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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALEJANDRO DIAZ et al.,

Plaintiffs and Appellants,

v.

CITICASTERS CO. et al.,

Defendants and Respondents.

D059273

(Super. Ct. No.
37-2009-00102808-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Steven R. Denton, Judge. Affirmed.

I.

INTRODUCTION

In 2001, appellants Alejandro Diaz and Martha Diaz (the Diazes) sold a radio tower (Tower) located in Tijuana, Mexico to Citicasters Co. (Citicasters) and Inmobiliaria Radial, S.A. de C.V. (Radial), for approximately \$40 million. In the sales agreement for the Tower, the Diazes warranted that the Tower was in good working condition and promised to indemnify Citicasters and Radial for damages arising from the

breach of this warranty. After the parties discovered structural problems related to the Tower, Citicasters and Radial submitted a notice of claim for indemnification to the Diazes. In December 2005, Citicasters, Radial, and the Diazes entered into an indemnification agreement, to which the parties refer as the Tower Indemnification Claim Agreement (TICA). Pursuant to the TICA, the Diazes agreed to pay Citicasters \$958,645 to resolve Citicasters and Radial's indemnification claim.

In November 2009, the Diazes filed this action against Citicasters, Radial, and Clear Channel Communications (Clear Channel)¹ (collectively respondents), among others. In their complaint, the Diazes brought a claim for breach of contract in which they alleged that the defendants had breached the TICA by "failing . . . to construct a new [t]ower to replace the Tower located at the Tijuana, Mexico, site."² Respondents filed a motion for summary judgment and/or adjudication in which they contended that they were entitled to judgment as a matter of law on the Diazes' breach of contract claim because they did not owe the Diazes any contractual duty to repair or replace the Tower. The trial court granted respondents' motion for summary adjudication of the Diazes' breach of contract claim, and the Diazes dismissed their remaining claims. The court subsequently entered judgment in favor of respondents.

1 In their complaint, the Diazes alleged that Clear Channel "owned, managed, or controlled" Citicasters.

2 The Diazes' complaint also contained claims for rescission, fraud, and negligent misrepresentation that are not at issue in this appeal.

On appeal, the Diazes claim that the trial court erred in granting respondents' motion for summary adjudication of their breach of contract claim. We conclude that the Diazes have failed to establish that that the trial court erred in determining that there was no triable issue of fact with respect to whether respondents breached the TICA by failing to repair or replace the Tower. We therefore affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, the Diazes sold the Tower and related properties to Citicasters and Radial pursuant to two sale agreements (2001 Agreements).³ One of the 2001 Agreements contained a provision warranting that all of the assets (including the Tower) were in good working condition. The 2001 Agreements also contained provisions that permitted Citicasters and Radial to bring claims for indemnification for any breach of the warranties and representations in the 2001 Agreements on the part of the Diazes. In 2003, the parties discovered that the Tower had significant structural problems. In May 2005, Citicasters and Radial submitted a claim for indemnification to the Diazes.

In July 2005, Citicasters entered into an agreement (Finest City Agreement) with Inmobiliaria Finest City, S. de R.L. de C.V. and Finest City Broadcasting, LLC (collectively Finest City) to sell various assets, including the Tower, to Finest City. The Finest City Agreement provides that Citicasters and Finest City acknowledge that the Tower "needs to be repaired or replaced." In December 2005, Citicasters and Radial

³ The various agreements at issue in this case involved additional entities who are not relevant to this appeal. We have omitted references to these entities from this opinion for purposes of clarity.

entered into the Tower Replacement Release Agreement (TRRA) with Finest City. In the TRRA, Citicasters and Radial agreed that Citicasters would provide Finest City with a credit against the purchase price of the Tower and related assets in exchange for Finest City's agreement to be solely responsible for replacing or repairing the Tower.

Concurrent with Citicasters and Radial's entering into the TRRA with Finest City, Citicasters and Radial entered into the TICA with the Diazes in order to resolve Citicasters and Radial's indemnification claim. The TICA provided that the Diazes had breached certain warranties and representations related to the 2001 Agreements. The TICA further provided that the Diazes would pay Citicasters \$958,645.23 and that, in exchange, Citicasters and Radial would release the Diazes from any further claim for indemnification.

In November 2009, the Diazes filed this action against Citicasters, Radial, Clear Channel, and Finest City, alleging claims for breach of contract, rescission, fraud, and negligent misrepresentation.⁴ The Diazes alleged that the defendants had breached the TICA by "failing . . . to construct a new [t]ower to replace the Tower located at the Tijuana, Mexico, site." The Diazes' rescission, fraud, and negligent misrepresentation claims were based on allegations that the defendants had fraudulently induced the Diazes to enter into the TICA.

