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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

KAWEAH CONSTRUCTION COMPANY,

Plaintiff and Appellant,

v.

FOX HILLS LANDOWNERS ASSOCIATION,
LLC, et al.,

Defendants and Respondents.

F062860

(Super. Ct. No. CU149690)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Mark V. Bacciarini and Brian L. McCabe, Judges.

Dowling Aaron Incorporated, Steven D. McGee and Stephanie Hamilton Borchers for Plaintiff and Appellant.

Pillsbury Winthrop Shaw Pittman, John S. Poulos and Christopher R. Rodriguez for Defendants and Respondents Compass Financial Partners, LC; Silar Special Opportunities Fund, LP; Silar Advisors, LP; Asset Resolution, LLC (as successors in interest to certain former assets of USA Commercial Company); and certain individual beneficiaries.

Plaintiff appeals from the judgment entered after the trial court granted defendants' motion for summary judgment. The trial court concluded plaintiff's mechanic's lien was recorded prematurely, and was therefore not enforceable, because it was recorded prior to completion of plaintiff's construction contract. Citing *Howard S. Wright Construction Co. v. BBIC Investors, LLC* (2006) 136 Cal.App.4th 228 (*Wright*), plaintiff argues that completion of a construction contract may be found where there is an anticipatory breach that discharges the contractor's obligations under the contract. While we find the motion did not present an issue of anticipatory breach, we conclude a triable issue of fact remains concerning whether plaintiff completed the contract prior to recordation of the mechanic's lien. Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On March 25, 2005, plaintiff entered into a contract with Fox Hills Landowners Association (FHLA) to construct a water treatment plant for a planned residential development. At that time, the land on which the plant was to be constructed belonged to U.S. Land and Cattle, which was a member of the FHLA. The development of that property was referred to as phase I and involved construction of 402 homes with a golf course and clubhouse. The developers also acquired property to the north and south of phase I, which they intended to develop as phase II. They obtained a loan from Point Center Financial, Inc. (Point Center), to finance the purchase of the property in phase I. They also obtained loans from USA Commercial Mortgage Company (USA Commercial), acting on behalf of multiple individual investors, for the acquisition of phase II properties. The loans were secured by deeds of trust on the respective properties.

Plaintiff commenced construction of the water treatment plant in March or April of 2005. After a significant payment to plaintiff in December 2005, the payments for plaintiff's work on the water treatment plant became seriously delinquent. On May 25, 2006, when plaintiff still had not been paid, plaintiff recorded its first mechanic's lien; on

August 22, 2006, it withdrew the first mechanic's lien and recorded a new one. On September 1, 2006, plaintiff filed its action against the developers and others, seeking damages for breach of contract and foreclosure of its mechanic's lien. According to defendants, plaintiff worked on the project continuously until October 2006, when it ceased to perform construction on the site. According to plaintiff, it "demobilized the majority of its crew and equipment" by August 13, 2006, but, at the developers' request, maintained a skeleton crew on site until October 31, 2006, to secure the site, mitigate hazards and safety concerns, maintain the water treatment plant's equipment in order to preserve the manufacturers' warranties, and prepare the plant for shutdown. Plaintiff performed only intermittent tasks on the project between October 31, 2006 and December 31, 2006. On September 19, 2007, plaintiff recorded an amended mechanic's lien, increasing its claim to include payment for work performed after August 22, 2006.

Point Center foreclosed on the loan on phase I and purchased the property, effectively eliminating plaintiff's mechanic's lien on phase I. Plaintiff's claim for foreclosure of the mechanic's lien on phase II remained. The defendants named in the foreclosure cause of action included the numerous individuals and entities who loaned money for the purchase of phase II through USA Commercial and who are the beneficiaries under the deeds of trust on the phase II properties. Those individuals and entities¹ filed a motion for summary judgment, contending the mechanic's liens were invalid because they were not recorded timely and, if they were timely, they did not attach to the phase II property. Without reaching the second issue, the trial court granted the motion on the ground the mechanic's liens were untimely, and entered judgment against plaintiff. Plaintiff appeals.

¹ For convenience, we will refer to these individuals and entities, who are the respondents in this appeal, as defendants, although they were not the only defendants in the trial court.

