Berman v. Bagno

2003 | Cited 0 times | California Court of Appeal | October 24, 2003

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Dr. Walter E. Berman appeals the judgment entered after a court trial denying his claims for declaratory relief and granting the request of 14 defendants and cross-complainants (collectively the Bagnos) [1] to reform three separate deeds of trust and promissory notes to correct an error in the signature blocks. Berman contends the reformation action was time-barred and that an extra-judicial investigation by the reference judge, along with errors in the admission of evidence, resulted in a miscarriage of justice. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Becman-WEB Partnership

Berman, a plastic surgeon, invested in several real estate ventures with defendant Manuel Mancha through a general partnership known as the Becman-WEB partnership. Becman-WEB had two general partners, Berman and G.M. Becman Development, Inc. (GM Becman), a corporation of which Mancha was vice-president. According to the Becman-WEB partnership agreement, GM Becman, "through its vice president, Manuel Mancha" was the managing partner of Becman-WEB. Upon formation of the partnership, Berman transferred his ownership interest in a Los Angeles apartment complex known as Cloverdale to Becman-WEB with the intent of ultimately converting the Cloverdale apartments to condominiums.

2. The Loans Secured by Cloverdale

On three separate occasions in 1994 and 1995 Mancha approached Eastern Mortgage (Eastern) to arrange for loans totaling $1.12 million to Becman-WEB. Each of the three loans was secured by a separate deed of trust against Cloverdale. [2] The loans were brokered by Eastern and funded by the Bagnos, a group of private investors.

Each trust deed identifies Becman-WEB as the trustor. However, the signature block on each omits Becman-WEB. Instead, it reads:

"Signature of Trustor

G.M. BECMAN DEVELOPMENT, a California general partnership, [3]

G.M. BECMAN DEVELOPMENT, INC. a California corporation, general partner

By: Manuel Mancha, Vice President."

Likewise, the signature blocks on the corresponding promissory notes also omit Becman-WEB, stating instead:

"G.M. Becman Development, Inc., a California Corporation, General Partner,

By: Manuel Mancha, Vice President."

When Becman-WEB defaulted on the loans the Bagnos sought to foreclose.

3. Berman Seeks Declaratory Relief that the Loans Are Invalid Because They Were Obtained Without His Consent

On April 30, 1998 Berman sued Mancha and the Bagnos, among others, alleging several causes of action. As to the Bagnos, Berman sought a declaration that the loans encumbering Cloverdale were invalid because they were obtained without his consent. [4] Berman cited the recorded Statement of Partnership, which provided: "Any conveyance, encumbrance, or investor of an interest in the partnership's real property must be agreed to and approved by all partners before being signed on behalf of the partnership by GM Becman Development Inc." To support his claim, Berman further alleged the signature blocks on the notes and trust deeds did not identify Becman-WEB and claimed Becman-WEB was not the authorized maker or trustor of the notes and trust deeds.

The Bagnos filed a cross-complaint for declaratory relief, seeking a declaration that the notes and deeds were valid. Later they amended the cross-complaint to add claims for reformation, alleging they were unaware of the omission of Becman-WEB from the signature blocks of the notes and trust deeds and did not learn of the "scrivener error" until Berman filed the lawsuit. After the reformation claims were added to the cross-complaint, Berman moved successfully to have his answer to the original cross-complaint serve as his answer to the amended cross-complaint. The original answer contained a general assertion of a statute of limitations defense, but did not cite to any particular section of the Code of Civil Procedure.

4. The Trial on Berman's Claim for Declaratory Relief and the Bagnos' Claim for Reformation

Pursuant to Code of Civil Procedure section 638, [5] the parties agreed to try all remaining claims

involving the Bagnos before a reference judge. [6] At trial Mancha testified that he had informed Berman of each of the loans; that Berman, intent on obtaining the funds for other real estate ventures, had consented orally; and that, when he executed the loans and trust deeds, he had intended to sign as the general partner of Becman-WEB, not noticing the omission of Becman-WEB from the signature blocks. None of the Bagno investors testified. Sean Dayani, the Eastern employee and the Bagnos' agent who brokered the deal for the Bagnos and prepared the trust deeds, testified the omission of Becman-WEB from the signature blocks on all three loans and trust deeds was a "typo." Alfred Spivak, the president of Eastern at the time of the transactions, explained that it was Eastern's practice to refer to the preliminary title report before preparing the notes and trust deeds to confirm ownership of the property sought to be used as security for the loan and that the preliminary title report in this case had identified Becman-WEB (not GM Becman) as the owner of Cloverdale. Spivak testified that it was always Eastern's intention, as the Bagnos' broker, to make the loans to Becman-WEB and not to GM Becman. No evidence was presented at trial as to when the Bagnos knew or reasonably should have discovered the omission of Becman-WEB from the signature blocks on the notes and trust deeds.

