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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ROSEMEAD BOULEVARD PROPERTIES, LLC, Plaintiff and Appellant, v. ESTEEM CLEANERS, INC., et al., Defendants and Respondents.	B213605 (Los Angeles County Super. Ct. No. BC384980)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory Alarcon, Judge. Reversed.

Kellman Hoffer, Matthew N. Falley for Plaintiff and Appellant.

DiJulio Law Group, R. David DiJulio, Michael M. Bergfeld, Tiffany Krog for Defendants and Respondents.

This case involves the interpretation of a lease and whether the complaint by plaintiff, landlord Rosemead Boulevard Properties, LLC (hereinafter, Rosemead Properties), sufficiently alleged an issue of hazardous environmental conditions to permit it to perform invasive test drilling inside of the store of defendant, tenant Esteem Cleaners, Inc. (Esteem), to facilitate efforts by Rosemead Properties to refinance its property. We find that because a preliminary environmental site assessment report—an exhibit with the proposed second amended complaint—reveals (1) county public health officials found possible hazardous chemical use (i.e., dry cleaning fluid) on the site during the early part of Esteem's tenancy, and (2) Esteem's assignor, a prior dry cleaning establishment, had likely used such hazardous chemicals, environmental issues exist which may be the result of Esteem's activities or for which it might be responsible as assignee.

Accordingly, sufficient facts were alleged in the proposed second amended complaint to permit Rosemead Properties to enter the premises and conduct testing in a reasonable and nonobstructive manner, consistent with the lease provisions and the implied covenant of good faith and fair dealing which allows investigation of an environmental hazard associated with the tenant. The trial court thus erred in dismissing the action without leave to amend, and we reverse.

FACTUAL AND PROCEDURAL SUMMARY

As set forth in its first amended complaint, Rosemead Properties owns a shopping center. Esteem Cleaners, by assignment from a prior tenant effective January of 2005, is one of several tenants at the shopping center. Rosemead Properties attempted to refinance the property, and in conjunction with the refinancing it was required to perform a Phase I environmental review of the property. Based on the historic use of the property, the Phase I review recommended a Phase II testing, which would require a number of borings approximately 15 feet deep on Esteem's property to obtain soil samples. The purpose of those tests would be to ascertain the nature and extent of any soil contamination.

The lease between the parties contains several provisions to which the parties point. The lease provides that the tenant paying rent and not in violation of the terms of the lease "shall have quiet possession of the Premises during the entire term of this Lease . . . ." An addendum to the lease expressly prohibits the tenant from causing any environmental contamination to the premises: "HAZARDOUS MATERIALS. (1) Restriction of Use. Tenant shall not use or permit the use of Premises, including, without limitation, the groundwater on or under the Premises, in violation of any federal, state or local laws, ordinances or regulations, now or hereafter in effect, relating to environmental conditions, industrial hygiene or Hazardous Materials . . . on, under or about the Premises."[1] The lease also contains a general use restriction: "Tenant agrees that it will not use or permit any person to use the Premises for any use or purpose in violation of any governmental law or authority and that Tenant shall at its sole cost and expense promptly comply with all laws, statutes, ordinances and governmental rules, regulations and requirements now in force or which may hereafter be in force and with the requirements of any board of fire underwriters or other similar body now or hereafter constituted relating to or affecting the condition, use or occupancy of the Premises . . . ."

In January of 2008, Esteem refused to give Rosemead Properties permission to have an environmental consultant enter inside its premises to perform the Phase II soil boring tests. Esteem asserted that Rosemead Properties had no right to enter the property for such testing. Nonetheless, Esteem agreed to grant permission to do the testing if it could obtain information about the testing, if the testing could be performed after hours or on a Sunday, and if Esteem would be indemnified for any loss due to the testing itself. Ultimately, however, Rosemead Properties rejected the indemnity and hold harmless

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[1] The lease also provides that, "Landlord, its agents and employees, shall have free access to the Premises during all reasonable hours for the purpose of examining the same to ascertain if they are in good repair and to make reasonable repairs which Landlord may be required or permitted to make hereunder." We note that it is unnecessary to determine whether the notion of contamination fits within the rubric of a failure to keep in "good repair" within the meaning of the lease.

agreement drafted by Esteem's counsel because Esteem apparently attempted to renegotiate several key provisions of the lease and sought to avoid liability for any environmental contamination.