DISCUSSION

I. Standard of Review

Summary judgment is properly granted when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In moving for summary judgment, a “defendant ... has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action.” (Code Civ. Proc., § 437c, subd. (p)(2).) Once the moving defendant has met its initial burden, “the burden shifts to the plaintiff ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.” (*Ibid.*)

“As a summary judgment motion raises only questions of law regarding the construction and effect of supporting and opposing papers, this court independently applies the same three-step analysis required of the trial court. We identify issues framed by the pleadings; determine whether the moving party’s showing established facts that negate the opponent’s claim and justify a judgment in the moving party’s favor; and if it does, we finally determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citations.]” (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342.) Statutory interpretation also presents a question of law, which we review de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 431; *Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

II. Timeliness of Recordation of August 22, 2006, Mechanic’s Lien

The trial court granted summary judgment based upon its conclusion that neither the mechanic’s lien claim recorded on August 22, 2006, nor the amended lien claim recorded on September 19, 2007, was timely. Contractors, subcontractors, and others “performing labor upon or bestowing skill or other necessary services on, or furnishing materials ... to be used on or consumed in ... a work of improvement shall have a lien

upon the property upon which they have bestowed labor or furnished materials ... for the value of such labor done or materials furnished ... whether done or furnished at the instance of the owner or of any person acting by his authority or under him as contractor or otherwise.” (Civ. Code, former § 3110.)² “Each original contractor, in order to enforce a lien, must record his claim of lien after he completes his contract and before the expiration of (a) 90 days after the completion of the work of improvement as defined in Section 3106 if no notice of completion or notice of cessation has been recorded, or (b) 60 days after recordation of a notice of completion or notice of cessation.” (§ 3115.)

In their motion for summary judgment, defendants argued that the August 22, 2006, mechanic’s lien claim was premature, because it was recorded before plaintiff completed its contract. Defendants also asserted the September 19, 2007, lien claim was recorded too late, because it was recorded more than 90 days after completion of the work of improvement. The trial court agreed with both arguments and granted the motion on the ground neither mechanic’s lien was timely.

Section 3115 sets out both an earliest date and a latest date for timely recording a mechanic’s lien claim. (*Wright, supra*, 136 Cal.App.4th at p. 238.) A contractor like plaintiff, who has a direct contractual relationship with the property owner, must record his claim “after he completes his contract,” but “before the expiration of ... 90 days after the completion of the work of improvement ..., if no notice of completion or notice of cessation has been recorded.” (§§ 3095, 3115.) We note that the triggering event of the

² The former mechanic’s lien law, found in former title 15 of part 4 of division 3 of the Civil Code (§§ 3082-3267), was repealed as of July 1, 2012, and replaced with part 6 of division 4 of the Civil Code (§§ 8000-9566). (Stats. 2010, ch. 697, §16.) Section 8052 of the new law provides that “the effectiveness of a notice given or other action taken on a work of improvement before July 1, 2012, is governed by the applicable law in effect before July 1, 2012, and not by this part.” Accordingly, prior law applies in determining the validity of the mechanic’s lien claim in this case. All further statutory references are to former sections of the Civil Code, unless otherwise indicated.

two dates is different. The beginning date is the completion of *the contract*; the expiration date is measured from completion of *the work of improvement*.

In *Wright*, the court considered the meaning of ““completes his contract”” as that term was used in section 3115. (*Wright, supra*, 136 Cal.App.4th at p. 238.) The plaintiff had contracted to perform construction work for the lessee of business premises. When the lessee encountered financial difficulties, it put the construction project on hold. The plaintiff then performed work to “mothball” the project and prepare for its departure. (*Id.* at p. 233.) Subsequently, on June 18, the lessee advised the plaintiff that it did not intend to make any payments to the plaintiff for 30 days; it could not give the plaintiff any assurances that payments would be made after that period. (*Ibid.*) On June 19, the plaintiff’s laborers left the construction site and no more work was done under any contract with the lessee. The last work on the site was done on June 26, when some materials were moved from one place to another within the site; it took a short time and the plaintiff did not charge anyone for that work. On June 20, the plaintiff recorded its claim of mechanic’s lien against the property.

