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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITY OF COACHELLA,

Plaintiff and Appellant,

v.

INSURANCE COMPANY OF THE  
WEST,

Defendant and Respondent.

G050279

(Super. Ct. No. INC1101495)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Harold W. Hopp, Judge. Reversed.

Best Best & Krieger, Kira L. Klatchko, and Irene S. Zurko for Plaintiff and Appellant.

Sedgwick, Marilyn Klinger, Robert H. Shaffer, and Douglas J. Collodel for Defendant and Respondent.

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The City of Coachella (the City) appeals from a judgment dismissing with prejudice its action against Insurance Company of the West (ICW), after the court sustained without leave to amend ICW's demurrer to the City's operative complaint on the ground the claim was barred by the statute of limitations. Because the City satisfactorily explained any pleading inconsistency between its second amended and original complaints, because the allegations liberally construed are not necessarily inconsistent, and because we accept the allegations as true, its complaint was timely filed. Accordingly, we reverse the judgment of dismissal.

## FACTS

### *The Second Amended Complaint's Allegations*

Accepting "as true all material allegations of the complaint" (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 929), we draw the following facts from the City's second amended complaint (SAC).

On August 11, 2005, the City entered into a subdivision improvement agreement (the Agreement) with a subdivider, J & R Montana, LLC (Montana).<sup>1</sup> The Agreement required Montana to build improvements at the subdivision site within one year, and permitted the City Council to extend the deadline for an additional year for good cause. The Agreement permitted the City engineer to serve written notice of default on Montana if Montana breached the Agreement by failing to complete the improvements.

The Agreement required Montana to post performance security with the City. In the event Montana defaulted, the Agreement required Montana's surety to take over and complete the improvements.

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<sup>1</sup>

The SAC attached the Agreement as an exhibit.

Montana as principal, and ICW as surety, gave the City a performance bond for \$1,467,990, which guaranteed performance of the Agreement.

The City Council extended Montana's time to complete the improvements for an additional year, until August 11, 2007. Between the original deadline (Aug. 11, 2006) and the extended deadline (Aug. 11, 2007), Montana affirmatively induced the City into believing it was actively working to complete the improvements and that ICW's bond and the Agreement had not expired.

Around November 14, 2007, Montana asked the City to reduce the obligation under ICW's bond to reflect the part of the improvements already completed. Because Montana induced the City to believe ICW's bond and the Agreement had not expired, the City Council reduced ICW's bond from \$1,467,990 to \$611,081.

In the third calendar quarter of 2008, the City learned Montana would not be completing the improvements, and that Montana's project had been foreclosed upon. As of July 29, 2008, Montana lost ownership in the remaining lots of the subdivision through nonjudicial foreclosure to Montana's construction lender.

In an August 15, 2008 letter, the City engineer advised Montana that the time period to complete the improvements had expired, and demanded that Montana promptly complete the improvements. Despite the City engineer's demand, Montana failed to complete the improvements.

Section 16.28.200 of the Coachella Municipal Code (CMC) authorizes the City engineer to approve and accept public improvements. Under section 16.28.130 of the CMC, if a subdivider fails to complete improvements, the City may complete the improvements and require the subdivider's surety to reimburse the City for the costs of completion.

The City estimated it would cost over \$1 million to complete the remaining improvements.

*Procedural History of the Statute of Limitations Issue*

The City's original, first amended, and second amended complaints each alleged two causes of action. First, the City sued Montana for breach of contract. Second, the City sued ICW for recovery on the performance bond.

As to each of the City's complaints, ICW demurred on the basis the cause of action was barred by the statute of limitations. Because the applicable statute of limitations is four years<sup>2</sup> and the City filed its initial complaint on February 18, 2011, its claim is time barred unless the City Council extended Montana's deadline to complete the improvements. If the City Council extended the deadline, then Montana defaulted on the Agreement on August 11, 2007 — three and one-half years before the City filed its complaint. But if the City Council did not extend the deadline, then Montana defaulted on the Agreement on August 11, 2006 — four and one-half years before the City filed its complaint. ICW became liable to the City upon Montana's default (Civ. Code, § 2807; *Bloom v. Bender* (1957) 48 Cal.2d 793, 799), so the City's claim against ICW is time-barred unless Montana's deadline for performance was extended.