This litigation ensued. Rosemead Properties alleged causes of action for breach of the lease agreement, declaratory relief, and injunctive relief. It sued Esteem, as well as defendant Ray Rangwala, Esteem's president and chief executive officer, who under the terms of the lease was a guarantor of the tenant's obligations under the lease.

Rangwala demurred to all three causes of action. He demurred on the ground that he was not properly a defendant because he was not a party to the lease, but instead was only a guarantor, and that the court had not yet determined that Esteem was in breach of the lease. Esteem demurred to only the cause of action for declaratory relief. Esteem demurred on the ground that the claim for declaratory relief was fatally uncertain as to whether the dispute was over its failure to allow Rosemead Properties to enter its premises, or whether it concerned Esteem's refusal to allow Rosemead Properties to conduct environmental testing.

Neither Rangwala nor Esteem argued that Rosemead Properties could not state a claim because it had no right under the lease to conduct Phase II environmental testing on its premises. Hence, Rosemead Properties did not brief at that point the question of whether it could state a claim based on an implied right to enter the premises to conduct reasonable environmental testing.

The trial court sustained the demurrers without leave to amend, and it did so on grounds not raised by defendants in their demurrers. The trial court concluded as follows: "The lessor and lessee were free to contract a specific term to permit environmental and/or destructive testing. However, the lease indicates that this was never contracted for. [¶] Accordingly, the [lessor] seeks relief [based on] a non-existent provision in the lease, with the position that 'free access' necessarily includes 'destructive testing.' [¶] Further, [the lessor] can only show that it would not be able to obtain financing, but that is a financing issue that . . . does not involve the defendant[s]. [¶] The parties to the lease could have provided that the lease would permit destructive

testing to insure that the property was not being contaminated. However, that was not contracted for. Without such a contractual provision, the complaint is without merit."

The trial court further found that Rosemead Properties could not cure the first amended complaint by amendment. It thus sustained the demurrers without leave to amend. Esteem then filed an amended motion for judgment on the pleadings directed at the remaining causes of action for breach of a covenant of the lease and injunctive relief.

Rosemead Properties filed a motion for leave to file a second amended complaint. The proposed second amended complaint alleged that it had conducted Phase I environmental testing of the property in compliance with relevant federal codes. Rosemead Properties annexed as an exhibit to its proposed second amended complaint a voluminous study of the property by Partner Engineering and Science, Inc., entitled "Phase I Environmental Site Assessment." This Phase I study was previously referred to in the first amended complaint. However, the actual text of the Phase I study had not been included as an exhibit with the first amended complaint, and the complete text of the study revealed additional details about the environmental hazards.

The Phase I Environmental Site Assessment report revealed, in pertinent part, that a portion of the property in question had been used as a gas station from approximately 1949 until the early 1980's, and that it is "possible that there may have been petroleum hydrocarbon and solvent releases (from auto fueling, washing, and possible maintenance) to the subsurface environment of the subject property." The report also stated that a portion of the property had been occupied by various dry cleaning businesses from approximately 1992 to the present and observed: "It is possible subsurface conditions at the subject property have been affected by the documented past use of dry cleaning solvents. . . . The prior use of the . . . space as a dry cleaner and the possibility of adverse impact to the subsurface environment and the lack of any documentation of prior subsurface exploration investigating the dry cleaner constitutes a recognized environmental condition . . . ."