When the plaintiff sued to foreclose on the mechanic’s lien, the property owner contended the lien was invalid because it was prematurely recorded. (*Wright, supra*, 136 Cal.App.4th at p. 235.) The trial court agreed, concluding pursuant to section 3086 that “completion” occurred 60 days after the cessation of labor, which would have put the completion date in August, long after recordation of the lien. Additionally, the trial court concluded recordation was premature under section 3115 because it found work on the project did not end until June 26, six days after the lien was recorded. (*Wright*, at p. 236.)

The appellate court reversed the judgment in favor of the owner. It noted the burden of proof of the validity of the lien was on the plaintiff. (*Wright, supra*, 136 Cal.App.4th at p. 237.) Validity required timely recordation. (*Ibid.*) The court concluded the provision that ““completion”” of a work of improvement occurred 60 days after cessation of labor applied only in determining the last date for recording the lien.

(*Id.* at pp. 238-239.) “The *earliest* date for timely recording turns on completion of the ‘contract.’” (*Id.* at p. 239.) Accordingly, section 3086 and its definition of completion of a work of improvement did not apply. Rather, “a construction contract is ‘complete[]’ within the meaning of section 3115 if the contractor’s obligations have been fully performed. As a corollary, a contract is generally *not* completed for purposes of section 3115 if work under the contract *remains* to be done. [Citation.]” (*Wright*, at p. 240, fn. omitted.) However, the court recognized that a contract is also complete “when, by some event before full performance, [the contractor] no longer has any further obligations under the contract.” (*Id.* at p. 241.) “Simply put, a contract is complete for purposes of commencing the recordation period under section 3115 when all work under the contract has been performed, excused, or otherwise discharged.” (*Ibid.*)

The court found the contractor’s obligations under the contract were terminated by the lessee’s June 19 repudiation of the contract. (*Wright, supra*, 136 Cal.App.4th at pp. 242-243.) “Anticipatory breach arises where a party repudiates performance of its obligations before they come due; if sufficiently significant, the anticipatory breach discharges the other party’s obligations and creates in the other party the right to pursue remedies for breach immediately.” (*Id.* at p. 243.) The communications between the owner and the plaintiff on June 19 demonstrated an anticipatory breach. The owner advised the plaintiff on June 18 that it would make no further payments to the plaintiff; on June 19, the plaintiff pulled its laborers and trades people from the construction site. Thereafter, the plaintiff performed no significant work at the site under the contract. (*Id.* at p. 233.) Thus, the contract was terminated as of June 19. Because of the anticipatory breach, the plaintiff had completed its contract, within the meaning of section 3115, on June 19, so recordation of the mechanic’s lien on June 20 was not premature. (*Wright*, at p. 243.)

Relying on the statement in *Wright* that “a contract is complete ... when all work under the contract has been performed, excused, or otherwise discharged,” plaintiff

argues that its further obligations under the contract were excused or discharged when the developers repudiated the contract. (*Wright, supra*, 136 Cal.App.4th at p. 241.) Plaintiff contends the developers repudiated the contract, and this amounted to an anticipatory breach, which discharged any further obligations of plaintiff under the contract. Thus, according to plaintiff, plaintiff's obligations were discharged and the contract was complete for purposes of recording a mechanic's lien prior to recordation of the August 22, 2006, mechanic's lien; therefore, the mechanic's lien was not premature. We find the arguments regarding anticipatory breach to be beyond the scope of the issues raised by the complaint and the motion for summary judgment, but conclude a triable issue of fact remains concerning whether plaintiff's obligations were discharged by the developers' actual breach by nonpayment and whether the contract was complete at the time of or prior to recordation of the August 22, 2006, mechanic's lien.

The first step in analyzing a motion for summary judgment is to "identify the issues framed by the pleadings, since it is these allegations to which the motion must respond." (*Truck Insurance Exchange v. Amoco Corp.* (1995) 35 Cal.App.4th 814, 822.) The complaint in this case alleges the developers breached the contract by failing to make payments in accordance with the payment schedules in the contract. It alleges defendants are beneficiaries under deeds of trust on phase II properties; plaintiff timely recorded its mechanic's lien against those properties and it now seeks to foreclose its lien. Thus, the issue raised by the complaint was whether there was an actual breach of the construction contract that discharged plaintiff's obligations and resulted in completion of the contract, not whether there was an anticipatory breach that resulted in its completion.

