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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RAUL Z. DIAZ et al.,

Plaintiffs and Appellants,

v.

PAVESTONE COMPANY, LLC,

Defendant and Respondent.

F061913

(Super. Ct. No. 09CECG00429)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Baradat & Paboojian, Warren R. Paboojian and Daniel C. Stein for Plaintiffs and Appellants.

Bledsoe, Cathcart, Diestel, Pedersen & Treppa, Richard S. Diestel and Alison M. Crane for Defendant and Respondent.

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Plaintiffs' wrongful death action includes the allegation that the driver of the pickup truck that struck the deceased's vehicle was "acting as an agent on behalf of and

at the request of” (unnecessary capitalization omitted) defendant Pavestone Company, LLC (Pavestone). Pavestone filed a general demurrer on the ground the driver was not its agent. The superior court sustained the demurrer without leave to amend and entered judgment in favor of Pavestone.

Plaintiffs appealed, arguing their allegations were sufficient to establish agency for purposes of demurrer. The California Supreme Court has addressed the allegations necessary to plead agency: “[A]n allegation of agency as such is a statement of ultimate fact. Consequently further allegations explaining how this fact of agency originated become unnecessary.” (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 439 (*Skopp*)). Applying this rule, we conclude that plaintiffs’ allegation that the driver acted as an agent of Pavestone is sufficient to withstand demurrer. We therefore reverse the judgment.

FACTS AND PROCEEDINGS

On November 30, 2008, Mauricio Inocencio Diaz was killed in a motor vehicle accident. He was a passenger in a vehicle that was stopped to make a left turn on westbound State Route 152 in Merced County when that vehicle was rear-ended by a pickup truck driven by defendant Gilbert Fuentes, Jr.

The Pleadings

Mauricio Diaz’s parents, Raul and Maria Diaz, and Antonio Franco, a minor by and through his guardian ad litem Maria N. Leos, (collectively Plaintiffs) filed a wrongful death lawsuit against the driver, Gilbert Fuentes, Jr. Plaintiffs also named as defendants Arizona Stone and Architectural Products, LLC, and related entities (collectively Arizona Stone). Plaintiffs alleged that Fuentes was operating the pickup truck in the course of his employment for Arizona Stone and that Arizona Stone owned the motor vehicle Fuentes was operating at the time of the accident.

In October 2010, Plaintiffs filed a first amended complaint (FAC), utilizing Judicial Council forms. The FAC named Pavestone as a defendant in the third cause of action for motor vehicle negligence and the fourth cause of action for general negligence.

Because this appeal is concerned with the alleged agency relationship between Fuentes and Pavestone, the FAC's allegations of agency, set forth in the fourth cause of action, are as follows:

“Pavestone ... manufactures paver stones. Defendant, Gilbert Fuentes sells a great deal of Pavestone Company product to his customers. Prior to November 30, 2008, defendant Pavestone contacted defendant Fuentes and requested him to attend an Oakland Raiders football game on Sunday November 30, 2008. Pavestone further requested Fuentes to bring one of his customers so as to further the business relationship and ultimately result in the sale of more Pavestone product.

“Acting on behalf of and at the request of Pavestone, defendant Fuentes invited Richard Lugo of Westcoast Concrete and Paving to the November 30, 2008 Oakland Raiders football game. Westcoast, among other services, purchases and install driveway pavers such as the product manufactured by Pavestone. Defendant Pavestone requested defendant Fuentes to arrive in Oakland around noon with Westcoast's Mr. Lugo. Pavestone had tickets to the football game and there was to be a Pavestone representative present to sit with them and to purchase food and drinks for Fuentes and Mr. Lugo.

“On November 30, 2008, defendant Fuentes, acting as an agent on behalf of and at the request of the principal, defendant Pavestone, traveled westbound on State Route 152 en route to pick up Mr. Lugo of Westcoast Concrete and Paving in San Jose, in order to then transport him to the Raiders football game. This was all done for the financial benefit of Arizona Stone and Pavestone. While on westbound State Route 152, defendant Fuentes negligently operated his vehicle and collided with the rear of the Plaintiffs' vehicle, causing serious and significant injuries to each of the Plaintiffs, resulting in damages according to proof.”
(Unnecessary capitalization omitted; italics added.)