The City's original complaint alleged the "City Engineer, pursuant to the authority granted by CMC §16.28.200 and . . . §5.6 [of the Agreement], extended Montana's time to complete the . . . Improvements for one additional year, until August 11, 2007."

ICW demurred to the complaint on grounds the statute of limitations barred the cause of action against it. It argued that the Agreement allowed the City Council to extend the completion date of the Agreement up to one year for good cause, but not the

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<sup>2</sup> The court ruled ICW's obligation under its performance bond was subject to the four-year statute of limitations for contracts and written instruments. (Code Civ. Proc., § 337, subd. (1).) ICW does not dispute this ruling on appeal, although it argued below that a three-year statute of limitations applied.

City engineer. Therefore, the City filed its complaint “four years and six months after the August 11, 2006 breach of the” Agreement.

The City opposed the demurrer, arguing the demurrer admitted the truth of the City’s factual allegation it extended Montana’s time to complete the improvements.

The court ruled the City failed to allege facts showing the action was filed within the four-year statute of limitations, since the Agreement provided that only the City Council could extend Montana’s deadline and no provision in the Agreement or the applicable code granted authority to the City engineer to extend it. The court sustained the demurrer with leave to amend.

The City’s first amended complaint alleged the “City Council extended Montana’s time to complete the . . . Improvements for one additional year, until August 11, 2007, as evidenced by a letter from the City Engineer, dated August 15, 2008, advising Montana that the two-year time period for Montana to complete the . . . Improvements had expired and demanding that Montana promptly complete the . . . Improvements.”

The court sustained, with leave to amend, ICW’s demurrer to the City’s first amended complaint. The court stated the first amended complaint’s allegation that the City Council extended Montana’s time to complete the improvements “contradicts the allegation in the original complaint that the City engineer extended the time and cannot without an explanation of the contradiction be accepted as true.”

The City filed its SAC, which alleged the “City Council extended Montana’s time to complete the . . . Improvements for one additional year, until August 11, 2007.” The SAC explained that the City engineer’s letter “confirmed” and “evidenced that the City Council had extended the time to complete the Improvements . . . . ”

The SAC explained the conflicting statement in the City’s initial complaint: “In its original Complaint, the City alleged: ‘The City Engineer, pursuant to the authority

granted by CMC § 16.28.200 and . . . §5.6 [of the Agreement], extended Montana's time to complete the . . . Improvements for one additional year, until August 11, 2007.' But, neither CMC § 16.28.200 nor . . . §5.6 [of the Agreement] relate to extensions of time. CMC § 16.28.200 vests the City Engineer with 'authority' and 'responsibility' for 'accepting' public improvements; 'completion of all improvements' is a condition of 'acceptance.' In other words, the ordinance vests the City Engineer with broad authority over subdivision improvements. . . . §5.6 [of the Agreement] only relates to the City Engineer's ability to serve written notice on 'SUBDIVIDER' in the event of a 'default.' The City Engineer, under those sections, did advise Defendants that the Improvements had not been completed or accepted and demanded that Montana promptly complete the Improvements. In doing so, the City Engineer confirmed the *two-year* time period for Montana to complete the . . . Improvements had expired." "The demand letter from the City Engineer . . . did not purport to extend the time to complete Improvements, in fact it was sent after the time to complete the Improvements had already expired. The City did not assert in its Complaint that the letter functioned as a extension of the time for Montana to complete the . . . Improvements; the letter merely evidenced that the City Council had extended the time to complete the Improvements . . . ."

ICW demurred to the SAC, arguing the City did not explain "why it originally plead that the City Engineer extended the completion time and now it alleges that the City Council extended the completion time. The City still has not alleged that a resolution was adopted by the City Council to extend the completion time. For every other action taken by the City Council, [the City's complaints attached] the Resolution evidencing such action. With respect to the alleged time extension, the [SAC] is silent as to the Resolution whereby the Council actually extended the completion time."