The second step in analyzing a motion for summary judgment is to "determine whether the moving party's showing established facts that negate the opponent's claim and justify a judgment in the moving party's favor." (*Tsemetzin, supra*, 57 Cal.App.4th at p. 1342.) Defendants' motion did not challenge the allegation that the developers breached the contract with plaintiff by failing to make required payments under the

contract. It challenged only the timeliness of recordation of the mechanic's liens and the scope of the liens, i.e., whether they could encompass the phase II properties and defendants' interests in them. Thus, defendants' moving papers did not raise any issue regarding whether there was a breach or anticipatory breach of the construction contract, and the allegation in the complaint of an actual breach was not disputed by defendants.

The trial court granted defendants' motion for summary judgment based on its conclusion that plaintiff's mechanic's liens were not recorded timely. It correctly concluded that the earliest the mechanic's lien properly could be filed was after plaintiff completed its contract. (§ 3115.) It followed the rule set out in *Wright*, that "a contract is complete for purposes of commencing the recordation period under section 3115 when all work under the contract has been performed, excused, or otherwise discharged." (*Wright, supra*, 136 Cal.App.4th at p. 241.) It erred, however, in finding that there was no evidence plaintiff's obligations under the contract had been performed, excused, or otherwise discharged, at the time plaintiff recorded the August 22, 2006, mechanic's lien.

Under California law, "a contract may be breached by nonperformance, by repudiation, or a combination of the two." (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 514, fn. omitted.) Repudiation occurs when the promisor, through an absolute and unequivocal declaration or act, in advance of the time when its performance is due, indicates it will not perform in the future when performance is due. (*Robinson v. Raquet* (1934) 1 Cal.App.2d 533, 542-543.) In contrast, wrongful failure to perform a contract when the time for performance has arrived is a breach. (1 Witkin, Summary of Cal. Law (10th ed. 2010) Contracts, § 847.) "A breach does not terminate a contract as a matter of course but is a ground for termination at the option of the injured party. [Citations.] Thus a finding of termination is not one which must be implied from a finding of a breach." (*Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 Cal.App.2d 594, 602.) If the breach is material, however, the other party may elect to terminate the contract and be discharged from its duty to perform further under the contract. (*Brown v.*

Grimes (2011) 192 Cal.App.4th 265, 277; *B. L. Metcalf General Contractor, Inc. v. Earl Erne, Inc.* (1963) 212 Cal.App.2d 689, 693-694.)

The complaint alleged the developers actually breached the construction contract by failing to make required payments to plaintiff. Defendants' motion for summary judgment did not challenge that element of plaintiff's cause of action. Defendants presented evidence that plaintiff's work continued uninterrupted until October 2006, although the mechanic's lien was recorded in August. Plaintiff's opposition presented evidence that payments to plaintiff were seriously in default in the spring of 2006. When plaintiff still had not been paid, it "demobilized the majority of its crew and equipment" from the construction site by August 13, 2006, and thereafter, at defendants' request, maintained only a skeleton crew "to secure the site, mitigate hazards and safety concerns, provide maintenance for the Fox Hills Water Treatment Plant's process equipment in order to preserve the manufacturer's warranty, and prepare the [plant] for shutdown." Plaintiff then recorded its mechanic's lien on August 22, 2006, and filed its action for foreclosure of the mechanic's lien 10 days later. Thus, the facts were disputed regarding whether plaintiff continued to work on the project despite defendants' breach or elected to terminate the contract based on the developers' breach and pursue its legal remedies. There was sufficient evidence to at least raise a triable issue of material fact regarding whether, at the time the mechanic's lien was recorded, plaintiff was continuing to perform under the contract or had elected to terminate it, thereby discharging plaintiff's further obligations and completing the contract for purposes of section 3115. In light of the existence of that triable issue of fact, the motion for summary judgment should not have been granted.

DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order granting summary judgment on the ground the mechanic's lien was premature, and to rule on the motion after considering any other issues raised therein. Plaintiff is entitled to its costs on appeal.

HILL, P. J.

WE CONCUR:

LEVY, J.

FRANSON, J.