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

BEAL PROPERTIES, INC.,

Plaintiff and Appellant,

v.

GARFIELD BEACH CVS, L.L.C.,

Defendant and Respondent.

F067928

(Super. Ct. No. 12CECG02435)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Wild, Carter, & Tipton and Steven E. Paganetti for Plaintiff and Appellant.

Miller Starr Regalia, Thomas S. McConnell and Allison K. Wopschall for Defendant and Respondent.

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This appeal involves a complaint to enforce covenants contained in a parcel map agreement entered in by a developer and the City of Fresno (City). The developer, a

* Before Detjen, Acting P.J., Franson, J. and Peña, J.

former owner of the property subject to the parcel map agreement, alleges the current owner of the property is obligated to perform the covenants regarding the construction of improvements, such as streets, and extensions to the water, sewer and drainage systems.

The current owner demurred to the complaint, contending it was not a party to the parcel map agreement and, therefore, was not responsible for building the improvements. The trial court agreed and sustained the demurrer without leave to amend. The developer appealed, contending it had stated a cause of action and, alternatively, could amend to cure any defect in its complaint.

We conclude the developer failed to allege facts sufficient to state a cause of action because the facts alleged (1) did not show any privity of contract between it and the current owner and (2) did not show any exceptions to the privity requirement, such as the exception for covenants running with the land, applied to this case.

We therefore affirm the judgment.

FACTS

Parties

Plaintiff Beal Properties, Inc., is a California corporation involved in the development of real estate.

Defendant Garfield Beach CVS, L.L.C. (CVS) is a California limited liability company with offices in Woonsocket, Rhode Island. It is wholly owned by CVS Pharmacy, Inc., a Rhode Island corporation.

California State University, Fresno Foundation is a University-affiliated, nonprofit auxiliary corporation (CSUF Foundation). (See *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 816; Ed. Code, § 89901 [auxiliary organization defined]; Cal. Code Regs., tit. 5, § 42500 [functions of auxiliary organizations].)

Parcel Map Agreement

Parcel Map Agreement No. 1999-14 was made on October 31, 2003, between (1) City and (2) Beal Properties and CSUF Foundation (Parcel Map Agreement). The Parcel Map Agreement referred to the latter two entities “as ‘Subdivider’ without regard for number or Gender.” It also referred to a parcel map that proposed the subdivision of land owned by Subdivider and described as “Parcels A through D, inclusive, of Parcel Map No. 99-14 as recorded in Book 63 of Parcel Maps at Page(s) 17, Fresno County Records.”¹ Recitals in the Parcel Map Agreement stated:

“B. The City requires, as a condition precedent to the acceptance and approval of said Parcel Map, the dedication of streets, highways, public places and easements as are delineated on the Parcel Map, and deems such dedications as necessary for the public use; and, requires the construction of improvements of the streets delineated on the Parcel Map.

“C. Section 12-1206 of the Fresno Municipal Code requires the Subdivider to either construct or enter into an Agreement whereby Subdivider agrees to perform and complete the work and improvements required as Conditions of Approval for Tentative Parcel Map No. 99-14

¹ For background purposes only, we note that the current and some prior versions of the Fresno County Assessor’s Maps can be viewed online at the assessor’s website. The 7.28 acres of land covered by Parcel Map No. 99-14 is located at the northeast corner of West Ashlan Avenue and North Polk Avenue in northwest Fresno. In 2003, before the Parcel Map Agreement was recorded, the four parcels covered by Parcel Map No. 99-14 were assigned a single number, APN 311-032-66. Currently, the parcels designated “A” and “B” by Parcel Map No. 99-14 are assigned APN 510-022-82 and parcels “C” and “D” are assigned APN 510-022-78 and APN 510-022-79, respectively.

We note that appellate courts reviewing a demurrer may consider matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6; see Code Civ. Proc., § 430.30, subd. (a) [use of judicial notice with demurrer].) Here, the parties made no request to the trial court or this court for judicial notice of any instruments in the Fresno County Records. Thus, we do not have the documents that show the chain of title from Beal Properties to CVS. The factual assertion by CVS’s attorney that CVS acquired the property at a foreclosure sale is not supported by the appellate record.

dated September 9, 1999 issued by the City and any amendments thereto ... in consideration of the approval of the Parcel Map for recording.”

