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

NHU HAN LIEN, et al.,

Plaintiffs and Appellants,

v.

ROSALIE CARTWRIGHT,

Defendant and Respondent.

H040367

(Santa Clara County

Super. Ct. No. 1-11-CV208979)

Plaintiffs and appellants Nhu Han Lien and Jacqueline Kieu (Plaintiffs) filed suit against a number of defendants relating to the business operations of a restaurant they opened in July 2004 and closed in August 2008. They purport to appeal from an order summarily adjudicating seven of 11 causes of action in their second amended complaint. This appeal is limited to the portion of the order relating to one of the defendants—Rosalie Cartwright. We conclude the challenged order is not an appealable order. We will therefore dismiss the appeal.

FACTS & PROCEDURAL HISTORY

In 2004, Plaintiffs, Rosalie Cartwright, and two other individuals entered into an agreement to operate a restaurant—the Anise Café. The business was incorporated in

March 2004 and the café opened in July 2004. Cartwright was responsible for day-to-day operation of the café.

In June 2008, Plaintiffs filed a petition for writ of mandate in the superior court (Case No. 1-08-CV115979) in which they alleged that Cartwright had (1) denied them access to the café's financial records, (2) issued inaccurate tax statements to the shareholders, and (3) embezzled money from the café. The café closed in August 2008.

In September 2011, Plaintiffs filed the instant action against Cartwright; her husband Thang Tran; Thang Tran, M.D., Inc. (hereafter "Tran, Inc."); Auraderm, Inc. (a corporation owned by Cartwright); and Cecilia Lopez (Cartwright and Tran's neighbor). The operative pleading is the second amended complaint. Plaintiffs allege that Cartwright (1) fraudulently induced them to invest in the café "for the wrongful purpose of using corporate assets and opportunities for all Defendants' personal gain," (2) provided them only limited financial information, (3) refused to provide them with all of the café's books and records, (4) failed to file tax returns, (5) provided inaccurate and fraudulent form K-1 tax statements to the shareholders, (6) misappropriated café assets, and (7) interfered with a proposed sale of the café.

The second amended complaint contains 14 causes of action. The seventh and ninth causes of action were labeled "Reserved" and contained no allegations. The 14th cause of action alleged breach of fiduciary duty by Cartwright and appears to be duplicative of the third cause of action. In September 2012, the trial court sustained the defendants' demurrers to the seventh, ninth, and 14th causes of action without leave to amend. (According to Plaintiffs, they agreed to withdraw those claims.)

After the demurrers were sustained without leave to amend, the following 11 causes of action remained at issue: (1) fraud against Cartwright; (2) conversion against Cartwright, Tran, Tran, Inc., and Auraderm; (3) breach of fiduciary duty against Cartwright; (4) three causes of action for constructive fraud against Cartwright; (5) civil

conspiracy against Cartwright and Tran; (6) breach of the covenant of good faith and fair dealing against Cartwright; (7) unjust enrichment against all defendants; (8) a request for an accounting against Cartwright and Tran; and (9) fraudulent transfer against Cartwright and Tran. Defendants subsequently answered the second amended complaint.

In July 2013, defendants moved for summary judgment or summary adjudication. The principal grounds for the motion were that Plaintiffs' remaining causes of action are barred by the doctrine of laches or applicable statutes of limitations. Plaintiffs opposed the motion. They relied primarily on the delayed discovery rule.

On October 11, 2013, the trial court denied the motion for summary judgment. It reasoned that the defense of laches did not apply since Plaintiffs alleged legal, not equitable, causes of action. The court also found that some, but not all, of Plaintiffs' claims were barred by the statute of limitations. The court granted summary adjudication of the first, fourth, fifth, and sixth causes of action for fraud or constructive fraud against Cartwright only. The court also granted summary adjudication of: (1) the conversion claim as to all defendants, except Tran; (2) the civil conspiracy claim against Cartwright and Tran; and (3) the unjust enrichment claim against all defendants. The court denied summary adjudication of the claims for breach of fiduciary duty and breach of the covenant of good faith and fair dealing against Cartwright, and the accounting claim against Cartwright and Tran. The court did not make a ruling on the fraudulent transfer claim because defendants did not move for summary adjudication of that claim.

