Filed 2/26/19 Adeli v. Zakskorn Construction Co. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

SAID ADELI, Plaintiff and Appellant, v. ZAKSKORN CONSTRUCTION COMPANY, Defendant and Respondent.	A151572 (Alameda County Super. Ct. No. RG15761513)

This appeal raises two primary issues, one procedural and the other substantive. The substantive issue concerns whether the trial court correctly ruled, in the context of defendant's motion for judgment on the pleadings, that plaintiff's breach of contract claim is barred by the statute of limitations. The procedural issue concerns whether the trial court should have entertained the defendant's motion at all. We conclude the trial court should not have entertained the motion, which was defendant's third challenge to the pleadings and second to the operative first amended complaint. The motion sought relief the defendant previously requested and the trial court previously denied. The motion did not meet the requirements of Code of Civil Procedure section 1008[1] because defendant made no effort to show it had acted with diligence and had good cause for failing earlier to raise the argument it made in the renewed motion. The court should have declined to entertain the motion on its merits for that reason alone. We do not reach

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

the further question whether, if the motion had met the requirements of section 1008, the judge should have referred it to the judge who earlier ruled on the statute of limitations issue or could properly revisit the matter himself. Nor, having concluded the court erred in hearing the motion at all, do we need to reach plaintiff's further argument that the court's ruling was wrong on the merits as well.

BACKGROUND

Allegations

The following factual allegations are set forth in the first amended complaint and attached exhibits. Plaintiff and respondent, Said Adeli, an individual, formed a family-owned company known as Berkeley Delaware Court, LLC (BDC) to develop a mixed-use residential and commercial complex in Berkeley, California. Adeli purchased the land, formed BDC, dedicated the land to the project and arranged for BDC to obtain a $16 million construction loan to build the project. Adeli was personally involved in the project and used his resources to move it along. Adeli hired Zakskorn Construction Company (known as Zcon) as the general contractor.

Things did not go well. In 2009, the original lender was shut down by the Federal Deposit Insurance Corporation, which transferred the loan to First Citizen Bank (FCB). Around the same time, a dispute arose regarding the progress of the work and payment of the loan. BDC filed for bankruptcy protection, and Zcon sued Adeli individually as the owner of the project alleging Adeli was liable as BDC's alter ego.

In 2010, Adeli, BDC, FCB and Zcon entered into a written settlement agreement providing that Zcon would remain as the general contractor and timely complete the project, Adeli would relinquish control over the project, and the construction loan would be discounted with the result that Adeli's equity interest in BDC would increase in value. The settlement agreement required BDC to dismiss the bankruptcy petition and obtain bankruptcy court approval of the settlement agreement or approval of a reorganization plan consistent with it and required BDC to dismiss with prejudice its action against Adeli.

Zcon did not complete the project in January 2011, when Adeli apparently believed it was supposed to be done, or by the February 2011 date on which Zcon assured Adeli the project would be completed with the extra time to which Zcon claimed it was entitled. On March 11, 2011, Adeli issued a notice of default and demand to cure to Zcon stating BDC declares Zcon in default of its obligations under the settlement agreement by failing to complete construction by the date required and demanding a cure within seven days. The notice was signed by Adeli, as BDC's "Managing Member."

Zcon failed to cure the noticed default within seven days and further breached the settlement agreement by excluding Adeli from possession of the project and submitting an invoice for unearned money falsely stating it had completed the work. Zcon's breaches caused Adeli to lose the project because he could not obtain financing for the unfinished project to pay off the construction loan by its due date, with the result that Adeli lost at least $7 million he had invested in the project.

Trial Court Proceedings

In March 2015, Adeli and BDC filed the original complaint in this case against Zcon, asserting two causes of action, one for breach of contract and one for an accounting and restitution. In May 2015, BDC requested and the clerk entered dismissal of its claims with prejudice. In July 2015, Zcon filed an answer with a general denial and affirmative defenses. In May 2016, Zcon filed a motion for judgment on the pleadings with a request for judicial notice of documents showing BDC's claims against Zcon had been purchased by Zcon and FCB in the bankruptcy proceedings. In the motion, Zcon argued Adeli lacked standing to pursue either cause of action because he was not a party to the construction agreement; BDC, the contracting party, owned the claims against Zcon; BDC had sold those claims in the bankruptcy; and BDC had dismissed its claims in this case. Zcon also argued Adeli's claims were barred by the four-year statute of limitations because Adeli had claimed the settlement agreement required construction to be completed, but it had not been completed, by January 2011. Adeli filed this suit in March 2015, more than four years after the alleged breach.