The Parcel Map Agreement stated that, in consideration of the approval of the parcel map for filing and recording, the Subdivider and City mutually agreed as follows:

“1. The Subdivider shall perform the work and improvements at the time a permit or other grant of approval for development of the parcel is issued by the City or before December 31, 2002, whichever occurs first, unless prior to this date of performance an extension of time is approved by the Public Works Director.[²]

[¶] ... [¶]

“19. Time is of the essence of this Agreement. The provisions contained in this Agreement are intended by the parties to run with the land, and the same shall bind and inure to the benefit of the parties hereto, their heirs, successors in interest, and assigns.

“20. No assignment of this Agreement or of any duty or obligation of performance hereunder shall be made in whole or in part by the Subdivider without the written consent of the City.”

Paragraph 4 of the Parcel Map Agreement described the required work and improvements, which included utility systems, water main extensions, sanitary sewer extensions, and lot drainage. Paragraph 5 required the Subdivider to post bonds as both performance security and payment security prior to City’s approval of the parcel map. Paragraphs 6 and 7 addressed the Subdivider’s payment of certain fees to City.

Beal Properties once was the owner of real property designated with Fresno County Assessor’s Parcel Number (APN) 311-032-76 (Lot 76), which is part of the land subdivided by Parcel Map No. 99-14 and subject to the Parcel Map Agreement.

² The use of December 31, 2002, as a deadline is a bit odd because the Parcel Map Agreement was made 10 months later on October 31, 2003. Beal Properties alleges the December 31, 2002, deadline “regarding completion of improvements was extended based upon requests by Beal [Properties] to have the improvement under the [Parcel Map] Agreement completed on or before December 31, 2012.”

CVS became the record owner of Lot 76 on February 6, 2008. When CVS acquired the land, the Parcel Map Agreement had been recorded.

Sometime after CVS became the owner of Lot 76, Beal Properties sent CVS a written demand for confirmation that CVS would be performing the improvement work described in the Parcel Map Agreement. CVS did not respond to the written demand.

PROCEEDINGS

In August 2012, Beal Properties filed a complaint against CVS for breach of contract, specific performance, declaratory relief and unjust enrichment. CVS demurred, which prompted Beal Properties to file its first amended complaint (FAC)—the operative pleading in this case.

The FAC alleged Beal Properties was a prior owner of Lot 76, and CVS, as the current owner, was obligated to complete the improvements required by the terms of the Parcel Map Agreement. The FAC further alleged (1) CVS had breached the Parcel Map Agreement by failing to acknowledge responsibility for the obligation to complete the improvements required by the agreement and (2) Beal Properties has or would suffer damages in excess of \$25,000 as a direct and proximate result of the breach.

CVS filed a demurrer to the FAC, contending Beal Properties had failed to allege sufficient facts to show the existence of an enforceable agreement between Beal Properties and CVS. CVS argued it had no contractual obligation to build public improvements pursuant to the Parcel Map Agreement because it was not a party to the agreement. In addition, CVS argued Beal Properties lacked standing to sue because Beal Properties no longer owned any property subject to the Parcel Map Agreement.

In May 2013, the trial court heard argument on the demurrer. Subsequently, the court filed an order sustaining the demurrer because CVS was not a party to the Parcel Map Agreement and there was no contract between Beal Properties and CVS. The court

also denied leave to amend, stating that Beal Properties had not shown a reasonable likelihood it could cure the defects in its pleading.

After the trial court sustained the demurrer, counsel for CVS filed an ex parte application to dismiss demurring defendant and submitted a proposed order granting that application. On June 27, 2013, the trial court signed and filed the proposed order dismissing CVS with prejudice. Beal Properties appealed.

DISCUSSION

I. STANDARD OF REVIEW

The standard of review for 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. Appellate courts independently review the ruling on demurrer and make a de novo determination of whether the pleading alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.)

Appellate courts conducting this independent review “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.]” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

As a general principle, the allegations in a pleading “must be liberally construed, with a view to substantial justice between the parties.” (Code Civ. Proc., § 452.) Under the principle of liberal (yet reasonable) construction, the reviewing court must draw inferences favorable to the plaintiff, not the defendant. (*Advanced Modular Sputtering, Inc. v. Superior Court* (2005) 132 Cal.App.4th 826, 835 [“pleadings are to be liberally construed in favor of the pleader”].) However, the principle of liberal construction (1) does not modify the rule that courts do not assume the truth of legal conclusions set forth in the pleading and (2) does not authorize courts to overlook the absence of factual

allegations by drawing favorable factual inferences from conclusions of law set forth in the pleading.