Furthermore, regarding the premises where Esteem is located, the report stated: "Advertising on the front of the tenant space indicates the dry cleaning process is an

environmentally friendly, green dry cleaning process. An employee of the tenant indicated the current occupant and green process has been present for approximately three years. Review of the regulatory database report indicates a prior tenant, Lexes Cleaners, was a RCRA [Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.] Small Quantity Generator of hazardous waste. In addition, files from the Los Angeles County Public Health Investigation Department indicated that perchloroethylene [commonly referred to as cleaning fluid] has been utilized on-site from as early as 1995 until as recent as 2006." The report concluded by recommending a Phase II Subsurface Investigation "to further evaluate past environmentally sensitive uses including the former gas station and the former dry cleaner that utilized solvents and generated hazardous wastes."

The trial court denied Rosemead Properties' motion to file a second amended complaint. It also granted Esteem's motion for judgment on the pleadings and dismissed without leave to amend the remaining causes of action as to Esteem. Thereafter, Esteem and Rangwala moved for attorney fees and costs based on the attorney fees provision in the lease. The court granted the motion for attorney fees, and entered an amended final judgment in favor of Esteem and Rangwala jointly and severally against Rosemead Properties in the amount of $95,424.50, consisting of attorney fees and costs.

Rosemead Properties appeals.

DISCUSSION

I. The standard of review.

We review this matter de novo following a successful demurrer and judgment on the pleadings in accordance with the customary standard of appellate review. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Vehicular Residents Assn. v. Agnos* (1990) 222 Cal.App.3d 996, 998.) We deem true all material facts properly pled (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591), including facts appearing in exhibits attached to the complaint (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627), as well as those facts that may be implied or inferred from those expressly alleged (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403).

A reviewing court gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 807.) A trial court abuses its discretion in refusing leave to amend where there is a reasonable possibility the pleading can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

II. The trial court erred in dismissing Rosemead Properties' claims at the pleading stage.

The resolution of this case is largely governed by *Sachs v. Exxon Co., U.S.A.* (1992) 9 Cal.App.4th 1491 (*Sachs*), where the court found that the landlords had the right to inspect a gas station for environmental hazards. In *Sachs*, the Court of Appeal held that the trial court erred in granting summary judgment in favor of the lessees, where expert opinion supported the landlords' allegation that contaminants from operating gasoline storage tanks might have damaged the soil and subsurface water, for which the landlords might be liable (even without fault) under a myriad of state and federal laws. (*Id.* at p. 1497-1498.) The landlords' allegations in *Sachs* further supported the conclusion that the lessees might have breached a provision of the lease requiring that their use of the premises comply with all governmental ordinances and laws. (*Ibid.*)

As explained in *Sachs*, the landlords' remedy to guard against or mitigate potential liability from an environmental hazard is grounded in the established concept of a lease's implied covenant of good faith and fair dealing. (*Sachs*, *supra*, 9 Cal.App.4th at pp. 1498-1499.) "In leases, as in contracts, a covenant of good faith and fair dealing has been implied. [Citation.] The covenant requires that neither party do anything which will have the effect of destroying or injuring the right of the other party to receive the benefits of the lease. [Citation.] One of the benefits provided to the [landlords] by this lease is the promise of the [tenants] that they will not violate governmental laws and regulations which apply to the leasehold. This assurance is of little benefit to the [landlords] if they are precluded from assuring themselves that no such violations are taking place, *particularly* in circumstances in which they reasonably suspect violations. Since contamination which would give rise to a violation of environmental law is usually

hidden from a layman's view, the means by which a violation can be ascertained requires the use of expert investigation. Thus, good faith and fair dealing as respects the covenant of lawful activity requires a reasonable means by which the [landlords] can assure themselves as to the status of environmental hazards which may be the result of the tenant's activities. Such assurance could presumably be provided by tests and reports initiated by the tenant which, from an objective point of view, provide adequate assurance to the landlord. Lacking such tenant action, we would imply a right on the part of the landlord to come upon the premises and conduct testing in a reasonable and nonobtrusive manner." (*Id.* at p. 1498.)