In July 2010, respondents moved for summary judgment and/or adjudication. Respondents contended that they were entitled to judgment as a matter of law on the Diazes' breach of contract claim because respondents "did not owe [the Diazes] any

⁴ It is undisputed that Finest City did not appear in the action.

contractual duty to repair or replace the Tower." Respondents contended that the remaining causes of action were barred by the applicable statute of limitations.

The Diazes opposed respondents' motion. With respect to their breach of contract claim, the Diazes contended that the TICA was intended to "document [the Diazes'] payment to [respondents] for the purpose of building a replacement tower." The Diazes also contended that language in various correspondence between the parties and in the Finest City Agreement "clearly establishes [respondents'] contractual obligation to undertake the repair or reconstruction of the [T]ower."

In September 2010, the trial court granted respondents' motion for summary adjudication of the Diazes' breach of contract claim. The court reasoned in part:

"It is undisputed that the [TICA] does not contain a provision requiring defendants to repair or replace the [T]ower. [The Diazes'] argument refers to provisions within other agreements. However, the provisions of other agreements are not incorporated into the [TICA] (even assuming such provisions create an obligation to repair or replace the . . . [T]ower)."

The court also noted that the TICA contained an integration clause, and that the "extrinsic evidence [the Diazes] seek to introduce would change the fundamental character of the agreement, not simply explain its terms." The court reasoned, "The [TICA] is simply a release of claims associated with the . . . [T]ower. There is no obligation to repair or replace the [T]ower, and such obligation cannot be inserted via parole evidence."

With respect to the Finest City Agreement, the court stated: "The [Diazes' breach of contract] cause of action does not allege a breach of [the Finest City Agreement]."

Even if such a breach was alleged, [the Finest City Agreement] also does not contain an obligation to repair or replace the . . . [T]ower."

The trial court treated the remainder of respondents' motion as a motion for judgment on the pleadings on the Diazes' claims for fraud, rescission, and negligent misrepresentation. As so construed, the court granted respondents' motion for judgment on the pleadings on the remaining causes of action on the ground that these claims were barred by the applicable statute of limitations. The court granted the Diazes leave to amend to file an amended complaint alleging delayed discovery of respondents' purported fraudulent conduct.

The Diazes filed both a motion for reconsideration of the trial court's ruling granting respondents' motion for summary adjudication on the breach of contract cause of action, and a first amended complaint alleging breach of contract, rescission, fraud, and negligent misrepresentation. The breach of contract cause of action in the Diazes' first amended complaint was similar in all material respects to that alleged in their original complaint.

In November 2010, the Diazes dismissed without prejudice the rescission, fraud, and negligent misrepresentation causes of action in their first amended complaint.

In December 2010, the trial court denied the Diazes' motion for reconsideration and shortly thereafter granted judgment in favor of respondents. The judgment states in relevant part:

"On September 17, 2010, this Court granted the motion of [respondents] for summary adjudication of the first cause of action (for breach of contract) of the complaint ("the Summary

Adjudication Order") of [the Diazes]; on November 29, 2010, [the Diazes] filed a request for dismissal, without prejudice, of all causes of action in [the Diazes'] complaint as they relate to [respondents], other than the first cause of action; and on December 3, 2010, this Court denied Plaintiff's motion for reconsideration of Summary Adjudication Order. Accordingly all causes of action of Plaintiff's complaint as they relate to [respondents] have either been dismissed or adjudicated in favor of Defendants." ⁵

The Diazes timely appeal from the judgment.

III.

DISCUSSION

The trial court properly granted respondents' motion for summary adjudication on the Diazes' breach of contract claim

The Diazes claim that the trial court erred in granting respondents' motion for summary adjudication of their breach of contract claim.

A. *Governing law*

1. *The law governing motions for summary adjudication*

"A motion for summary judgment shall be granted when 'all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citation.] . . . A summary adjudication is properly granted only if a motion therefor completely disposes of a cause of action, an

⁵ The Diazes' dismissed causes of action were contained in their *first amended complaint*, not the *complaint*, as stated in the judgment. In light of the fact that the Diazes' breach of contract claim in the first amended complaint was identical in all material respects to that claim as stated in the original complaint, we conclude that the Diazes have abandoned any intention of litigating the breach of contract cause of action contained in the first amended complaint, and that this court may therefore exercise appellate jurisdiction over the Diazes' appeal of the trial court's order granting summary adjudication of the breach of contract claim in the original complaint.

affirmative defense, a claim for damages, or an issue of duty. [Citation.] Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment. [Citation.]" (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

The Court of Appeal "review[s] de novo a grant of summary adjudication. [Citation.] 'In independently reviewing a motion for summary adjudication of issues, we apply the same three-step analysis used by the superior court. "First, we identify the issues framed by the pleadings [¶] Secondly, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor. . . . [¶] When a . . . motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue." ' [Citation.]" (*Rosales v. Battle* (2003) 113 Cal.App.4th 1178, 1182.)