When a contract is attached to a pleading and incorporated by reference, courts accept the contents of the exhibit as a true representation of the text of the contract, rather than the allegations in the pleading about the terms contained in the contract. (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.) Furthermore, if the contract contains recitals, the evidentiary facts contained in the recitals are accepted as true. (*Satten v. Webb* (2002) 99 Cal.App.4th 365, 375; see Evid. Code, § 622 [facts recited in written instruments are conclusively presumed to be true as between the parties].)

When a demurrer is properly sustained on the ground that the complaint fails to state facts sufficient to constitute a cause of action, and leave to amend is denied, “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; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The requisite showing of a reasonable possibility of curing the defect by amendment may be made by the plaintiff for the first time on appeal. (Code Civ. Proc., § 472c, subd. (a); *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746-747 [the issue of leave to amend is always open on appeal, even if not raised by the plaintiff].)

II. STANDING TO ASSERT CONTRACT CLAIMS

A. Rules of Law

1. *Privity Requirement*

The elements of a cause of action for breach of contract are well established. The California Supreme Court recently reiterated those elements as “(1) the existence of the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s

breach, and (4) the resulting damages to the plaintiff.” (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) This statement of the elements of a contract claim appears to assume that the contract in question is between the plaintiff and the defendant.³

“Under the traditional common-law rule, only parties in privity of contract could sue on the contract” (13 Williston on Contracts (4th ed. 2000) § 37.1, p. 5.) This rule was applied in *Howard Contracting, Inc. v. G. A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, when the court stated that a subcontractor on a construction project had no standing to sue the city directly on a breach of contract claim because the subcontractor and the city “were not in privity of contract.” (*Id.* at p. 60.)

“Privity of contract” is defined by Black’s Law Dictionary (9th ed. 2009) page 1320 as follows: “The relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so. The requirement of privity has been relaxed under modern laws and doctrines of implied warranty and strict liability, which allow a third-party beneficiary or other foreseeable user to sue the seller of a defective product.”

2. *Exceptions for Third Party Beneficiaries*

The traditional rule that only a party to the contract may sue for its breach has exceptions. The most widely litigated exception allows a third party beneficiary of the contract to sue for its breach. (*Gulf Ins. Co. v. TIG Ins. Co.* (2001) 86 Cal.App.4th 422, 428 [claim of no standing was based on argument that there was no contractual relationship between the two parties and plaintiff did not qualify as a third party beneficiary]; see Rest.2d Contracts, § 302, pp. 439-440 [intended and incidental

³ The “existence of the contract” element is explained by Civil Code section 1550, which lists the essential elements of a contract, including parties capable of contracting and their consent.

beneficiaries]; CACI No. 301 [third party beneficiary]; BAJI No. 10.59 [same].) This exception does not apply to the present case because, when Beal Properties filed the FAC, it abandoned the position that it was a third party beneficiary of the Parcel Map Agreement.

3. *Exceptions for Assignees*

Another exception to the privity requirement involves assignees who have acquired the right to receive the obligor's performance under the contract. (Rest.2d Contracts, § 317, pp. 14-15 [assignment of right]; see CACI No. 326 [assignment contested]; BAJI No. 10.96 [assignment—generally].) Such an assignee may sue for breach of contract if the obligor under the contract does not perform. (*Applera Corp. v. MP Biomedicals, LLC* (2009) 173 Cal.App.4th 769, 786 [assignee had standing to sue for breach of contract providing for royalty payments].)

Beal Properties has not relied on this exception. During oral argument, its counsel indicated Beal Properties was not asserting an assignment as the basis for CVS's responsibility to build the improvements.

4. *Exceptions for Covenants Running with the Land*

The privity requirement does not apply to covenants running with the land. “The distinguishing characteristic of a covenant running with the land is that both liability on it and enforcement of it pass with the transfer of the estate. Covenants running with the land are binding on subsequent transferees of the property, even though they do not contractually assume any responsibility for their performance. In other words, if the covenant runs with the land, it is unnecessary to establish liability founded on privity of contract. It binds not only the original covenantor, but also his or her heirs, devisees, assignees, and subsequent purchasers.” (26 Cal.Jur.3d (2008) Deeds, § 245, pp. 623-624.)