Based on the trial court's orders on the demurrer and the motion for summary judgment or summary adjudication, the following five causes of action are still at issue in the trial court: (1) the second cause of action for conversion against Tran only; (2) the third cause of action for breach of fiduciary duty and the 10th cause of action for breach of the covenant of good faith and fair dealing against Cartwright; and (3) the 12th cause of action for an accounting and the 13th cause of action for fraudulent transfer against

Cartwright and Tran. After the trial court filed its order denying summary judgment and granting, in part, summary adjudication, no party filed a notice of entry of order or requested entry of judgment.

Plaintiffs filed their notice of appeal in October 2013 and this matter was fully briefed by both sides in January 2015. Cartwright did not challenge the appealability of the court's October 11, 2013 order, either by motion to dismiss or in her respondent's brief.

DISCUSSION

On appeal, Plaintiffs challenge the trial court's order granting summary adjudication of the first, second, fourth, fifth, and sixth causes of action (the claims for fraud, constructive fraud, and conversion) as to Cartwright only. Their opening brief contains the following statement of appealability: "The trial court's order *granting* the motion for summary judgment by defendant Rosalie Cartwright . . . on the first, second, fourth, fifth, and sixth causes of action, and entering *final judgment* thereon on October 11, 2013, is appealable as a final order under Code of Civil Procedure § 904.1(a)(1) because it constitutes a *final disposition of the case*." (Italics added.) The court, however, *denied* summary judgment. And its *order* of October 11, 2013, is not a final *judgment* or a "*final disposition of the case*" as to Cartwright.

An order granting summary adjudication is not appealable. Indeed, no direct appeal lies from an order granting or denying a motion for summary judgment or a motion for summary adjudication. (Code Civ. Proc., § 437c, subd. (m)(1); *Kasparian v. AvalonBay Communities* (2007) 156 Cal.App.4th 11, 14, fn. 1 (*Kasparian*).) The appeal lies from the judgment, not from the order on the motion. (*Ibid.*)

In most cases, a judgment that fails to completely dispose of all the causes of action between the parties is not appealable. (*Morehart v. County of Santa Barbara*

(1994) 7 Cal.4th 725, 743.) Instead, an order “granting summary adjudication of certain claims . . . is generally reviewable on appeal from the final *judgment* in the action.” (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 128 (*Jennings*), italics added.) In a multi-party case, if an order grants summary adjudication of some, but not all, causes of action, and there are still claims pending against one or more defendants, there is no final judgment and the plaintiff may not pursue an appeal against those defendants. (*Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1206, fn. 1 (*Tran*); see also *Canadaigua Wine Co., Inc. v. County of Madera* (2009) 177 Cal.App.4th 298, 300-302 (*Canadaigua*) [order summarily adjudicating one of three causes of action is not an appealable order].)

The order at issue in this case disposed of seven causes of action against Cartwright and the other defendants, but left four claims pending against Cartwright and three claims pending against Tran. Thus, the court may not enter a final judgment as to Cartwright or Tran, and Plaintiffs may not pursue an appeal against either of them at this point in the proceedings.

We issued an order to show cause (OSC) “why this appeal should not be dismissed on the grounds that (1) the trial court’s order of October 11, 2013_[,] denying summary judgment and granting, in part, summary adjudication is not an appealable order; and (2) there is no final or appealable judgment.” Our order cited Code of Civil Procedure section 437c, subd. (m)(1), *Jennings*, *Canadaigua*, and *Tran*. In response, Plaintiffs filed a “Notice of No Contest” in which they “find” the legal authorities cited in the OSC “compelling” and agree that this appeal must be dismissed.

The existence of an appealable judgment or order is a jurisdictional prerequisite to an appeal. (*Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1292.) Accordingly, if the judgment or order at issue is not appealable, the appeal must be dismissed. (*Don Jose’s Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115, 119.) Since this

appeal is limited to the portion of the court's order in favor of Cartwright, and that part of the order is not appealable, we will dismiss the appeal.

Plaintiffs' "Notice of No Contest" states they will file a "Request for Dismissal without Prejudice of the Appeal." We have not received that request. Even if we had received such a request, our dismissal of this appeal is with prejudice. Nothing stated herein, however, precludes the parties from filing a new appeal if further proceedings in the trial court result in a final, appealable judgment.

DISPOSITION

The appeal is dismissed. The parties shall bear their own costs on appeal.

Márquez, J.

WE CONCUR:

Rushing, P. J.

Grover, J.