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

MCKENZIE BUILDERS, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA
CLARA COUNTY,

Respondent;

EAST WEST BANK,

Real Party in Interest.

H037334

(Santa Clara County

Super. Ct. No. 1-10-CV-163513)

Seeking to foreclose its mechanic's lien on an office condominium project, petitioner McKenzie Builders, Inc. (McKenzie) timely sued the project owner, Willow Glen Investments, LLC (Willow), and 50 Doe defendants in February 2010. A few weeks after the statute of limitations to foreclose the lien expired, McKenzie learned that real party in interest East West Bank (EWB) had a security interest in the project that was subordinate to McKenzie's interest. McKenzie applied ex parte for leave to file a second amended complaint adding EWB as a defendant. The superior court granted leave, and McKenzie filed its amended pleading. EWB answered, asserting as an affirmative

defense that the 90-day statute of limitations in former Civil Code section 3144 barred McKenzie's mechanic's lien cause of action.

Instead of substituting EWB as a Doe defendant, McKenzie had simply added EWB to the caption of its second amended complaint. It made other attempts to add EWB as a defendant, but those too were procedurally defective. McKenzie did not seek leave to file a Doe amendment until April 1, 2011, 397 days after the 90-day statute of limitations had expired. The superior court denied the motion as untimely.

In this writ petition challenging the superior court's order, McKenzie contends it was an abuse of discretion to deny leave "on the basis of delay, without a[n] express finding of prejudice." We conclude that the superior court's order incorporates an implicit finding of prejudice. Accordingly, we deny the petition.

I. Background

In June 2008, Willow hired McKenzie as the general contractor on an office condominium project. McKenzie started work later that month.

In August 2008, Willow obtained a construction loan from United California Bank (UCB), securing its note with a deed of trust, and an assignment of the contractor agreement with McKenzie. The deed of trust was recorded on August 21, 2008.

UCB went into receivership, and on November 6, 2009, EWB purchased its assets and liabilities, which included the deed of trust securing UCB's loan to Willow.

On November 18, 2009, McKenzie recorded a mechanic's lien on the project, asserting that Willow owed it \$268,397.70. On February 10, 2010, six days before the 90-day limitations period on an action to foreclose the lien expired, McKenzie filed suit against Willow and 50 Doe defendants, asserting causes of action for breach of contract, foreclosure of the mechanic's lien, quantum meruit, and account stated. A week later, McKenzie filed a first amended complaint correcting the amount claimed. Neither complaint named UCB or EWB as a defendant.

In December 2009, Willow defaulted on its construction loan. In January 2010, EWB recorded a notice of default and election to sell the project, which it ultimately purchased at the foreclosure sale.

In March 2010, after McKenzie's president learned that EWB's interest in the project was subordinate to McKenzie's because McKenzie had started work before UCB recorded its deed of trust, McKenzie applied ex parte for leave to file a second amended complaint adding EWB as a defendant. The court granted the application, and McKenzie filed its second amended complaint. EWB answered, asserting as an affirmative defense that former Civil Code section 3144 barred the lien foreclosure claim against EWB.

In July 2010, McKenzie filed a motion to determine its lien priority over EWB's deed of trust. EWB opposed the motion as prematurely filed, and the court denied it.

In December 2010, EWB moved for summary adjudication of the foreclosure cause of action, asserting that it was "null and void" as a matter of law because McKenzie had not named UCB or EWB as defendants until "well after" the statute of limitations expired, and when it finally did so, it named EWB "as an additional new defendant" instead of substituting it as a Doe defendant.

The parties stipulated to mediation, which was set for February 2011. In its mediation statement, EWB briefed the relation back doctrine, labeling it McKenzie's "only hope" of joining EWB as a defendant. The mediation failed, and the next day, without leave of court, McKenzie filed a "Doe Amendment" purporting to substitute EWB as "Doe 1." EWB moved to strike the amendment, asserting that McKenzie's "unreasonable delay in filing the DOE amendment (10 months after filing the [second amended complaint]) specifically prejudiced EWB." EWB asked the court to order McKenzie to pay EWB \$9,083.50 in fees in the event the court denied EWB's motion.

In March 2011, the court heard arguments on EWB's motions to strike and for summary adjudication. The court struck the Doe amendment, ruling that allowing it to stand would "deprive EWB of the opportunity to file an evidence-based motion arguing

that [McKenzie] unreasonably delayed filing the amendment. (See *A.N. v. County of Los Angeles* (2009) 171 Cal.App.4th 1058, 1067 [A.N.]) . . . [T]he Court finds it is appropriate to grant EWB's motion . . . without prejudice to [McKenzie] bringing a noticed motion for leave to substitute EWB for Doe 1." The court instructed McKenzie to "present evidence explaining the reasons for the delay" and advised EWB to "present all arguments and evidence why the proposed amendment should be denied."