At the hearing on ICW's demurrer to the SAC, the City's attorney explained that "usually the City engineer is the person [who] acts on behalf of the Council," and that the City Council granted the authority to the City engineer. She

argued nothing on the face of the SAC shows the City Council was required to adopt a resolution in order to extend Montana's deadline, and that the Agreement contains no such requirement. She offered examples of other ways that the City Council could have granted the extension. For example, the City Council could have instructed their staff in a closed session "to go forward and extend it." She pointed out that the evidence showed "everybody believed . . . the period had been extended and all sorts of activity took place in that second year period." She concluded the issue of what type of action the City Council was required to take to give the City engineer authority was a factual question. She argued this was a summary judgment issue and the City was entitled to conduct discovery. The court stated the City did not need to do any discovery on whether the City Council extended the deadline because the City "knows what those facts are." The City's attorney stated the City engineer was no longer employed by the City. She stated that the City engineer had "said he had no particular recollection of the case," but "that the general direction [he was given] in all subdivision matters was that the City [Council's] wishes were for him to give people as much time as possible, because this was during the building boom." The City's attorney also explained that any action the City Council took in closed session was confidential and could not be disclosed in the complaint.

The court sustained, without leave to amend, ICW's demurrer to the SAC. The court's written order stated: "Plaintiff fails to plead facts showing a satisfactory explanation as to why it alleged in the original complaint that the City Engineer extended the time for completion, but now sets forth the contradictory and conclusory allegation that the City Council extended the time for completion. The Second Amended Complaint does not address this conflict in any detail; no information is alleged as to how or when the City Council extended the time for completion."

## DISCUSSION

The City contends the court erred by sustaining ICW's demurrer to the SAC. The City argues: "ICW's assertion that Montana's deadline to complete the improvements was not properly extended given the lack of a City Council resolution or other formal action evidencing such an extension, is a factual issue . . . not properly resolved on demurrer. Neither the face of [the] pleadings nor any exhibits to the pleadings revealed such a requirement. Thus the purported time bar did not clearly and affirmatively appear on the face of the pleadings and the judgment sustaining the demurrer must be reversed . . . ."

ICW counters that the SAC failed to adequately explain the pleading contradiction between it and the original complaint. ICW argues "the City was bound by the admission made in the original complaint's allegations," unless the City showed the harmful allegation was "a mistake or it subsequently discovered new facts warranting the amendment of the original complaint." ICW further argues that, "[t]ellingly, . . . no document corroborates the City's amended assertion that the City Council 'actually' extended the completion time."

### *General legal principles*

The standard of review for an order sustaining or overruling a demurrer is *de novo*. (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034.) We treat the demurrer as admitting "the truth of (1) all facts properly pleaded by the plaintiff, (2) all facts contained in exhibits to the complaint, (3) all facts that are properly the subject of judicial notice, and (4) all facts that reasonably may be inferred from the foregoing facts." (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296,

1305.)<sup>3</sup> We do not assume the truth of “contentions, deductions or conclusions of fact or law.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*)). We deem the properly pleaded facts “to be true, however improbable they may be.” (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) “[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.” (*Blank*, at p. 318.) “[I]ts allegations must be liberally construed, with a view to substantial justice between the parties.” (Code Civ. Proc., § 452.) The plaintiff “bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law.” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43.)

“In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred.” (*Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963, 971-972.)

A plaintiff may not avoid a demurrer by pleading facts in an amended complaint that contradict or omit, harmful allegations pleaded in a previous complaint (*State of California ex rel. v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 412), unless the plaintiff provides a satisfactory explanation (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 426 (*Deveny*)). For example, in *Kenworthy v. Brown* (1967) 248 Cal.App.2d 298, the plaintiffs could not avoid the defendants’ demurrer based on the statute of limitations simply by omitting exact dates from their amended complaint. (*Id.* at pp. 300, 302.) “Absent an explanation for the inconsistency, a court will read the original defect into the amended complaint, rendering it vulnerable to demurrer again.” (*Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044.)

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<sup>3</sup> As to exhibits, a demurrer does not admit “the pleader’s allegations as to the legal effect of the exhibits.” (*Barnett v. Fireman’s Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505; *Estate of O’Brien* (1966) 246 Cal.App.2d 788, 794.)