Judge Robert Freedman, to whom the case had been assigned for all purposes, denied the motion insofar as it claimed Adeli lacked standing to pursue the causes of action, concluding that the allegations and matters subject to judicial notice did not establish as a matter of law that Adeli lacked any standing to pursue the claims as an individual. The court observed that the claims were for breach of the settlement agreement, to which Adeli was party, and the documents did not show any claims by Adeli had been purchased, waived or released. Whether the breached duties were owed to BDC alone and not to Adeli, and whether Adeli had suffered any individual harm, could not be determined as a matter of law on the record before the court. However, Judge Freedman granted the motion with leave to amend insofar as it asserted Adeli's claims were barred by the statute of limitations, because Adeli had failed to provide authority for the proposition that the statute did not begin to run until the notice of default was served and the time to cure had expired. The court also granted the motion with leave to amend as to the second cause of action concluding Adeli had failed to allege sufficient facts to support a fiduciary relationship or other grounds for an accounting or restitution.

Adeli then filed a first amended complaint, to which Zcon demurred. Zcon again argued the contract claim was barred by the statute of limitations because Adeli had admitted it was required to be completed by January 2010 and was not completed by that date. Zcon again argued as well that Adeli had failed to allege sufficient facts to support his claim for an accounting and restitution.

After requesting supplemental briefing, in a thoughtful three-page, single-spaced order issued on November 28, 2016, Judge Freedman overruled Zcon's demurrer to the contract cause of action. Reviewing the authorities cited, and some he found on his own, Judge Freedman found the legal issue whether a right of action accrues and the statute of limitations commences to run immediately upon breach or after a contractually required notice of default is issued and the time for cure expired was not resolved by any authority directly on point. He concluded it was "more appropriate to exercise caution and permit the case to proceed past the pleading stage, where the matter can be further tested on an

evidentiary record." Judge Freedman also recognized that Adeli had alleged breaches other the failure to timely complete the project, and that such breaches had occurred after March 11, 2011. Because a portion of the contract cause of action was thus based on conduct within the limitations period, this was sufficient to overcome the statute of limitations bar as to the cause of action. As to Adeli's accounting/restitution/unjust enrichment cause of action, however, the court sustained the demurrer without leave to amend because the first amended complaint remained "unclear and deficient as to Zcon's alleged receipt of benefits at Adeli's (as distinguished from BDC's) expense" and Adeli had failed to allege other facts that would "support the equitable remedy of an 'accounting.' " In December 2016, Zcon filed an answer to the first amended complaint.

On February 1, 2017, the case was reassigned for all purposes to Judge Paul Herbert. Three weeks later, Zcon filed a third pleading challenge, its second to attack Adeli's first amended complaint, this time by way of a motion for judgment on the pleadings. As with its prior pleadings challenges, it sought judicial notice of various pleadings, declarations, and orders from this action and various prior proceedings. Except for three pleadings relating to the demurrer, all documents Zcon submitted with the motion for judgment on the pleadings had been submitted with the demurrer. There were no new documents or evidence that had not previously been presented to Judge Freedman.

Nor was Zcon's basic approach new or different; it again claimed the statute of limitations barred Adeli's first cause of action for breach of contract. This time, however, it added a new twist to that argument, focusing on the fact that the notice of default Adeli had served on Zcon was "issued to Zcon by BDC only." The fact that Adeli did not issue such a notice of default on his own behalf, Zcon argued, had not been considered by Judge Freedman in his prior motion for judgment on the pleadings and demurrer rulings. The result of Adeli's failure to issue his own notice of default, Zcon further argued, was that the four-year limitations period on his breach of contract cause of action commenced to run when the project was not completed on January 25, 2011, and barred Adeli's claim because it was not filed until March 9, 2015. Relatedly, Zcon

argued that Adeli's claims that Zcon also breached the settlement after March 2011 by excluding Adeli from possession of the project, submitting an improper invoice for unearned funds, and failing to account for the expenditure of construction loan proceeds should be dismissed on their merits because, under the settlement agreement, Adeli was required to issue a notice of default to Zcon as to those alleged breaches as a prerequisite to suing for such breaches.[2]

The notice of default was at the center of Zcon's argument on this motion for judgment on the pleadings, its third challenge to Adeli's pleadings. That notice had been attached to Adeli's original complaint filed in March 2015, and first amended complaint filed in July 2016, and Zcon had included it in the request for judicial notice and discussed it in the memorandum of points and authorities filed in support of its August 2016 demurrer. Further, as Zcon acknowledged in its brief in support of the motion, the statute of limitations argument, and in particular the date of accrual of a breach of contract claim when the contract requires the non-breaching party to give a notice of default, was squarely before Judge Freedman, who even sought supplemental briefing on the issue, in the prior demurrer proceedings.