The Demurrer

Pavestone demurred on the grounds that the FAC was uncertain and the allegations of the third and fourth causes of action failed to state facts sufficient to constitute a cause of action.¹ Pavestone argued that “Plaintiffs’ theory, while creative,

¹ During oral argument, counsel for plaintiffs admitted the third cause of action mistakenly identified Pavestone as the agent, rather than the principal. In the event counsel wishes to change that allegation, he should seek leave to amend from the trial

attempts to convert this everyday business relationship into an agency where it simply does not exist.” Pavestone relied heavily on *Violette v. Shoup* (1993) 16 Cal.App.4th 611. Although that case provided the general definition of an agency relationship, it did so in the context of a motion for summary judgment and, as such, did not address the allegations necessary to plead an agency relationship. Pavestone emphasized the importance of control to establish an agency relationship and argued that it “had no right to control the acts of Fuentes and Fuentes was under no legal obligation to follow Pavestone’s direction.”

Plaintiffs opposed the demurrer by arguing that Pavestone, as alleged in the FAC, in fact did control their agent Fuentes, with respect to the particular acts on November 30, 2008, because, among other reasons, it had the right to terminate Fuentes’ services, and thereby exercise control, by simply stating that he and his guest were no longer invited to the game and not providing game tickets.

Trial Court Ruling

In November 2010, the superior court held a hearing on the demurrer and took the matter under advisement. The court later filed a written minute order adopting its tentative ruling to sustain the general demurrers without leave to amend. The tentative ruling set forth the basic rule that “[a]gency is the relationship which results from the manifestation of consent by one person[, the principal,] to another that the other[, the agent,] shall act on his behalf and subject to his control, and consent by the other so to act.” (Boldface omitted.) It also stated that “there are no facts alleged that would indicate that Fuentes was ‘acting on behalf’ of Pavestone ...” The superior court

court or a stipulation from opposing counsel. Our review of a general demurrer ends and reversal is required once we determine the complaint has stated a cause of action under any legal theory. (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 603.)

concluded the necessary element of control was lacking, which justified granting the demurrer.

In December 2010, the superior court filed a judgment in favor of Pavestone. Plaintiffs thereafter filed a timely notice of appeal.

DISCUSSION

I. STANDARD OF REVIEW

Our standard of review of an order sustaining a demurrer on the ground that the complaint, here the FAC, fails to state facts sufficient to constitute a cause of action is well settled. We review the sufficiency of the complaint de novo. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) “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.]” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

Determining whether a pleading alleges facts sufficient to state a cause of action is a question of law. (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1305.) Thus, appellate courts independently resolve the sufficiency of a pleading’s allegations without deference to the superior court’s conclusions. (*Id.* at p. 1304.)

II. PLEADING AN AGENCY RELATIONSHIP

A. General Allegations of Ultimate Fact

In *Skopp, supra*, 16 Cal.3d 432, the California Supreme Court case addressed what is required to plead the existence of an agency relationship.² In that case, the plaintiffs alleged that defendants, who were real estate brokers and salesmen, were plaintiffs’

² The appellate briefing filed by the parties, as well as the points and authorities filed in the superior court, failed to cite *Skopp*. Consequently, before oral argument, we sent counsel a letter asking that they be prepared to address that case.

agents in connection with a sale of plaintiffs' land. (*Id.* at p. 434.) Plaintiffs alleged defendants breached their duty as agents and contended that the allegations stated a cause of action for breach of fiduciary duty. (*Ibid.*) Defendants demurred on the ground that they were not agents and thus owed no fiduciary duty to plaintiffs. (*Id.* at pp. 434-435.) The trial court sustained the demurrer without leave to amend. (*Id.* at p. 435.)

The Supreme Court considered whether defendants bore a fiduciary duty to plaintiffs, a duty based on the allegations that defendants were plaintiffs' agents. (*Skopp, supra*, 16 Cal.3d at p. 436.) The court observed that a number of cases have held a finding of agency to be a finding of fact and "that numerous cases have held a pleading of agency an averment of ultimate fact. [Citations.]" (*Id.* at p. 437.)³ The court rejected defendants' contention that plaintiffs failed to clearly allege facts explaining how the agency relationship between them and defendants arose by stating: "We have already noted, however, that an allegation of agency as such is a statement of ultimate fact. Consequently further allegations explaining how this fact of agency originated become unnecessary." (*Id.* at p. 439.) Based on this reasoning, the court reversed the judgment with directions to the trial court to overrule the general demurrer. (*Id.* at p. 441.)

In *Garton v. Title Ins. & Trust Co.* (1980) 106 Cal.App.3d 365, 376 (*Garton*), plaintiffs alleged "that each of the defendants were the agents and employees of each other and were acting in the course and scope of their agency, employment and authority and with the permission and consent of their codefendants in committing the acts alleged." Citing *Skopp*, these ultimate facts were held sufficient to plead an agency relationship for purposes of a demurrer.