Such implied covenants "can be created only when they are firmly rooted in the parties' express agreement and justified by legal necessity." (*Sachs*, *supra*, 9 Cal.App.4th at pp. 1498-1499.) In *Sachs*, the implied covenant was "based squarely on [the tenants'] obligation to operate [the premises] in a lawful manner and the necessity which arises because contamination, regulated by state and federal law, normally cannot be discovered except by way of expert investigation." (*Id*. at p. 1499.)

In the present case, as in *Sachs*, we find a similar implied covenant rooted in the tenant's obligation, specified in the addendum to the lease, which requires that the tenant not use or permit the use of the premises in violation of any laws or regulations relating to environmental conditions or hazardous materials. We acknowledge that Esteem advertised itself as using a dry cleaning process that is environmentally friendly and "green," and that an employee indicated that such processes have been used for approximately three years. However, the Phase I environmental report also revealed that the county Public Health Investigation Department indicated that perchloroethylene had been used on the tenant's site as recently as 2006, which was during the period of Esteem's tenancy. The report also cautioned that "possible subsurface conditions at the subject property have been affected by the documented past use of dry cleaning solvents." Significantly, in 2005 Esteem became a tenant by way of an assignment agreement with the prior tenant, pursuant to which Esteem assumed all "rights and obligations of Assignor [i.e., the prior dry cleaners]." Esteem, as assignee, thus arguably

may have obligations relating to the hazardous chemicals associated with the activities of the prior dry cleaner.

The present case is somewhat different from *Sachs*, but not in any way that would compel a different conclusion. *Sachs* was in the context of a summary judgment. Here, the appeal is in the context of a demurrer and judgment on the pleadings. The procedural settings, however, are of no consequence to the applicable implied covenant principles. Also, the landlords in *Sachs* sought declaratory relief to establish a right to enter their property for the purpose of determining whether the tenant oil companies had committed waste on the property and for a determination of whether the tenants had forfeited the lease by refusing to permit an inspection. (*Sachs*, *supra*, 9 Cal.App.4th at p. 1495.) The motivation of Rosemead Properties was not to prevent waste by the tenant, but to facilitate new financing on the property. This distinction is not controlling. The financing of the property and the lender's requirement of environmental testing do not trigger any environmental necessity. Rather, it is the implied covenant and applicable laws and regulations that trigger the tenant's obligations.

Accordingly, the trial court erred in dismissing the action at the pleading stage. It should have granted Rosemead Properties leave to file a second amended complaint. Any invasive and destructive environmental testing that ensues must "be limited to what the trial court determines is reasonably necessary under the circumstances." (*Sachs*, *supra*, 9 Cal.App.4th at p. 1499.)

III. *Other issues.*

Rangwala urges that he is not properly a defendant as a guarantor of the lease because Rosemead Properties must first pursue its claims against Esteem before bringing any claims against him as a guarantor. To the contrary, it is well settled that a principal obligor and a guarantor or surety can be sued either separately *or* jointly in the same action, at the option of the plaintiff. (See *Ralston-Purina Co. v. Carter* (1962) 210 Cal.App.2d 372, 380-381; *Rice Securities Co. v. Daggs* (1923) 63 Cal.App. 273, 276.)

Moreover, because the judgment must be reversed, the award of attorney fees that is part of the judgment is consequently reversed as well. It is thus unnecessary to discuss Rosemead Properties' complaints about the award of attorney fees.

Finally, Esteem and Rangwala have requested that we impose sanctions of not more than $10,000 against Rosemead Properties and its counsel for a frivolous appeal. For obvious reasons, the motion is denied.

DISPOSITION

The judgment is reversed. Rosemead Properties is entitled to costs on appeal.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.