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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVID DOWNS et al.,	
Plaintiffs and Appellants,	G043126
v.	(Super. Ct. No. 30-2009-00121566)
MARILYN LARSEN,	O P I N I O N
Defendant and Respondent.	

Appeal from a judgment of the Superior Court of Orange County, Peter J. Polos, Judge. Affirmed.

Geller & Stewart, Michael S. Geller and Richard A. Stewart for Plaintiffs and Appellants.

Jonathan A. Goldstein for Defendant and Respondent.

David and Cassie Downs (hereafter referred to collectively and in the singular and masculine as "Downs"), bought residential real property with knowledge that a portion of the property was subject to a 99-year lease in favor of their next door neighbor, Marilyn Larsen. After escrow closed, Downs sued Larsen contending the lease violated the Subdivision Map Act (Gov. Code, § 66410 et seq.). The trial court sustained Larsen's demurrer without leave to amend and dismissed the complaint. On appeal, Downs concedes the lack of a remedy under the Subdivision Map Act but asserts he could have amended his complaint to state causes of action for violations of municipal subdivision and zoning ordinances. We reject his contentions and affirm the judgment.

FACTS

The Complaint

On April 15, 2009, Downs filed a complaint against Larsen titled "Complaint for Quiet Title." The complaint alleged that on January 2, 2009, he purchased residential real property located at 5052 Grandview Avenue, Yorba Linda (the Subject Property). A portion of the Subject Property was subject to a recorded lease executed in April 2004. The lease was executed by one of Downs's predecessors in interest, John A. Skogman, as trustee for the family trust that had previously owned the Subject Property, as landlord, and Larsen, who owned the residential property next door, as tenant. The lease gave Larsen the right to utilize a large detached garage for a recreational vehicle located on part of the Subject Property, and some exterior parking spaces outside the garage, for a term of 99 years. Downs's complaint alleged that although the lease stated the rent had been prepaid for the entire term, he believed Larsen never actually paid any consideration and had "bullied" Skogman into signing the lease.

The complaint alleged the lease constituted an invalid subdivision of the Subject Property in violation of the Subdivision Map Act (Gov. Code, § 66410 et seq.), and the Subdivision Ordinance of the City of Yorba Linda contained in Yorba Linda

Municipal Code Title 17, because it effectively divided the Subject Property into two parcels without obtaining approval of and recording an appropriate parcel map. Downs alleged a one-year statute of limitations applied to actions for violations of the Subdivision Map Act, but he was not put on notice of the violation until he received the preliminary title report on December 30, 2008, shortly before he purchased the property.

The complaint attached the recorded documents concerning the lease. The exhibits included the lease itself, and a memorandum of lease agreement recorded against the Subject Property in 2006. The memorandum of lease agreement was between Dairen Shelton, David Dragonetti, and Greg Roseen (hereafter collectively and in the singular "Shelton"), as landlord, and Larsen, as tenant. Shelton had acquired the Subject Property from Skogman in July 2004. The recorded memorandum of lease acknowledged the validity of the lease, incorporated and confirmed its terms, and stated Larsen had fully performed her obligations under the lease.

Demurrer/Request for Judicial Notice/Ruling

Larsen filed a demurrer on the grounds the complaint failed to state a cause of action (Code Civ. Proc., § 430.10), because the Subdivision Map Act did not apply and, in any event, the complaint was barred by the one-year statute of limitations. She requested the court take judicial notice of various documents from the Yorba Linda building department files concerning the Subject Property, including building permits and final inspection records for the freestanding garage constructed in 1982. She also requested the court take judicial notice of documents pertaining to her prior litigation with Shelton.

In his opposition to the demurrer, Downs argued the lease was not a covenant running with the land because Larsen's prepayment of all the rent to Downs's predecessor in interest meant he would get no benefit from the lease. He argued the Subdivision Map Act was applicable to the situation because the length of the lease term made it effectively a subdivision and sale of property. And he argued the one-year statute

of limitations applicable to the Subdivision Map Act violation did not commence until he was put on notice of the lease when he received the preliminary title report in December 2008, right before he bought the Subject Property.

There is no reporter's transcript from the hearing on Larsen's demurrer. The trial court's minute order states the court sustained the demurrer without leave to amend. The court concluded the Subdivision Map Act did not apply as it only provides a remedy to the grantee against the original subdivider of the property. Furthermore, even if applicable, the memorandum of lease recorded in 2006, constituted constructive notice of the lease and its terms, and the instant action, filed in 2009, was untimely. A judgment was entered dismissing Downs's complaint and awarding Larsen her costs and $11,340 in attorney fees.