³ The concept of an "ultimate fact" is important in the context of pleading because of the rule that a "pleading must allege the ultimate facts that constitute the cause of action ..., not the evidence by which the ultimate facts will be proved at the trial." (49A Cal.Jur.3d (2010) Pleading, § 19, p. 37; see *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 551, fn. 5 [complaint must contain allegations of ultimate fact].)

Similarly, in *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858 at page 886 (*Blickman Turkus*), the court stated:

“But an allegation of agency is deemed an allegation of ultimate fact. (*Skopp*[, *supra*,] 16 Cal.3d 432, 437, 439.) [Respondent] acknowledged this rule below but implied that it was inapplicable because ‘where the essential facts are not contested, the question whether an agency relationship existed may be decided as a matter of law.’ This is a rule applicable to the assessment of *evidence*, not to determining the sufficiency of a *pleading*. In the latter context, the existence of an agency relationship *is* the ‘essential fact[],’ and where alleged must be accepted as true. (See *id.* at pp. 436-437.)” (Original italics.)

California courts treat a demurrer as admitting all material facts properly plead. (*Doe v. City of Los Angeles, supra*, 42 Cal.4th at p. 543.) Pursuant to the rules of law regarding the proper pleading of agency established by *Skopp*, and applied in *Garton* and *Blickman Turkus*, we accept as true the ultimate fact as alleged in the fourth cause of action that Fuentes was “acting as an agent and on behalf of and at the request of the principal, defendant Pavestone,” (unnecessary capitalization omitted) when the motor vehicle collision occurred. Therefore, the quoted allegation, standing alone, is sufficient to plead the existence of an agency relationship between Pavestone and Fuentes.

B. The Specific Allegations Do Not Negate the Agency Relationship

At oral argument, Pavestone’s counsel raised the issue whether plaintiffs’ general allegation of agency was contradicted by the more detailed allegations in the fourth cause of action. California courts have dealt with the possibility of contradictory allegations by adopting the principle that specific allegations in a complaint control over an inconsistent general allegation. (*Skopp, supra*, 16 Cal.3d at p. 437; 4 Witkin, Cal. Procedure (5th ed. 2008) Pleadings, § 450, p. 584.) Under this principle, it is possible that specific allegations will render a complaint defective when the general allegations, standing alone, might have been sufficient. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390; 49A Cal.Jur.3d (2010) Pleading, § 67, p. 112.)

Pavestone argues plaintiffs' specific allegations that Pavestone "requested" Fuentes to do certain things, rather than ordering or directing him to do them, establishes that an agency relationship did not exist. The allegations in the fourth cause of action state that Pavestone contacted Fuentes, "requested him to attend an Oakland Raiders football game" and "further requested Fuentes to bring one of his customers" (Unnecessary capitalization omitted.) In addition, plaintiffs alleged that "Pavestone requested defendant Fuentes to arrive in Oakland around noon with Westcoast's Mr. Lugo." (Unnecessary capitalization omitted.) We conclude that plaintiffs' use of the verb "requested" does not contradict the existence of an agency relationship because it is not uncommon for principals to "request" agents to take certain action in the scope of the agency relationship. For instance, BAJI No. 13.02.1 (Going and Coming—Special Errand) sets forth the general rule that an agent is not acting with the scope of authority while engaged in the ordinary commute to and from the place of work. BAJI No. 13.02.1 then sets forth the special errand exception as follows:

"However, if the agent is coming from home or returning to it on a special errand either as part of regular duties, or *at the specific order or request of the principal*, the agent is acting within the scope of [employment] [or] [authority] from the time of starting on the errand until return, or until completely abandoning the business errand for personal reasons." (Italics added.)

This instruction's use of the phrase "at the ... request of the principal" shows that plaintiffs' allegations that Pavestone merely "requested" Fuentes to attend the game and bring a potential customer does not necessarily contradict or negate the existence of an agency relationship.

Based on this conclusion that the plaintiffs' detailed allegations did not negate the general allegation that an agency relationship existed, we, like the court in *Skopp, supra*, 16 Cal.3d 432, conclude that the general demurrer should have been overruled. As a result, this matter is reversed and remanded for further proceedings.

DISPOSITION

The December 21, 2010, judgment is reversed. The superior court is directed to vacate its order sustaining Pavestone's demurrer and to enter a new order overruling the demurrer. Plaintiffs shall recover their costs on appeal.

Franson, J.

WE CONCUR:

Cornell, Acting P.J.

Gomes, J.