The court denied EWB's motion for summary adjudication, finding that McKenzie had no actual knowledge of EWB's interest in the project when it filed its original complaint, and therefore, it was not required to name EWB in its original complaint. The court found that McKenzie acquired actual knowledge on March 12, 2010 at the latest; at that time it became incumbent on McKenzie to amend its complaint to name EWB as an additional defendant. The "ultimate question," the court explained, was whether a Doe amendment would relate back to the original complaint. "Unreasonable delay in filing an amendment after actually acquiring knowledge of a fictitiously named defendant's identity can bar a plaintiff's resort to the fictitious name procedure," the court wrote. "The defendant must show not only that the plaintiff was dilatory but that [the] defendant suffered specific prejudice from the delay, i.e., prejudice apart from the prejudice generally presumed from the policy of the statute of limitations. [Citation.] . . . [T]he issues of unreasonable delay in filing a Doe amendment and prejudice should be heard in the context of a noticed motion, brought by [McKenzie], for leave to file a Doe amendment."

On April 1, 2011, McKenzie filed a motion for leave to substitute EWB as a Doe defendant. McKenzie's counsel explained in his supporting declaration that "[t]he Doe Amendment was not filed before February 2, 2011, because EWB did not object to its joinder via the [second amended complaint] until the summary [adjudication] papers filed on December 22, 2011." Counsel also asserted that "[i]n addition to its non-objection, EWB participated in discovery and mediation as a party aware of the claims against it."

EWB argued that McKenzie's unreasonable delay had prejudiced it in at least four ways. Notwithstanding "overwhelming evidence" that McKenzie knew UCB was the construction lender, it failed to name *any* lender in its complaint, an omission that gave UCB (and EWB as its successor-in-interest) a statute of limitations defense. Allowing McKenzie to belatedly substitute EWB as a defendant would deprive EWB of that defense.

McKenzie's failure to timely sue UCB also "deprived the FDIC and EWB [of] the opportunity to properly value the loan at issue." "Without doubt," EWB argued, "if [McKenzie] had a valid cause of action against UCB, the value of the loan would have been less." Additionally, "[McKenzie's] failure to timely sue UCB deprived the FDIC and EWB from properly determining their respective set-offs and allowances with respect to the loss-sharing provisions in the FDIC/EWB Assumption Agreement."

Finally, EWB asserted that it had been forced to incur and would continue to incur an estimated \$50,000 attorney's fees and costs in connection with the mediation, its motion for summary adjudication, its motion to strike the original Doe amendment, and its opposition to the motion for leave to file the Doe amendment.

The court heard argument on April 26, 2011, and took the matter under submission, telling the parties, "I still don't know the answer to this question." "I didn't have time to go through all of this," the court explained. "And, frankly, it's going to be an issue of digesting this in order to make the decision. I'm not real clear on which way this goes frankly."

In a written order filed on July 13, 2011, the court denied the motion. The "pivotal issue," the court ruled, was whether McKenzie's motion was timely. "It was not." McKenzie had acquired knowledge of EWB's junior interest in the project "a few days before" March 12, 2010, when McKenzie applied *ex parte* to file its second amended complaint. Since the 90-day statute of limitations (former Civ. Code, § 3144) had expired on February 16, 2010, "[t]he only way" McKenzie could serve EWB was as

a Doe defendant. McKenzie did not utilize that procedure until it filed the instant motion on April 1, 2011. “Although several efforts were made, such as filing a first amended complaint, an *ex parte* application to file a second amended complaint, and an *ex parte* application seeking to name EWB as a DOE defendant, none of them were the appropriate procedure.”

On August 9, 2011, McKenzie filed a motion for relief under Code of Civil Procedure section 473, claiming that it had been deprived of its day in court “solely because of the mistake or neglect” of its counsel. McKenzie acknowledged that prejudice to the defendant can defeat such a motion but argued that no finding of prejudice had been made. The record before us does not indicate how (or if) the court ruled on that motion.

On September 9, 2011, McKenzie timely filed this writ petition and requested a stay of proceedings in the superior court. We granted the stay request and issued an order to show cause why a peremptory writ should not issue.

II. Discussion

McKenzie claims the superior court abused its discretion in denying it leave to file its Doe amendment “on the basis of delay, without [an express] finding of prejudice.” EWB argues that the court’s July 13, 2011 order included an implicit finding of prejudice. We agree with EWB.

“Where a complaint sets forth . . . a cause of action against a defendant designated by fictitious name and his true name is thereafter discovered and substituted by amendment, he is considered a party to the action from its commencement” if both pleadings seek relief on the same general set of facts. (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 599; Code Civ. Proc., § 474.) However, unreasonable delay in filing an amendment after acquiring actual knowledge of the Doe defendant’s identify can bar a plaintiff’s resort to the fictitious name procedure.