B. CVS's Duty to Provide Improvements

Most of the appellate briefing addresses whether CVS has an obligation to provide the improvements described in the Parcel Map Agreement.

CVS's brief asserts that it is not a party to the Parcel Map Agreement and, therefore, it has no contractual duty to perform the obligations set forth in the agreement. CVS's brief does not mention that paragraph 19 of the Parcel Map Agreement stated the provisions of the agreement "are intended by the parties to run with the land" and does not address the exception to the privity requirement for covenants that run with the land.

In light of these gaps in the briefing, we will not decide whether CVS is bound to perform the covenants requiring the construction of improvements. Instead, we will address whether Beal Properties has the right to enforce the covenants to build improvements contained in the Parcel Map Agreement.

C. Beal Properties Right to Enforce the Covenants

CVS contends that Beal Properties is no longer a real party in interest to the contract and, therefore, lacks standing to force CVS to perform the obligations set forth in the contract.

1. *Enforcing Covenants Running with the Land*

Under California law, a covenant running with the land generally can be enforced only by one with a current ownership interest in the tract intended to be benefited by the covenant. (*B.C.E. Development, Inc. v. Smith* (1989) 215 Cal.App.3d 1142, 1148.) Beal Properties has not alleged that it currently holds a property interest that was intended to be benefited by the covenants in the Parcel Map Agreement. Furthermore, it has not demonstrated it is capable of making such an allegation if granted leave to amend.

Therefore, we conclude that Beal Properties failed to state a cause of action that would allow it to enforce a covenant running with the land and has failed to show a reasonable probability that it can cure the defect by amendment.

2. *Beal Properties' Assumption (Implied in Fact) Theory*

Beal Properties distinguishes between an assumption of a contract and an assignment of a contract and asserts CVS assumed the contractual obligation to construct improvements set forth in the Parcel Map Agreement. In addition, Beal Properties asserts the assumption in this case was not express, but a type of implied in fact contract. (See Civ. Code, §§ 1619 [a contract is either express or implied], 1620 [express contracts are stated in words], 1621 [existence and terms of implied contract are manifested by conduct].)

The breach of contract cause of action in the FAC does not state CVS “assumed” the obligation under the Parcel Map Agreement. Instead, it alleges CVS, as a subsequent owner of Lot 76, was “obligated to perform improvements not yet completed on the property under the terms of the [Parcel Map] Agreement,” which agreement was of record at the time CVS became the owner of Lot 76 in February 2008.

The declaration submitted in opposition to the demurrer states the allegations in the FAC could be expanded to include the following facts. First, at the time CVS purchased Lot 76, it was aware of the Parcel Map Agreement, the obligations to perform improvements contained in the agreement, and the fact no improvements had been built. Second, CVS “thereafter assumed the responsibility to perform the improvements under the [Parcel Map A]greement.”

During oral argument, Beal Properties contended an allegation that CVS assumed the obligations contained in the Parcel Map Agreement was sufficient to allege CVS was bound by an implied in fact contract. In effect, Beal Properties contends that stating a defendant assumed obligations in a written contract is an allegation of fact and not a conclusion of law. (See *City of Dinuba v. County of Tulare*, *supra*, 41 Cal.4th at p. 865 [courts reviewing a demurrer accept as true all material facts properly pleaded, but do not assume the truth of conclusions of law stated in the pleading].)

We hold an allegation that “A assumed contract X” or “A, by its conduct, assumed contract X” is a conclusion of law and not an allegation of fact. The parties have not cited, and we have not located, any authority directly addressing whether an assumption of a contract is an allegation of fact or a conclusion of law. However, under California’s general rules of pleading that distinguish between ultimate facts and conclusions of law, we determine that the statement a contract was assumed by the defendant is a legal conclusion and a plaintiff must allege some facts about the conduct of the defendant that shows the defendant consented to the formation of an implied in fact contract. (Cf. *Vincent v. Grayson* (1973) 30 Cal.App.3d 899, 906 [fact that written contracts were not signed by principal was not determinative; plaintiff need allege only the ultimate fact of the making of the written contract by the principal and need not allege either the fact of agency, or the agent’s authority, to state a cause of action for breach of contract against the principal].)