In his detailed statement of decision, the reference judge found that Berman's claims as to the first two loans (the $380,000 loan and the $120,000 loan, respectively) were barred by the three-year statute of limitations (Code, Civ. Proc., § 338, subd. (d)). As to the third loan (the $620,000 loan), the reference judge found that Berman had consented to the loan, and, in any event, that Mancha was the authorized signatory for Becman-WEB and could legally bind the partnership to a contract with an innocent third party without Berman's consent. Finding that the failure to identify Becman-WEB in the signature block was a scrivener error due to the similarity in the names Becman-WEB and GM Becman, the court granted the Bagnos's request to reform the notes and trust deeds to reflect Becman-WEB in the signature blocks of each. In a footnote, the reference judge indicated that, because "plaintiff [Berman] did not provide any expert testimony regarding title issues," the reference judge had independently contacted two different title companies and learned from each that policies of title insurance would have issued regardless of the omission of Becman-WEB from the signature blocks of the trust deeds so long as the trust deeds were signed by the general partner of Becman-WEB, the owner of the Cloverdale property.

Berman moved for a new trial. Because the reference judge did not timely rule upon the motion, it was denied by operation of law. (§ 660.) Berman filed a timely notice of appeal. [7]

CONTENTIONS

Berman contends the reformation actions were time-barred, and the reference judge's independent acquisition of evidence from two title companies while the case was under submission, along with several errors in the admission of evidence, resulted in a miscarriage of justice. [8]

DISCUSSION

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1. Berman Has Waived His Claim that the Reformation Action Is Time-Barred

A contract is subject to reformation when the written agreement, due to fraud or mutual mistake, does not reflect the intended agreement between the parties. (See, e.g., Schaefer v. California-Western States Life Ins. Co. (1968) 262 Cal.App.2d 840, 846; Sapin v. Security First National Bank (1966) 243 Cal.App.2d 201, 205; Douglass v. Dahm (1950) 101 Cal.App.2d 125, 128.) An action for reformation based upon fraud or mutual mistake must be brought within three years after the plaintiff discovered, or should have with reasonable diligence discovered, the fraud or mistake. (§ 338, subd. (d); Schaefer, at p. 845.) When the cause of action appears time-barred on the face of the complaint, it is subject to demurrer unless a party pleads the discovery rule -- specific facts showing the fraud or mistake was not and could not have been discovered with reasonable diligence within the limitations period. (Bradbury v. Higginson (1914) 167 Cal. 553, 558; McKelvey v. Boeing North American, Inc. (1999) 74 Cal.App.4th 151, 160.)

Berman asserts the Bagnos failed to plead or prove that the mistake was not discovered, or with reasonable diligence could not have been discovered, within three years of the execution of any of the three loans. Because Berman did not demur to the cross-complaint, he has waived any challenge that the cross-complaint itself was defective. (Berendsen v. McIver (1954) 126 Cal.App.2d 347, 354; Union Sugar Go. v. Hollister Estate Co. (1935) 3 Cal.2d 740, 744.) Similarly, having failed to challenge the Bagnos' right to seek reformation on statute of limitation grounds in the trial court, Berman has waived any right to assert the defense on appeal. (Estate of Horman (1971) 5 Cal.3d 62, 72 [statute of limitations is an affirmative defense that must be properly presented, otherwise it will be deemed waived]; see § 458 [to properly raise the affirmative defense of the statute of limitations, defendant must plead both the number and subdivision of statute on which he or she seeks to rely]; Davies v. Krasna (1975) 14 Cal.3d 502, 508 [reference to an inapplicable statute in the defendant's answer is insufficient to raise the defense]; DeCelle v. City of Alameda (1963) 221 Cal.App.2d 528, 533.)

To overcome these deficiencies, Berman, relying on Johnson v. Ware (1943) 58 Cal.App.2d 204, 205 (Johnson) and Faulkner v. Burton (1954) 126 Cal.App.2d 210, 213-215 (Faulkner), argues that delayed discovery is, in effect, an essential element of the Bagnos' reformation claim and insists that the failure of proof by the Bagnos at trial as to when the mistake was discovered or could have been discovered renders the judgment of reformation unsupported by substantial (or any) evidence. Neither case stands for the proposition Berman espouses.