(*Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 938-939.) “[A] defendant named in an action by a Doe amendment . . . may challenge the amendment by way of an evidence-based motion, which argues that the plaintiff ‘unreasonabl[y] delayed’ . . . filing of the challenged amendment. ‘[U]nreasonable delay’ . . . includes a prejudice element, which requires a showing by the defendant that he or she would suffer prejudice from plaintiff’s delay” (*A.N., supra*, 171 Cal.App.4th at p. 1067; *Sobek & Associates, Inc. v. B & R Investments No. 24* (1989) 215 Cal.App.3d 861, 870 [where contractor seeking to foreclose a mechanic’s lien belatedly substituted bank as a Doe defendant, reversing judgment against successor investment company and remanding with instructions that the trial court consider evidence of unreasonable delay and prejudice from the amendment of the complaint].)

We review an order denying leave to amend a pleading for abuse of discretion. (*A.N., supra*, 171 Cal.App.4th at p. 1067.)

“‘A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.’” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) “[W]hatever uncertainties may exist in the findings of the court are to be so resolved, if reasonably possible, to support the judgment rather than to defeat it.” (*Ensele v. Jolley* (1922) 188 Cal. 297, 302-303.)

Here, the superior court expressly found that McKenzie acquired knowledge of EWB’s interest in the project and knew that its own lien was senior to EWB’s lien “a few days before . . . March 12, 2010,” but did not *properly* seek to add EWB as a Doe defendant until almost a year later. McKenzie does not seriously challenge the court’s conclusion that its motion was not timely. The only issue is whether the order implicitly incorporates a finding of prejudice. We think it does.

It is apparent from the record before us that the court understood the relevant inquiry. In its order on EWB’s motions to strike and for summary adjudication, the court

explained that the “ultimate question” was whether the Doe amendment would relate back to the original complaint. Citing *A.N.*, the court apprised the parties that unreasonable delay can bar a plaintiff’s resort to the fictitious name procedure if the defendant suffered prejudice. The court invited McKenzie to notice a motion presenting “evidence explaining the reasons for the delay,” and it advised EWB that its opposition should “present all arguments and evidence why the proposed amendment should be denied.”

The parties briefed the prejudice issue at length. McKenzie cited the liberal policy in favor of amendment and attributed what it characterized as only a “six month” delay to “the actions and representations of EWB.” When EWB “finally” raised an objection to its joinder, McKenzie “immediately” filed its Doe amendment. The delay was a mere “procedural error,” easily curable before trial.

EWB countered McKenzie’s argument with four distinct assertions of prejudice resulting from the unreasonable delay, claiming first that the failure to timely name USB or EWB as a defendant caused EWB to overvalue the loan, which “without doubt” would have been less had McKenzie had a valid cause of action. The delay also detrimentally affected EWB’s and the FDIC’s determination of their respective set-offs and allowances with respect to the loss-sharing provisions in the FDIC/EWB Assumption Agreement. EWB also cited its “inability to locate former employees of UCB involved in the loan,” who could provide “critical information.” EWB also noted the “considerable” sums it had expended on fees “that would not have been incurred had UCB and EWB been properly and timely served.” The parties vigorously argued these positions at the hearing.

Although the order the court issued several months later did not include an explicit finding of prejudice, the record compels us to conclude that such a finding was implied. (*A.N.*, *supra*, 171 Cal.App.4th at p. 1068.) In *A.N.*, the Court of Appeal affirmed an order quashing service of a belated Doe amendment, finding that the trial court’s order, which

did not include express findings, “implicitly incorporate[d] a finding of prejudice.” (*A.N.*, at pp. 1068, 1070.) The appellate court explained that its inference was confirmed by the trial court’s expression of concern at the hearing about drawing the belatedly-identified Doe defendants “‘into this spinning vortex shortly before trial.’” (*A.N.*, at p. 1069.)

Here, as in *A.N.*, the court’s statements throughout the proceedings confirm that it made an implied finding that EWB was prejudiced by McKenzie’s dilatory filing. Where, as here, the court correctly explained the legal standard, instructed the parties to brief the prejudice issue, heard their arguments, and took the matter under submission for the express purpose of “digesting” those positions, it would defy logic for us to suppose the court ignored a critical component of the relevant inquiry. We thus infer a finding of prejudice, and conclude that the court did not abuse its discretion in denying McKenzie’s motion. (*A.N.*, *supra*, 171 Cal.App.4th at p. 1067.)

McKenzie’s efforts to distinguish *A.N.* do not change our conclusion. We do not read *A.N.* to apply *only* where there is “a lack of preparatory time or a looming trial date,” nor do we find it significant that McKenzie’s almost one-year delay was “less than half of the delay in *A.N.*” Here, EWB identified specific ways in which it was prejudiced by McKenzie’s dilatory filing. McKenzie’s writ petition nowhere challenges the adequacy of EWB’s showing of prejudice. Its only assertion of error is that the superior court’s order denying McKenzie’s motion for leave to file a Doe amendment “made no mention of prejudice.” As we have already explained, the lack of an express finding of prejudice is of no moment here, because the order incorporates an implicit finding of prejudice.

III. Disposition

The petition is denied, and the temporary stay is vacated. Costs in this original proceeding are awarded to real party in interest.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Elia, J.