Zcon submitted no declaration in support of its motion for judgment on the pleadings, and nowhere in its papers did it attempt to explain why it could not have raised its newest argument—that the notice of default was on behalf of BDC only and not Adeli—in the context of its demurrer. It would have been hard pressed to make such a showing since the same key document and no new documents were the basis for its motion.[3]

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[2] This last was a merits argument rather than a statute of limitations argument, since these alleged breaches occurred within four years of when Adeli filed the complaint.

[3] Indeed, it had previously argued in its reply brief on the demurrer that Adeli's additional alleged breaches occurring after the January 2011 completion date were barred because Adeli had issued no notice of default as to those breaches; thus, it could easily have argued that the notice of default Adeli had issued regarding the failure to timely complete the construction was on behalf of BDC only as well. In any event, because

Adeli opposed the motion, arguing it was an improper and untimely motion for reconsideration of Judge Freeman's prior demurrer order, citing section 1008, subdivisions (a) and (b). Adeli also argued Zcon should be judicially estopped from taking the position that Adeli was required to issue a notice of default separate from the notice issued by BDC because Zcon had previously alleged that BDC and Adeli were alter egos. Third, Adeli argued that whether the notice of default was issued for himself as well as BDC was a factual issue, and that, regardless, considering Zcon's failure to cure, sending another notice would have been an idle act.

Judge Herbert, to whom the case had since been reassigned for all purposes, heard the motion and granted it. He held it was not an improper motion for reconsideration because it did not ask the court to "reconsider," "modify, amend, or revoke" its prior ruling within the meaning of section 1008, subdivision (a). Rather Zcon was "raising a new argument as to an asserted deficiency in the First Cause of Action that was not specifically addressed in the prior order." Nor did the motion fall within subdivision (b) of section 1008 because, although it did "seek the same relief sought in the prior demurrer to the FAC (i.e., dismissal of the First Cause of Action)," it was not made " 'on the same grounds' raised in the demurrer."

Addressing the merits, Judge Herbert held that Adeli's failure to provide individual notice and opportunity to cure to Zcon precluded him from pursuing his breach of contract cause of action. First, he held that the allegations of the complaint and the notice of default that was an exhibit (B) to the complaint "show on their face that the Notice of Default . . . was given solely by BDC, and not by Adeli." Second, he rejected Adeli's judicial estoppel argument because Zcon's alter ego complaint against Adeli was not totally inconsistent with its position that Adeli was required to issue a separate notice of default and because, having settled that prior case, Zcon was not successful in asserting its position that Adeli and BDC were alter egos. Third, he held Adeli had failed to allege or show that individual notice of default was excused as an "idle act." Adeli had

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Zcon raised this argument about the other alleged breaches for the first time in its reply brief, Judge Freedman declined to consider it.

not alleged that Zcon could not have cured within the 7-day period had Adeli sent an individual notice of default or included himself in the notice that was sent. The notice referred to paragraphs of the settlement agreement that referred only to Zcon, FCB and BDC, and not to Adeli. "The fact that these provisions . . . do not make any reference to obligations owed individually to Adeli," the court held "underscore that Adeli did not contend at the time of the notice of default that Zcon had breached any obligations owed to him individually." These circumstances "preclude Adeli's belated attempt to bring a breach of contract claim against Zcon in his individual capacity, after BDC dismissed its breach of contract claim in this action in light of Zcon's argument that the claims for breach of contract against Zcon were purchased and released in the context of the bankruptcy proceeding."

The court also held that Adeli's claim that Zcon breached the settlement agreement by failing timely to complete the construction was barred by the statute of limitations because, since the notice of default was sent only on BDC's and not on Adeli's own individual behalf Adeli could not rely on the notice and any subsequent failure to cure to extend the time for commencement of the limitations period. While noting the lack of clarity in the law regarding whether a notice of default and failure to cure begins the accrual of the cause of action, Judge Herbert held it was clear "that a party who has not given the required notice of default is not entitled to take advantage of any principle that might (or might not) apply to toll the accrual of the cause of action until after the expiration of the notice to cure period in the notice of default. [Citing *Wittman v. Board of Police Commissioners* (1912) 19 Cal.App. 229, 232 and *Clark v. Tide Water Associated Oil Co.* (1950) 98 Cal.App.2d 488, 490.]"