In Johnson the plaintiff sought reformation of a deed drafted 13 years before the action was filed, alleging it was the contracting parties' mutual intent to accomplish the transfer to plaintiff as a "joint tenant," even though the deed stated the plaintiff's ownership rights as a tenant in common. The defendants, claiming the reformation action was barred by the three year statute of limitations, successfully moved for non-suit and the court of appeal affirmed, holding that plaintiff had failed to prove that her late discovery of the facts constituting the mistake was excused. (Johnson, supra, 58 Cal.App.2d at p. 206.) In Faulkner, a case not involving reformation, the plaintiff sued for fraud. After

plaintiff prevailed on the fraud claim at trial, the defendant appealed, claiming the plaintiff had failed to plead or prove when he discovered the fraud. The court reversed, holding that, although defendant had waived his challenge to the pleading by failing to demur to the complaint, that waiver did not relieve the plaintiff of his burden to prove facts excusing his late discovery of the fraud. (Faulkner, supra, 126 Cal.App.2d at pp. 214-215.) In both Johnson and Faulkner, unlike in the instant case, the defendant properly asserted the statute of limitations in the trial court, thus preserving the right to raise the issue on appeal. [9]

The general rule is that a properly asserted statute of limitations, proved by the defendant, will bar an otherwise meritorious claim. (April Enterprises, Inc. v. KTTV (1983) 147 Cal.App.3d 805, 826 (April Enterprises); see also Samuels v. Mix (1999) 22 Cal.4th 1, 14; Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal.4th 739, 756.) In some circumstances, however, it is manifestly unjust to deprive a plaintiff, reasonably ignorant of his or her injury, the right to pursue an action. In those cases the discovery rule ameliorates the harsh effects that would otherwise result from a mechanical application of the statute, permitting a plaintiff to overcome the statutory bar with pleading and proof that the injury was not discovered, nor with reasonable diligence could have been discovered, within the authorized limitations period. (Buttram v. Owens-Corning Fiberglass Corp. (1997) 16 Cal.4th 520, 530-531; April Enterprises, at p. 826.)

The discovery rule thus serves as an expansion of the plaintiff's right to pursue his or her action notwithstanding the defendant's proper assertion of the applicable statute of limitations. In requiring the plaintiff to plead and prove its elements, the discovery rule logically imposes on the party seeking to overcome the statutory bar the burden to plead and prove the facts necessary to benefit from the rule's ameliorating effects. A plaintiff's failure to plead and/or prove the discovery rule may thus render his or her action vulnerable to attack by demurrer, or by a pretrial or trial motion where the defendant has properly asserted the statute of limitations as a defense in the answer. However, if the statute of limitations defense has not been properly asserted and claimed sufficiently for the trial court to rule on it, there is no limitations "defense" for plaintiff to overcome. In that case, the statute is waived and may not be asserted for the first time on appeal. To hold otherwise and accept Berman's effort to convert the limitations defense to an essential element of the Bagnos' affirmative case notwithstanding his failure to properly raise it would contravene well over a century of legal precedent firmly establishing the limitations defense as a waivable defense. (See Bliss v. Sneath (1898) 119 Cal. 526, 528 ["[U]pon appeal from a judgment against a party entitled to make the [statute of limitations] defense, it will be assumed that the defense was waived unless it affirmatively appears from the record that it was made in the court below."].) Because Berman failed to properly assert the statute of limitations in his answer or claim it at trial, he has waived any argument on appeal that the reformation claims are time-barred. [10]

2. The Extra-Judicial Communications, Albeit Improper, Were Not Prejudicial

A retired judge hearing a matter pursuant to a general reference "is bound by the same rules of

evidence and procedures as those applicable in superior court trials . . . ." (In re Marriage of Assemi (1994) 7 Cal.4th 896, 908.) A court, or a reference judge acting as the court, abuses its powers and violates the canons of judicial conduct when it conducts an independent investigation on substantive matters without affording the parties notice and a reasonable opportunity to respond. (Wenger v. Commission on Judicial Performance (1981) 29 Cal.3d 615, 632; People v. Archerd (1970) 3 Cal.3d 615, 638 (Archerd).)

Although plainly improper, the trial court's ex parte communication with two title companies does not compel reversal in the absence of demonstrable prejudice. (See Archerd, supra, 3 Cal.3d at p. 638.) In Archerd, the trial court made its own ex parte inquiries of a physician about insulin, the murder weapon, though the court learned no new facts that had not been presented at trial. In upholding the verdict against the defendant, the Supreme Court explained: "[W]e disapprove the action of the trial judge in consulting experts outside of court. While in this instance the facts of the case were not involved, the extra-judicial inquiry by the judge gave no opportunity to counsel to examine or cross-examine the experts with whom he spoke. However lofty the motivation of the judge in his desire to be informed, the interviewing of potential witnesses anywhere but on the witness stand should be avoided. Despite the error in the conduct of the judge, we do not find the error to be prejudicial." (Ibid.)

