Filed 3/22/12 Defehr v. E-Escrows CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RICHARD DEFEHR, Plaintiff and Appellant, v. E-ESCROWS, INC., Defendant and Respondent.	B229603 (Los Angeles County Super. Ct. No. YC062440)

APPEAL from a judgment of the Superior Court of Los Angeles County. William G. Willett, Judge. Affirmed.

Webb & Walton and Lenden F. Webb for Plaintiff and Appellant.

White & Bright, Eric R. Ginder and T. Stephen Burke; Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller and Brittany H. Bartold for Defendant and Respondent.

Richard DeFehr (appellant) appeals from a final judgment dismissing his claims against respondent E-Escrows, Inc. (respondent) after the trial court sustained respondent's demurrer to appellant's first amended complaint (FAC). We affirm.

CONTENTIONS

Appellant contends that Code of Civil Procedure section 708.210 permits appellant, as a judgment creditor, to state a cause of action against respondent on behalf of the judgment debtors.[1] Further, appellant contends that the trial court erred in determining that *Certified Grocers of California, Ltd. v. San Gabriel Valley Bank* (1983) 150 Cal.App.3d 281 (*Certified Grocers*), is inapposite.

Appellant maintains that he stated facts sufficient to establish a debt or obligation imposed by law. He argues that the trial court abused its discretion by sustaining respondent's demurrer to the FAC without leave to amend.

FACTUAL BACKGROUND

On May 13, 2009, appellant recovered a money judgment in Tulare County Superior Court, case No. 07-224532, entitled *Richard DeFehr v. Dragoon Investment Group, Inc.*(Dragoon)*; Frank Ernest Cutler; Rani Lynn Calderon; Elzi "Tony" Garth Emmanuel; Herbert Sachs; Rani Lynn Calderon dba Elite Mortgage; Rani Lynn Calderon dba Elite Real Estate Company; Leslie J. Adams; Show Me Entertainment, Inc.; and Does 5 through 50, inclusive* (judgment debtors). The judgment was entered against the judgment debtors jointly and severally for the sum of $2,652,770.42, plus daily interest through the date of the judgment in the sum of $131,879, attorney fees of $106,297, and costs of $16,794.42.

Execution was issued on appellant's judgment. However, the judgment was returned unsatisfied.

PROCEDURAL BACKGROUND

On January 28, 2010, appellant filed a complaint against respondent "on behalf and in the shoes of" the judgment debtors pursuant to section 708.210. The FAC, filed

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

on July 22, 2010, alleged causes of action for breach of fiduciary duty; breach of written contract; breach of implied covenant of good faith and fair dealing; negligence; and declaratory relief.

Appellant alleged that respondent was indebted to the judgment debtors in the amount of $447,000. Specifically, on or about February 26, 2007, per written escrow instructions, respondent received into its escrow account $447,000 of earnest money deposited by the judgment debtors to be applied to the purchase of real property. Appellant further alleged that on or about March 1, 2007, "per the oral request of an acquaintance of an unrelated real estate agent," respondent "mistakenly" distributed the judgment debtor's earnest money to an unauthorized, unrelated third party, after deducting cancellation fees and escrow expenses.

Appellant's causes of action against respondent were based on this alleged breach of the escrow instructions.

On August 23, 2010, respondent filed a demurrer to each cause of action alleged in the FAC. A motion to strike was filed concurrently. In its memorandum of points and authorities in support of the demurrer, respondent explained that one of the judgment debtors, Dragoon, deposited $447,000 into an escrow account with respondent in connection with a transaction. Following the cancellation of the transaction, and pursuant to written e-mail instructions from Dragoon's authorized agent dated March 1, 2007, respondent distributed the money to another entity owned by Dragoon: Show Me Entertainment. Respondent merely followed the written instructions of Dragoon's authorized agent, and no one acting on behalf of Dragoon ever claimed that respondent was indebted to Dragoon. Respondent argued that appellant could not state causes of action against respondent pursuant to section 708.210 because (1) respondent did not currently have possession or control of the escrow funds that appellant sought to have applied to the satisfaction of his money judgment; and (2) respondent was not indebted to Dragoon. Respondent argued that the entire FAC was based on section 708.210, and because appellant could not show that respondent was "indebted to the judgment debtor,"

appellant's entire complaint failed. Respondent also requested that the trial court take judicial notice of the escrow instructions which were the subject of the lawsuit.

Respondent's demurrer and motion to strike were heard on October 12, 2010. On October 20, 2010, the trial court issued a ruling. The court sustained respondent's demurrer to the FAC in its entirety. The court reasoned that respondent "did not have possession or control of the escrow funds on May 13, 2009 when [appellant] obtained a monetary judgment against non-party Dragoon Investment Group, Inc." The court also found *Certified Grocers* to be "inapposite" because it was decided under a repealed statute, and because appellant could not allege facts showing a debt was owed by respondent to the judgment debtor.

As to appellant's causes of action for breach of contract and breach of implied covenant of good faith and fair dealing, the court found that appellant had failed to allege the existence of a contract between appellant and respondent, therefore those claims failed. Finally, the court determined that "[w]ithout a contract and/or other obligations imposed by law, this Court finds [appellant] cannot state the causes of action for negligence and declaratory relief."

A judgment of dismissal on appellant's complaint was entered on November 5, 2010. On December 16, 2010, appellant filed his notice of appeal.

DISCUSSION

I. Standard of review

"'On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And 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. [Citation.]' [Citations.]" (*Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1043-1044, quoting *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) Nevertheless, if no liability exists as a matter of law, we must affirm that part of the judgment sustaining the demurrer, and if the plaintiff cannot show an abuse of discretion, the trial court's order sustaining the demurrer without leave to amend must be affirmed. (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 44.) "The burden is on the plaintiff . . . to demonstrate the manner in which the complaint might be amended. [Citation.]" (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)

II. Section 708.210

Section 708.210 provides, in its entirety:

> "If a third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor, the judgment creditor may bring an action against the third person to have the interest or debt applied to the satisfaction of the money judgment."