DISCUSSION

Standard of Review

"On appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend, we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. [Citation.] We assume the truth of all material facts properly pleaded, as well as facts that may be implied or inferred from those expressly alleged. [Citation.] Relevant matters that are properly the subject of judicial notice may be treated as having been pled. [Citation.]" (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 742 (*Ross*).)

Great liberality will ordinarily be allowed in the amendment of a complaint after the sustaining of a demurrer (*Warden v. Kahn* (1979) 99 Cal.App.3d 805, 810) as long as the plaintiff does not attempt to state facts which give rise to a wholly distinct and different legal obligation against the defendant. (*Herrera v. Superior Court* (1984) 158 Cal.App.3d 255, 259.) It is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified

by the defendant can be cured by amendment. (*Ross, supra,* 100 Cal.App.4th at p. 748.) A plaintiff can make this showing to the appellate court, whether or not he made it to the trial court. (*Ibid.*)

Subdivision Map Act

Although on appeal, Downs concedes he has no remedy under the Subdivision Map Act, we nonetheless briefly explain why this is the case as it impacts his argument concerning the Yorba Linda Subdivision Ordinance.

"The Subdivision Map Act is 'the primary regulatory control' governing the subdivision of real property in California. [Citation.] The Act vests the '[r]egulation and control of the design and improvement of subdivisions' in the legislative bodies of local agencies, which must promulgate ordinances on the subject. [Citation.] The Act generally requires all subdividers of property to design their subdivisions in conformity with applicable general and specific plans and to comply with all of the conditions of applicable local ordinances. [Citation.] [¶] As used in the Act, 'subdivision' means 'the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing, whether immediate or future.' [Citation.] Ordinarily, subdivision under the Act may be lawfully accomplished only by obtaining local approval and recordation of a tentative and final map . . . when five or more parcels are involved, or a parcel map . . . when four or fewer parcels are involved. [Citation.] A local agency will approve a tentative and final map or a parcel map only after extensive review of the proposed subdivision and consideration of such matters as the property's suitability for development, the adequacy of roads, sewer, drainage, and other services, the preservation of agricultural lands and sensitive natural resources, and dedication issues. [Citations.] [¶] By generally requiring local review and approval of all proposed subdivisions, the Act aims to 'control the design of subdivisions for the benefit of adjacent landowners, prospective purchasers and the public

in general.' [Citation.] More specifically, the Act seeks 'to encourage and facilitate orderly community development, coordinate planning with the community pattern established by local authorities, and assure proper improvements are made, so that the area does not become an undue burden on the taxpayer.' [Citations.]" (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 996-997.)

Accepting, without deciding, Downs's premise that the "prepaid" 99-year lease of the garage constituted a subdivision of the Subject Property requiring approval of a parcel map, Government Code section 66499.32 governs private remedies for violations of the Subdivision Map Act. In short, a transfer of property without approval of a parcel map is "*voidable* at the sole option of the [original] *grantee*" (Gov. Code, § 66499.32, subd. (a), italics added), it is not void. (*Falk v. Mt. Whitney Sav. & Loan Ass'n* (9th Cir. 1993) 5 F.3d 347, 351.) The remedy proposed by Downs (i.e., voiding the lease) is Larsen's alone—she was the "grantee" of the allegedly improperly subdivided property, having acquired it from Downs's predecessor in interest. Government Code section 66499.32, subdivision (a), specifically provides, "the deed of conveyance, sale or contract to sell is binding upon . . . the grantor, vendor, or person contracting to sell, or his assignee, heir or devisee." Downs is bound by the conveyance made by his predecessor in interest and he has no basis to assert a claim for violation of the Subdivision Map Act in an attempt to set the lease aside.

Furthermore, the trial court correctly observed that even if Downs could assert a cause of action for violation of the Subdivision Map Act, the one-year statute of limitations applicable to actions to set aside transfers of improperly subdivided property has expired. The action must be brought "one year after the date of discovery of the violation . . . ." (Gov. Code, § 66499.32, subd. (a).) As section 66499.32, subdivision (a), makes clear, Downs is bound by the actions of his predecessors in interest. The lease was executed and recorded in 2004 and the memorandum of lease recorded in 2006.