Here, other than point out the court's impropriety, Berman does not demonstrate how the information acquired during the court's ex parte communication -- that is, that title insurance would have issued so long as the deeds were signed by the general partner of Becman-WEB -- was prejudicial with respect to either the reformation or declaratory relief actions. The court's conclusions in favor of the Bagnos with respect to both rested on its finding that Berman had consented to the loans and, alternatively, that Mancha had the legal authority to bind Becman-WEB to a contract with the Bagnos, innocent third parties, irrespective of Berman's consent. None of the information acquired during the ex parte communications has any bearing on either conclusion. In the absence of any demonstrable prejudice, the court's actions, although improper, do not compel reversal of the judgment.

3. Berman Has Not Demonstrated Reversible Error in the Admission of Evidence

Berman asserts the court erred when it admitted, over objection, evidence that his net worth was in the millions of dollars. The trial court permitted the evidence, reasoning that it was responsive to Berman's testimony that Mancha's actions had deprived him of a significant portion of his retirement. Even if this evidence were irrelevant, there has been no showing by Berman that it is reasonably probable a different result would have been reached if the evidence had been excluded. (See, e.g., Code Civ. Proc., § 475 ["No judgment, decision or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction or defect, was prejudicial, and also that by reason of such error, ruling instruction or defect, the said party complaining or appealing sustained and suffered substantial

injury, and that a different result would have been probable if such error, ruling instruction or defect had not occurred or existed."]; Evid. Code, § 353, subd. (b) [erroneous admission of evidence not ground for reversal unless complaining party demonstrates miscarriage of justice]; City of Oakland v. Public Employees' Retirement System (2002) 95 Cal.App.4th 29, 51-52 [prejudice will not be presumed; burden rests with party claiming error to demonstrate not only error, but also a resulting miscarriage of justice].)

Berman also argues reversal is required because the court erred in admitting into evidence a copy of an executed partnership agreement between Berman and his son, on the one hand, and GM Becman, on the other hand, concerning a property known as "Tremont." Berman contends admission of this evidence was error because neither Berman's signature nor that of his son was properly authenticated and argues the error was prejudicial because it supported the Bagnos' theory that Berman had consented to the loans on Cloverdale in order to fund Tremont. The contention is not persuasive. Although he refused to authenticate his signature on the document outright, Berman admitted on cross-examination that he had no reason to believe that the signature purporting to be his on the agreement was actually a forgery. In any event, the introduction of the Tremont agreement, even if error, was hardly prejudicial. Berman alleged in his complaint he was a partner in Tremont and admitted at trial that, until this lawsuit, he had always believed he was a partner in Tremont (rather than an investor). The partnership agreement merely supported Berman's own pleadings and testimony that, at the time the Cloverdale loans were arranged, Berman believed he was a partner in the Tremont project. Accordingly, any error in admitting the agreement was harmless.

4. The Trial Court's Refusal to Further Clarify its Statement of Decision Does Not Compel Reversal

Noting that the Statement of Decision does not address Berman's "affirmative defense of fraud" to the reformation actions and that the court refused to amend the Statement of Decision to "address that defense" when requested by Berman in his motion to clarify the statement of decision, Berman contends remand is necessary because the trial court failed to resolve a controverted issue in regard to the reformation action. (See § 634 ["When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under section 657 or 663, it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue."].)

In particular, Berman asserts undisputed evidence at trial established that a corporate resolution of GM Becman, purportedly signed by Mancha and George Beccacio, President of GM Becman, authorizing Mancha, on behalf of GM Becman, to execute "all documents and enter into any agreements encumbering" Cloverdale, and which was provided to Eastern, was fraudulent because Beccacio testified he did not remember signing the document and believed his signature on the document was a forgery. In his motion to clarify the statement of decision, Berman specifically

requested, among other things, the trial court affirm that "the testimony of George Becaccio regarding his fraudulent signature, as President of G.M. Becman on the corporate resolution authorizing Mancha to borrow funds on Cloverdale, was given no weight."

Section 632 requires the court to issue "a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any part appearing at trial." "The trial court is not required to respond point by point to the issues posed in a request for statement of decision. The court's statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case." (Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 Cal.App.4th 1372, 1379-1380 (italics added); see also Bauer v. Bauer (1996) 46 Cal.App.4th 1106, 1118; Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal.2d 396, 410 (Coleman).) The statement of decision in this case sets forth in great detail the facts and conclusions of law supporting the court's decision on the reformation claims. The trial court was not required to respond to Berman's request to affirm that it had given "no weight" to Beccacio's testimony. (Coleman Engineering Co., at p. 410 [section 634 "does not require that a finding be made as to every minute matter on which evidence is received at trial[;] . . . the refusal of the court to make specific findings on every matter proposed in defendant's counterfindings does not require a reversal of the judgment."].)