" 'On review of a summary [adjudication], the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.] . . . "[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." [Citation.]' [Citation.]" (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 455.)

2. *Elements of a breach of contract claim*

"The essential elements of a breach of contract claim are: '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.' [Citation.]" (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614.)

B. *Application*

It is the Diazes' burden on appeal to demonstrate that the trial court erred in granting respondents' motion for summary adjudication. They have clearly failed to do so. The legal argument portion of the Diazes' opening brief contains four sections. In two of the sections, the Diazes refer to portions of the TICA, the Finest City Agreement and the deposition testimony of David Schroeder, the marketing controller of Clear Channel. The Diazes note that one of the recitals in the TICA references section 10.8 of the Finest City Agreement. The portion of the TICA to which the Diazes refer states in relevant part:

"WHEREAS pursuant to Section 10.8 of the [Finest City Agreement], [Citicasters, Radial] and [Finest City] agreed that Citicasters would provide [Finest City] with a credit against the Purchase Price (as defined in the [Finest City Agreement]), in exchange for [Finest City's] agreement to be solely responsible for constructing a new tower to replace the Tower, to be located at a site to be purchased by [Finest City]."

The Diazes assert that section 10.8 of the Finest City Agreement authorizes Citicasters to "begin" and "complete" repair or replacement of the Tower prior to closing. In his deposition, Schroeder testified that Citicasters authorized work to be performed on

its behalf related to the construction of a replacement tower, prior to the close of the Finest City Agreement.

However, the Diazes fail to present *any* legal argument as to how these cited provisions and portions of Schroeder's deposition testimony establish a triable issue of fact with respect to whether Citicasters breached the TICA by failing to repair or replace the Tower, and we see nothing in the documents that the Diazes cite that establishes a triable issue of fact on the Diazes' breach of contract claim. The recitals in the TICA neither expressly nor impliedly create a duty on respondents' part to repair or replace the Tower. The purpose of the TICA was, as stated in the TICA itself, for Citicasters and Radial to release the Diazes from "all claims, demands, and causes of action that Citicasters or Radial[] currently have or may have in the future arising from or in connection with the Indemnification Claim and the Replacement Tower," in exchange for a payment of \$958,645.23 from the Diazes to Citicasters. As the trial court noted, it is undisputed that the TICA does not contain a provision requiring respondents to repair or replace the Tower, and we see no basis for concluding that section 10.8 of the Finest City Agreement (an agreement between *Citicasters* and *Finest City*) establishes any affirmative duties on the part of *respondents* vis-à-vis the *Diazes*. Finally, the fact that Citicasters authorized work related to the construction of a replacement tower prior to the close of the Finest City Agreement clearly does not establish a triable issue of fact with respect to whether respondents owed the Diazes a legal duty to perform such work.

In a third section of the legal argument portion of their brief, the Diazes appear to contend that the trial court erred in concluding that the TICA's integration clause

precluded the court's consideration of other agreements among the parties. Even assuming that the Diazes are correct in this regard, the Diazes have not demonstrated that consideration of these other agreements (even if not precluded by the integration clause) creates a triable issue of fact as to the respondents' breach of the TICA.

Finally, the Diazes appear to claim to have raised triable issues of fact with respect to whether respondents owed them a duty to replace the Tower pursuant to agreements other than the TICA. The Diazes' complaint alleged that respondents breached only one agreement—the TICA. Therefore, none of the Diazes' contentions with respect to purported duties owed by respondents to the Diazes based on agreements other than the TICA created a triable issue of material fact with respect to the Diazes' breach of contract claim. (See *Bisno v. Douglas Emmett Realty Fund 1988* (2009) 174 Cal.App.4th 1534, 1543 ["The . . . party [moving for summary adjudication] need address only those theories actually pled"].)⁶

⁶ In their reply brief, the Diazes contend that respondents' use of the term "assign" in their respondents' brief constitutes a "virtual admission of the existence of its duty to repair or replace the Tower." For example, the Diazes note that a heading in respondents' brief states, "The [Finest City Agreement] and the TRRA Assign Finest City Sole Responsibility for the Tower." We read the relevant portions of respondents' brief as stating merely that, as between *respondents* and *Finest City*, respondents and Finest City agreed that Finest City would be responsible for any repair or replacement of the Tower. We therefore reject the Diazes' contentions that respondents acknowledged owing the Diazes a duty to repair or replace the Tower and that respondents acknowledged attempting to assign that duty to Finest City. In light of our conclusion, we deny as moot respondents' motion to strike portions of the Diazes' reply brief pertaining to this issue.

IV.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.