Downs's complaint was filed in 2009, well past the one-year period allowed by the Subdivision Map Act to void a transfer.

Cause of Action for Violations of Yorba Linda Municipal Code

Downs contends that although his Subdivision Map Act claim fails, he should have been permitted to amend his complaint to state causes of action for violation of the Yorba Linda Municipal Code. He asserts the long term lease of the garage violates the Yorba Linda subdivision ordinance, for the same reasons it violated the Subdivision Map Act. And he contends the lease violates the Yorba Linda zoning ordinance because the relevant zoning prohibits lots smaller than 15,000 square feet and the lease results in separate lots that do not meet the zoning requirements.

Downs cannot amend his complaint to state causes of action for alleged violations of the Yorba Linda subdivision or zoning ordinances. The Yorba Linda subdivision ordinance makes no provision for a private enforcement action. The Yorba Linda subdivision ordinance supplements and implements the Subdivision Map Act (Yorba Linda Mun. Code, § 17.04.020.) The ordinance provides for two methods of enforcement only: (1) the remedy provided for in the Subdivision Map Act, which as we have already explained and Downs concedes is inapplicable here, and (2) criminal prosecution. (See Yorba Linda Mun. Code, §§ 17.24.010 ["The provisions of this chapter shall be enforced in accordance with the provisions of Chapter 7 of the Subdivisions Map Act and Section 17.04.140 of this title"]; and 17.04.140 ["Violation of this chapter which is not also prohibited by the Subdivision Map Act or by any other state statute is a misdemeanor and punishable by a fine not to exceed five hundred dollars or imprisonment for a term not to exceed six months or both."].)

Similarly, the Yorba Linda zoning ordinance permits enforcement actions by the city but does not provide for a private action based on alleged zoning violations. (See Yorba Linda Mun. Code, § 18.40.010 ["The City Council, the City Attorney, the Police Chief, the Community Development Director, the City Building Official, the City

Clerk and all officials charged with the issuance of licenses or permits, shall enforce the provisions of this Title"].)

Downs cites no authority suggesting a private property owner may maintain a private cause of action to remedy alleged violations of zoning codes. The only cases permitting private enforcement actions are those in which the plaintiff can state a cause of action for nuisance. (See *Carter v. Chotiner* (1930) 210 Cal. 288, 292 [no private cause of action for operation cemetery in violation of ordinance]; *Taliaferro v. Salyer* (1958) 162 Cal.App.2d 685, 691 [plaintiff failed to state cause of action alleging neighbor's violation of applicable setback requirements]; *Stegner v. Bahr & Ledoyen, Inc.* (1954) 126 Cal.App.2d 220, 231 [plaintiff could not sue to enjoin the operation of a quarry in violation of zoning ordinance absent proof quarry was nuisance]; see also *Pacifica Homeowners' Assn. v. Wesley Palms Retirement* Community (1986) 178 Cal.App.3d 1147, 1152 [private individual may enjoin zoning violation as a nuisance] *McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 253-254 [same]; *Hopkins v. MacCulloch* (1939) 35 Cal.App.2d 442, 453 [same]; *Smith v. Collison* (1931) 119 Cal.App. 180, 184 [same].) In view of the fact it is Downs's own property at issue, we are hard pressed to fathom how he could state a cause of action for a nuisance on his own property.

Attorney Fees on Appeal

Larsen seeks an award of attorney fees on appeal. The lease provides for an award of attorney fees to the prevailing party "in any litigation related to this agreement . . . ." Larsen was awarded $11,340 in attorney fees incurred below. Downs has not challenged the trial court's attorney fees award, nor has he opposed Larsen's request for fees on appeal.

"Where a contract or a statute creates a right for the prevailing party to recover attorney fees, the prevailing party is also entitled to attorney fees on appeal. [Citation.]" (*Villinger/Nicholls Development Co. v. Meleyco* (1995) 31 Cal.App.4th 321, 329.) We grant Larsen's motion for attorney fees on appeal.

"Although we have the power to appraise and fix attorney fees on appeal, we deem it the better practice to remand the cause to the trial court to determine the appropriate amount of such fees. [Citation.]" (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134; see also *Milman v. Shukhat* (1994) 22 Cal.App.4th 538, 546.)

DISPOSITION

The judgment is affirmed. Respondent is awarded her costs on appeal. Respondent's motion for attorney fees on appeal is granted and the matter remanded to the trial court to set a reasonable attorney fee.

O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.