Requiring a plaintiff to allege facts about conduct manifesting a mutual assent to form a contract is not onerous because the mutual assent necessary to form a contract is determined under an objective standard applied to the outward manifestations or expressions of the parties. (See *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 150 [subjective, unexpressed beliefs of parties cannot provide the basis for the formation of a contract; outward manifestations of mutual assent are necessary]; Civ. Code, § 1565 [essentials of consent], § 1580 [mutuality of consent].) A plaintiff would be aware of the defendant’s outward manifestations of an intention to form a contract because those outward manifestations must be communicated to the plaintiff—that is, the party with whom the contract alleged is formed. (See *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 271 [examination of mutual assent involves an inquiry into the communication of the parties’ willingness to enter into a bargain].) Thus, the pertinent

facts regarding the defendant's outward manifestation of consent to the contract are not the type of facts that will be learned by a plaintiff only after discovery.

Based on our conclusion that Beal Properties' willingness to allege CVS assumed the obligations in the Parcel Map Agreement is insufficient to allege the facts needed to establish the formation of an implied in fact contract, we turn to the question of whether Beal Properties has shown that it can plead the necessary facts.

Beal Properties has not identified the conduct and actions communicated between Beal Properties and CVS that manifested their mutual consent to a contract. The conduct Beal Properties identified in the declaration submitted in opposition to the demurrer—that is, CVS purchased Lot 76 knowing the Parcel Map Agreement had been recorded and the improvements had not been built—is relevant to CVS's knowledge, but is insufficient to show CVS impliedly *promised Beal Properties* that it would build the improvements.

Therefore, we conclude Beal Properties has failed to show a reasonable probability that it could allege facts that would show the existence of an implied in fact contract between CVS and Beal Properties.

3. *Implied in Law Theory*

The declaration that Beal Properties submitted to support its opposition to the demurrer asserted that additional facts would be alleged to support the alternate theory of implied in law obligations to support its claim that CVS was required to provide the improvements. The declaration and the opposition did not identify what those facts were and did not identify the law that imposed the obligations. Beal Properties may have been referring to the rules of law that govern covenants running with the land. However, we have addressed those principles and concluded that Beal Properties has failed to show it has a sufficient interest to enforce the covenants running with the land. (See pt. II.C.1, *ante*.)

Because Beal Properties has failed to identify a rule of law from which an implied obligation would arise, we conclude it has failed to show a reasonable probability that it could cure its defective pleading by amendment.

D. Unjust Enrichment

Beal Properties contends that it properly pled a cause of action for unjust enrichment or restitution. Beal Properties argues that a person is unjustly enriched if he or she receives a benefit at another's expense, which benefit can involve being saved from an expense.

Generally, California requires a person to make restitution if he or she is unjustly enriched at the expense of another. (*First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662.) “The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it.” (*Id.* at p. 1663.)

The FAC states that Beal Properties “seeks restitution of any and all money paid for the development of the [Parcel] under the [Parcel Map Agreement].” The declaration Beal Properties submitted to support its opposition to the demurrer stated it could “allege additional facts to establish it has paid fees to the City of Fresno under the terms of the Parcel [Map] Agreement which inured to the benefit of [CVS] serving as a basis for unjust enrichment claim.”

Neither the FAC nor the declaration set forth facts showing it would be unjust for CVS to benefit from any fees Beal Property paid under the Parcel Map Agreement. For example, Beal Properties does not allege that when CVS purchased the CVS Property, the circumstances of that acquisition warrant CVS reimbursing Beal Properties for the fees it paid. It is possible the purchase price paid by CVS took into account the fact that fees had already been paid.

Also, it is unclear from the allegations whether CVS even dealt with Beal Properties when it purchased the CVS Property. Lastly, nothing in the Parcel Map Agreement itself suggests it would be unjust for a subsequent owner such as CVS to benefit from Beal Properties' payment of fees to City.

Consequently, we conclude Beal Properties has failed to allege, or show it can allege, sufficient facts to demonstrate it would be unjust or otherwise inequitable for CVS to retain the benefit of the Beal Properties payment of the fees.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.