Finally, the court held that Adeli's failure to give any notice of the additional breaches Adeli claimed (excluding Adeli from possession of the project, billing for funds not earned and failing to account for construction loan proceeds) barred any remedy for such further alleged breaches. Further, by failing to refer to the provisions of the settlement agreement he claimed were breached, Adeli had not sufficiently pled these as contractual breaches, as was his failure to allege that such obligations were owed to Adeli

individually. Even if he had so alleged, the court observed, "the terms of the Settlement Agreement appear to be inconsistent with any such contention, as the Settlement Agreement expressly provides that FCB was to be responsible for overseeing payments and that Adeli was not to be personally involved in directing the project." The court concluded that these " 'further' breaches" did not support an action for breach of contract by Adeli individually, and that his attempt to assert them separately from any breaches to BDC "substantiates the prerequisite for Adeli to have given notice of default for such claims separate from the notice of default made by BDC." The court denied Adeli's request for leave to amend because Adeli had not shown how any new allegations could remedy the fatal deficiencies.

The court entered judgment on April 18, 2017, from which Adeli timely appealed.

DISCUSSION

On appeal, Adeli again argues that the demurrer and (second) motion for judgment on the pleadings addressed the same statute of limitations issue and the latter is an improper "reconsideration motion." He contends Judge Herbert erred in reconsidering Judge Freedman's determination that the statute of limitations issue should be decided on an evidentiary record rather than at the pleading stage. He also argues the motion fails to satisfy the requirements of section 1008, subdivisions (a) or (b), including "that good cause be shown for failing to provide earlier the new facts, circumstances or law." He points out that the matters judicially noticed in connection with the motion for judgment on the pleadings, including the notice of default, were part of the record before Judge Freeman when he ruled on the demurrer.

Zcon's respondent's brief argues that the arguments it raised by its motion for judgment on the pleadings are different from those it presented to Judge Freedman, and the latter is not, therefore, a motion for reconsideration. Zcon fails to address whether its motion was governed by section 1008, subdivision (b) and ignores Adeli's contention that it did not meet the requirements of that subdivision. Zcon does not contend it showed or could show any justification for failing to raise its most recent argument—that

the notice of default did not include Adeli individually and that his claim is therefore barred—at the time it demurred to the first amended complaint.

We turn first to the section 1008 issue since, if Adeli is correct that Judge Herbert should not have entertained Zcon's motion, we need not address the merits of his ruling.

We begin with section 1008. Subdivision (a) of that section states, "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." Subdivision (b) provides, "A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion." Subdivision (e) states, "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. *No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section.*" (Italics added.)

In discussing this statute, the courts have recognized that section 1008, subdivisions (a) and (b) describe two different types of motions. Subdivision (a) applies

where a party seeks to "modify, amend, or revoke [a] prior order," and is referred to as a "motion for reconsideration." (*California Correctional Peace Officers Assn. v. Virga* (2010) 181 Cal.App.4th 30, 42–43 (*California Correctional Peace Officers*).) Subdivision (b), on the other hand, governs what is referred to as a "renewed motion," which though it does not seek to modify or set aside a previous order, is a renewed application for an order that has previously been denied or conditionally granted based on new facts, circumstances or law. (See *California Correctional Peace Officers*, at pp. 44–45.) Parties often conflate the two types of motions, as the parties did here, but they are not the same. A true motion for reconsideration that seeks, in effect, to change or revoke a prior order is distinct from a motion for renewal that seeks the same relief that has previously been denied but asserts a different factual or legal basis for that relief. (See *id*. at p. 45.)

Only a true reconsideration motion is required to be filed within 10 days of notice of the prior ruling. (§ 1008, subd. (a).) But both reconsideration motions under subdivision (a) and renewal motions under subdivision (b) require the moving party to make a similar showing. (Compare *id*., subd. (a) ["The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown"] with *id*., subd. (b) ["it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown"].) This language has been construed, for either type of motion, to require an affidavit showing not only what new or different facts, circumstances or law are claimed but also that the moving party exercised diligence, including "a satisfactory explanation for not presenting the new or different information earlier." (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 833 (*Even Zohar Construction*); *California Correctional Peace Officers*, *supra*, 181 Cal.App.4th at p. 46.) The reason for these requirements has its roots in the purpose of section 1008. As our high court has stated, section 1008 was intended " 'to reduce the number of motions to reconsider and

renewals of previous motions heard by judges in this state.' " (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1098 (*Le Francois*) [quoting Stats. 1992, ch. 460, § 1, p. 1831].)

