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 959; see *Connerly v. State of California* (2014) 229 Cal.App.4th 457, 460 [chiding respondents for not being aware of this appellate principle]; Code Civ. Proc., § 472c.)

In response to their general claim that the trial court violated their right to a trial by jury, plaintiffs should be aware that the legal sufficiency of a complaint to state a

cause of action is a question of law for the court; only when there is a cognizable legal claim is it for the jury to resolve questions of fact. (*Palmer v. Metro-Goldwyn-Mayer Pictures* (1953) 119 Cal.App.2d 456, 460; 5 Witkin, *supra*, Pleading, § 946, p. 358.)

A. Trespass, Conversion, or Waste

As noted above, the trial court cited an inapposite holding in concluding that plaintiffs failed to allege facts establishing the necessary element of lawful possession (or the right to possession) of the subject property. (5 Witkin, *supra*, Pleading, § 631, p. 65) Thus, defendants' reiteration of that case does not add anything on appeal, nor does their misstated citation to *Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 774 (*Smith*), which does *not* hold that trespass protects only possessory interests *rather than* ownership interests; rather, the case holds that trespass protects possessory interests *in addition to* ownership interests (see 5 Witkin, *supra*, § 632, p. 65). Plaintiffs alleged they held title to the real property at issue, which is all that was necessary.

However, as with any tort, trespass requires an allegation establishing that the act proximately caused damages. (5 Witkin, *supra*, § 631, p. 65.) The alleged acts of defendants in the course of their unconsented entry upon the property as agents of Allstar ultimately did not cause *plaintiffs* to suffer damages; it caused damages to the ultimate owners of the damaged residence to whom plaintiffs lost title. Nor did the acts of defendants *cause* plaintiffs to lose title—they do not allege (nor include in their brief on appeal) any allegations that their default in payments on the loan had a causal connection with defendants' *trespass* (i.e., that without the acts of defendants the residence could have been completed in satisfaction of the forbearance agreement). Therefore, they have failed to state a claim for trespass.

On appeal, plaintiffs suggest they have stated a claim for conversion. However, they run afoul of the need to allege entitlement to a *return* of the appropriated property. (5 Witkin, *supra*, Pleading, § 705, p. 121.) As they no longer have possession of the

damaged residence, they cannot allege the necessary right to return of the fixtures or their equivalent value.

As for their suggestion that they have stated a claim for *waste*, this requires them to have alleged conduct of a nonpossessory defendant that resulted in the substantial depreciation of the market value of the land. (*Smith, supra*, 133 Cal.App.3d at pp. 776-777.) However, these damages accrue to the successors in interest to the plaintiffs. (To the extent plaintiffs appear to be suggesting the demolition debris that defendants failed to remove is actionable, this would sound in breach of contract, a theory neither pursued below nor advanced on appeal; indeed, as noted next, plaintiffs sought only to rescind their contracts with the present defendants.)

B. Quiet Title

Plaintiffs do not offer any argument on appeal demonstrating that the trial court erred in the flaws it identified with this theory. They have not alleged any facts under which *defendants* have an adverse possessory interest that is without right, nor have they alleged that they offered (or could offer) payment of the encumbrance on the subject property. (5 Witkin, *supra*, Pleading, §§ 668, 670, pp. 94, 97.)

Plaintiffs have consequently forfeited our further consideration of this claim. (*Imagistics Internat., Inc. v. Department of General Services* (2007) 150 Cal.App.4th 581, 591, fn. 8, 593 (*Imagistics*); *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 [“Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues [forfeited]”].) This is true even though we exercise de novo review of the trial court’s ruling. (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230 (*Claudio*) [trial court is not “potted plant,” the reasoning of which can simply be disregarded].)

C. Cancellation or Rescission

As the trial court ruled, the *present* defendants do not have any connection with the February 2007 deed of trust alleged in this count, nor did plaintiffs allege facts that establish any of the grounds for rescission (including performance on their part of any obligation under the contracts). (4 Witkin, *supra*, Pleading, §§ 541-552, pp. 668-680.)