A plaintiff can, however, “plead around” harmful prior pleadings “by including in the complaint a satisfactory explanation why the earlier admissions are incorrect.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 7:48, p. 7(1)-26 (rev. #1, 2013).) To do so, the plaintiff must provide “‘very satisfactory evidence’ upon which it is ‘clearly shown that the earlier pleading is the result of mistake or inadvertence.’” (*American Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 879.) Evidence that the earlier allegation resulted from “inadequate knowledge of facts” may also constitute a satisfactory explanation. (*Patane v. Kiddoo* (1985) 167 Cal.App.3d 1207, 1213.)

“The purpose of the [sham pleading] doctrine is to enable the courts to prevent an abuse of process. [Citation.] The doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts.” (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751.) “‘It would seem to be a travesty on justice if a litigant had inadvertently, ignorantly and erroneously stated as a fact, without fault on his part, an admission against interest, if he were to become bound thereby and would not be permitted upon proper showing to correct the innocent error and assert the true fact in that regard.’” (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 457, p. 589.) On the other hand, if “the fact admitted in the original pleading was true, and the object of the amendment is to cover up a fundamental weakness in the case, the correction is not justified . . . .” (*Id.* at § 458, p. 589.)

*The Pleading Inconsistency was Satisfactorily Explained; Evidentiary Facts about the City Council’s Extension of Time Need Not be Pleaded*

A reasonable inference from the SAC’s allegations is that the City made a mistake when it alleged in its original complaint that the City engineer granted Montana an extension. (*Neilson v. City of California City, supra*, 133 Cal.App.4th at p. 1305 [demurrer admits truth of facts reasonably inferred from properly pleaded facts].) The

SAC explained that, contrary to its allegation in the original complaint, paragraph 5.6 of the Agreement and CMC section 16.28.200 did *not* grant the City engineer the authority to extend the time for completion. The SAC noted the City engineer sent a demand letter to Montana *after* the deadline to complete the improvements had passed. The SAC clarified that the City engineer's letter did *not* purport to extend Montana's deadline, but rather "confirmed the *two-year* time period for Montana to complete the . . . Improvements had expired." The SAC explained: "The City did not assert in its Complaint that the letter functioned as an extension of the time for Montana to complete the . . . Improvements; the letter merely evidenced that the City Council had extended the time to complete the Improvements . . . and that all parties, including Montana and its principals, had been acting as if the time to complete the Improvements had been extended." The City has satisfactorily explained the mistaken allegation in its first complaint. Accordingly, we do not read it into the SAC.

Moreover, it is not at all clear that alleging an extension of time by the City engineer is necessarily inconsistent with alleging an extension by the City Council. After all, the City engineer as an agent of the City acts pursuant to authority ultimately granted by the City Council, whether in the form of a resolution, an ordinance, a general delegation of authority, or a specific delegation of authority for a specific action. From an allegation that the City engineer granted the extension, it is just as reasonable to infer that the City engineer acted within the scope of his or her established authority, as it is to infer that it was not. We abide by the statutory command: "[F]or the purpose of determining [a pleadings'] effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) It will be soon enough to inquire into the factual predicate for the scope of the City engineer's authority at summary judgment or at trial.

Contrary to ICW's suggestion, the City was *not* required to allege (or provide proof of) *how* the City Council granted the extension. Paragraph 1.1 of the Agreement provides that the time for Montana to complete the improvements "may be extended up to one (1) additional year by the City Council for good cause shown." This language does *not* specify how the Council is to extend the time for completion. It does *not* specify any type of formal action, such as a resolution, which the City Council must take to grant an extension. A reasonable inference from the SAC's allegations is that, under the terms of the Agreement, the City Council could act through its engineer by delegating appropriate authority to him or her. A demurrer admits not only the contents of a written contract attached to the complaint, but also any pleaded meaning to which the contract is reasonably susceptible. (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239.)

In sum, the SAC adequately pleads that the City Council extended Montana's deadline, such that the four-year statute of limitations began running on August 11, 2007. The SAC is not, on its face, barred by the statute of limitations.

Because we reverse the judgment of dismissal on this ground, we do not consider the City's alternate arguments the statute of limitations was tolled as to ICW and that ICW is estopped from invoking the statute of limitations.

DISPOSITION

The judgment is reversed. The City is entitled to its costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.