" 'Without a diligence requirement the number of times a court could be required to reconsider its prior orders would be limited only by the ability of counsel to belatedly conjure up a legal theory different from those previously rejected, which is not much of a limitation.' " (*California Correctional Peace Officers*, *supra*, 181 Cal.App.4th at p. 46.) Similarly, section 1008 avoids the congestion courts could face if parties could simply "make *seriatim* motions that seek the same relief." (*California Correctional Peace Officers*, at p. 45.) Under subdivision (b), they cannot. "[R]ather, Defendants [are] obligated to put forth all of their reasons for [the relief they seek] when they made their initial request." (*California Correctional Peace Officers*, at p. 45.)

Judge Herbert entertained Zcon's motion and decided it on the merits after first addressing Adeli's argument that it violated section 1008. He held that the motion for judgment on the pleadings was not one for reconsideration under section 1008, subdivision (a), but did not decide whether it was a "renewed motion" under section 1008, subdivision (b). Rather, he concluded that even if the motion fell within section 1008, subdivision (b), Zcon had effectively met the requirements of that section that it show "by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown."

We do not agree. We find no fault with Judge Herbert's determination that the motion for judgment on the pleadings did not seek to revoke or modify Judge Freedman's prior order overruling Zcon's demurrer (in part), and thus was not a "motion for reconsideration" within the meaning of section 1008, subdivision (a). However, we do not agree with his conclusion that the motion was not a renewal motion under subdivision (b). Indeed, it was. The motion for judgment on the pleadings sought the same relief as Zcon had previously sought from Judge Freedman in its demurrer, and which he had previously denied, namely dismissal of the breach of contract cause of action. A motion that seeks the same relief as a previously denied motion is "an

application for the same order" within the meaning of section 1008, subdivision (b), regardless of " ' "the label attached to it." ' " (*California Correctional Peace Officers*, *supra*, 181 Cal.App.4th at p. 43.) We also disagree with Judge Herbert's determination that Zcon's motion effectively satisfied the requirements of section 1008, subdivision (b).

Zcon did not comply with section 1008's affidavit requirements as articulated by this and other courts. First, Zcon submitted no affidavit or declaration in support of its motion. Nor did it identify any "new or different facts, circumstances, or law" as required by section 1008, subdivision (b). Judge Herbert concluded that the memorandum of points and authorities and request for judicial notice Zcon submitted effectively complied, because they provided a description of the prior proceedings and set forth the new or different facts or circumstances on which the renewed motion is based. We disagree. Moreover, as Adeli points out, and as we have already stated, the courts have interpreted section 1008, subdivisions (a) and (b) also to require a showing of diligence, that is, good cause for failing earlier to provide the new or different facts, circumstances or law. (*Even Zohar Construction*, *supra*, 61 Cal.4th at p. 833; *California Correctional Peace Officers*, *supra*, 181 Cal.App.4th at p. 46 & fns. 14 & 15.) Zcon made no attempt to show diligence in its motion for judgment on the pleadings; nor was there any basis in its request for judicial notice or memorandum from which a finding of diligence could be made. There was no new evidence; the document on which Zcon relied for its new argument in that motion that Adeli issued a notice of default only on BDC's and not his own behalf, was attached to Adeli's first amended complaint and was part of the record before Judge Freedman in ruling on the demurrer. While there was a new twist on its statute of limitations argument and a new merits argument, both based on the purportedly deficient notice of default, there is simply no hint in Zcon's moving or reply papers below, or in its respondent's brief, of any reason it could not have made precisely the same arguments in its earlier motions. Indeed, as we have indicated, Zcon partially made the merits argument in its reply brief in support of the demurrer, arguing Adeli had failed to provide a notice of default with respect to the later alleged breaches of the contract. (See *ante*, footnote 2.) For the second assigned judge to entertain these

arguments, which either were not made at all or not timely made (before the reply brief) in the earlier demurrer was to invite precisely what section 1008, subdivision (b) prohibits: seriatim motions seeking the same relief again and again on different grounds.

In short, we conclude it was error for the court to entertain and decide Zcon's second motion for judgment on the pleadings. No matter how well intended, its doing so ran afoul of the Legislature's directive in section 1008, subdivision (b). We are aware that our Supreme Court has held that courts may, on their own motion, reconsider their own prior rulings, though such reconsideration "must formally begin with the court on *its own motion*." (*Le Francois*, *supra*, 35 Cal.4th at p. 1108.) The court left open the question "when and under what circumstances one judge may revisit a ruling of another judge." (*Id*. at p. 1097, fn. 2.) Since neither party has addressed these issues, we will not address them either. Suffice it to say that the court failed to act within the limits of section 1008 or in the manner permitted by the California Supreme Court's holding in *Le Francois*.

We express no opinion on the merits of Judge Herbert's ruling.

DISPOSITION

The judgment is reversed and remanded for further proceedings consistent with this opinion.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.