Plaintiffs do not offer any argument demonstrating that the trial court was in error. They have thus again forfeited any further consideration of this claim. (*Imagistics, supra*, 150 Cal.App.4th at pp. 591, fn. 8, 593; *Claudio, supra*, 134 Cal.App.4th at p. 230.)

D. Intentional Fraud

In departure from the usual rule of liberal interpretation of pleadings, a plaintiff must plead fraud with *particularity*, alleging *specific facts* that establish fraud and any other element (such as detrimental reliance). (5 Witkin, *supra*, Pleading, § 711, p. 127; cf. *Fuller, supra*, 216 Cal.App.4th at p. 962 [pleading fraudulent concealment].)

We do not discern any such particular allegations in connection with the present defendants resulting in damages to plaintiffs, nor do plaintiffs offer any argument to establish that the trial court erred in so ruling, or any additional allegations to establish this theory. They forfeit any further consideration of this claim as a result. (*Imagistics, supra*, 150 Cal.App.4th at pp. 591, fn. 8, 593; *Claudio, supra*, 134 Cal.App.4th at p. 230.)

E. Negligence and Professional Malpractice

The pleading not only fails to allege any facts establishing that defendants have a duty of due care in tort to plaintiffs that they breached that was both the actual and proximate cause of damages (4 Witkin, *supra*, Pleading, § 580, p. 708; *County of Sacramento v. Superior Court* (2012) 209 Cal.App.4th 776, 779), the allegations further fail to establish any *professional* status on the part of the present defendants (4 Witkin, *supra*, § 593, p. 719).

Plaintiffs do not offer any argument on this point, or any additional allegations that might cure the defects. We thus do not need to discuss the point any further. (*Imagistics, supra*, 150 Cal.App.4th at pp. 591, fn. 8, 593; *Claudio, supra*, 134 Cal.App.4th at p. 230.)

F. Elder Financial Abuse

While neither the trial court nor defendants provided any authority on the elements of a claim of elder financial abuse beyond the statutory language itself, a plaintiff must allege a defendant either retained or assisted in retaining an elder's property with an intent to defraud or make a "wrongful" use of an elder's property, i.e., one that is not pursuant to any good faith claim of right. (*Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 527; *Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1315-1316; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 174; *Wood v. Jamison* (2008) 167 Cal.App.4th 156, 164-165.)

The allegations of the pleading do not establish that defendants retained any real property of plaintiffs, or assisted the ultimate successors in interest in retaining the real property by means of fraud or without a good faith claim of right. (The pleading does not premise this cause of action on the fixtures defendants allegedly retained for their own use, which in any event runs afoul of the problem we have identified above—the loss of value of this property did not inure to plaintiffs but to the successors in interest). Given that plaintiffs do not offer any argument on this point, or any additional allegations that might cure this defect, we do not need to discuss the point any further. (*Imagistics, supra*, 150 Cal.App.4th at pp. 591, fn. 8, 593; *Claudio, supra*, 134 Cal.App.4th at p. 230.)

II. The Trial Court Properly Denied Leave to Amend

A plaintiff has the burden on appeal of affirmatively demonstrating the manner in which it would be possible to amend the pleading to make it legally sufficient. (*Fuller, supra*, 216 Cal.App.4th at p. 962.) Such allegations as plaintiffs add in their brief on appeal do not cure any of the defects in their pleading.

Assuming the truth of plaintiffs' allegations, the present defendants played a role in the ultimate loss of their property. However, *their* alleged actions (other than leaving the demolition waste) took place as agents of Allstar, and do not give rise to independent liability as best we can discern in the loss of the subject property. The liability of Allstar, however, is not at issue in the present appeal, nor is it open for redetermination because plaintiffs did not appeal the now final judgment of dismissal as to Allstar. We therefore cannot find any basis for giving leave to amend.

DISPOSITION

The judgment is affirmed.

_____ BUTZ _____, J.

We concur:

_____ BLEASE _____, Acting P. J.

_____ MAURO _____, J.