In order for appellant to bring an action against respondent under this section, appellant was required to show that respondent is currently in possession or control of property in which the judgment debtor has an interest, or is currently indebted to the judgment debtor. Appellant failed to sufficiently plead either one of these facts.

According to the facts alleged, respondent returned the escrow funds to the judgment debtors, years before appellant ever obtained a judgment against the judgment debtors. Therefore, respondent was not in "possession or control" of any property of the judgment debtor's at the time that appellant obtained his judgment against the judgment debtors.

Appellant alleged, on information and belief, that respondent is indebted to the judgment debtors in the approximate sum of $447,000. Appellant alleged that on March 1, 2007, respondent "mistakenly" distributed appellant's earnest money to an unauthorized third party. However, we need not accept this conclusory statement. (*C &*

H Foods Co. v. Hartford Ins. Co. (1984) 163 Cal.App.3d 1055, 1062.) Mere contentions or conclusions of fact or law need not be accepted where "a complaint contains allegations of facts inconsistent with attached documents, or allegations contrary to facts which are judicially noticed. [Citations.]" (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) Thus, "a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless." (*Ibid.*)

Here, appellant failed to allege any specific facts suggesting a legal obligation from respondent to the judgment debtors. In fact, attached as exhibit 2 to appellant's complaint is a "wire verification" from respondent to an entity called "Shome Entertainment." The wire was credited as "Buyer Refund of Deposit Funds." Appellant did not allege sufficient facts to show that the individual who authorized the refund was an unauthorized agent. Nor did appellant allege sufficient facts to show that respondent's distribution of the funds to Shome Entertainment varied from the judgment debtor's instructions.[2] Finally, appellant did not allege that respondent or the judgment debtors considered the refund to Shome Entertainment to be a "mistake." The document itself suggests that the distribution of funds was a "refund of buyer's deposit," and, under the circumstances, we need not accept as true appellant's unsupported and conclusory statement to the contrary.

In sum, appellant has failed to allege sufficient facts to show that he is entitled to bring an action against respondent pursuant to section 708.210. Appellant has failed to show that respondent "has possession or control of property in which the judgment debtor has an interest" or that respondent "is indebted to the judgment debtor." Because all of

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[2] In fact, it appears from the record that "Shome Entertainment" was a misspelling of "Show Me Entertainment."

appellant's causes of action against respondent were premised on liability pursuant to section 708.210, all of appellant's causes of action must fail.[3]

III. *Certified Grocers*

Appellant argues that the controlling precedent for this case is *Certified Grocers, supra*, 150 Cal.App.3d 281. In *Certified Grocers*, a judgment creditor brought an action against a bank at which the judgment debtor had an account. The action was brought under former section 720. The complaint alleged that the judgment debtor had opened an account with the defendant bank and lodged with the bank a document known as a signature card, which authorized certain individuals to draw checks on the account. The complaint further alleged that the judgment debtor's secretary later went to the bank and authorized a new signature card designating himself as the corporate officer authorized to draw checks. (*Certified Grocers, supra*, at p. 284.) The complaint alleged that the bank knowingly allowed the secretary to deplete the payroll account by writing checks which he alone signed, using the funds for his personal benefit. The plaintiff alleged that the bank actively aided and abetted the secretary and participated in this breach of fiduciary duty. (*Id.* at p. 285.)

Certified Grocers is distinguishable from this matter because it concerned detailed, specific allegations of fraudulent activity and complicity. In contrast, the FAC in this matter contained only unsupported factual contentions which were countered by attached documents. Further, as respondent has pointed out, a bank is different from an escrow company. "When a bank receives deposits it becomes a debtor of the depositor . . . ; the bank is not entitled to debit his account with payments not made by his order or direction. [Citations.]" (*Certified Grocers, supra*, 150 Cal.App.3d at p. 286.) An escrow company, on the other hand, receives money or documents to be held by the escrow company until the performance of certain specified conditions. (*Markowitz v. Fidelity*

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[3] Appellant has made no effort to show that he is able to meet the elements of any of his causes of action independent of section 708.210. Because we have determined that appellant does not meet the requirements of that statute, we decline to address in detail the elements of each cause of action or the specific deficiencies under each cause of action.

Nat. Title Co. (2006) 142 Cal.App.4th 508, 526.) Unlike a bank, the escrow holder's obligations are limited to compliance with the parties' instructions. (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711.)

Appellant has made no allegations of fraud or collusion. Unlike the bank in *Certified Growers*, there is no allegation that respondent knowingly transferred the money to an unauthorized party. Instead, respondent refunded the money as instructed upon cancellation of the pending transaction. Appellant's allegations were insufficient to show that respondent was ever indebted to the judgment debtors. We agree with the trial court that *Certified Grocers* is not controlling precedent for this matter.[4]

IV. Leave to amend

Appellant argues that the trial court abused its discretion in sustaining respondent's demurrer to the FAC without leave to amend. However, as set forth above, "[t]he burden is on the plaintiff . . . to demonstrate the manner in which the complaint might be amended. [Citation.]" (*Hendy v. Losse, supra*, 54 Cal.3d at p. 742.) Appellant has made no effort to meet this burden. Under the circumstances, we decline to find an abuse of discretion.

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs of appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD

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[4] Because we find *Certified Grocers* distinguishable on the facts, we decline to address appellant's argument that former section 720 and the current section 708.210 are consistent for the purposes of this matter.