In addition, the evidence of fraud cited by Berman is not material to the reformation claim. At most, the testimony relates to Mancha's authority to bind GM Becman; it has no bearing on the intent of the contracting parties (Mancha and the Bagnos) to bind Becman-WEB, the central issue in the reformation actions.

DISPOSITION

The judgment is affirmed. The respondents are to recover their costs on appeal.

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We concur:

JOHNSON, J.

WOODS, J.

1. The cross- complainants are 14 private investors: Benjamin D. Bagno, as Trustee for Standard Investment Under Defined Benefit KEOGH Plan; Benjamin D. Bagno, as Trustee of the Bagno Living Trust dated November 11, 1987; Harriet Bagno, as Trustee of the Bagno Living Trust dated November 11, 1987; Bernard Dvoren, as Trustee under Trust Agreement dated December 11, 1975; Henrietta Dvoren, as Trustee under Trust Agreement dated December 11, 1975; Nassar Elazari; David M. Beckman, as Trustee of the David and Dolores Beckman Family Trust dated July 1, 1991;

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Dorothy R. Beckman as Trustee of the David and Dolores Beckman Family Trust dated July 1, 1991; Ruth Babette Feinberg, as Trustee of the Ruth Babette Feinberg Revocable Trust Declaration dated September 5, 1989; William H. Ross; Esther Ross; Carolyn Fried; Charles F. Feinberg, as Trustee of the Charles F. Feinberg Inter Vivos Revocable Trust Declaration of November, 1987; Dr. Marshall Sands, M.D., as Trustee of the Dr. Marshall Sands, M.D., Inc. Profit Sharing Plan; and the Dr. Marshall Sands, M.D., Inc. Pension Plan.

2. A first deed of trust in the amount of approximately $1.9 million already existed on Cloverdale at the time of the transfer to Becman-WEB. That deed of trust is not at issue in this case. For convenience, we refer to the loans and related security documents at issue in this case as the first, second and third note and deed of trust. The first promissory note and deed of trust executed by Mancha in November 1994 was in the principal amount of $380,000. The second, executed in March 1995, was in the principal amount of $120,000; and the third, executed in July 1995, was for $620,000. Each note bore an interest rate of 13 percent.

3. At trial, the undisputed evidence established there was never any partnership entity entitled "G.M. Becman Development, a General Partnership."

4. Berman also asserted claims for declaratory relief against the Bagnos relating to two other real properties, Ridgeley and Weldon. Those causes of action were resolved against Berman by motion for summary adjudication.

5. Code of Civil Procedure section 638 provides in part: "A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties: [¶] (a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision." All statutory references are to the Code of Civil Procedure unless otherwise indicated.

6. Pursuant to an agreement to bifurcate the trial, Berman's claims against Mancha and the other parties were deferred pending resolution of the actions involving the Bagnos.

7. Since this appeal was filed, Becman- WEB (which is not a party to the appeal) declared bankruptcy. Pursuant to an order of the bankruptcy court, Cloverdale was sold, apparently for $4,725,000, with the funds placed in an interest bearing trust account after the Cloverdale liens were satisfied. The bankruptcy action has since been dismissed.

8. Berman does not challenge the trial court's findings that Mancha had the legal authority to encumber Cloverdale, that Berman consented to each loan transaction and that Berman's actions for declaratory relief in connection with the $380,000 and $120,00 loans are barred by the statute of limitations.

9. Watson v. Santa Carmelita etc. Co. (1943) 58 Cal.App.2d 709, 716-717, overruled on other grounds in Chance v. Superior Court (1962) 58 Cal.2d 275, 288, is similarly inapposite. Watson involved a challenge to the sufficiency of a complaint for injunctive relief in which the plaintiff had failed to allege facts showing the fraud was not discovered and could not have been discovered within the three years after it had occurred. In finding the pleading deficient for failing to allege the

facts constituting the discovery of the fraud, the court stated, "The reasons assigned by plaintiff for his failure to make a discovery of the facts constituting the alleged fraud until within three years prior to the commencement of his action are an element of plaintiff's right of action and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint." (Watson, at pp. 716- 717.)

10. Because Berman's complaint, filed April 30, 1998, tolled the limitations period for any compulsory cross- complaint, the reformation action with respect to the third promissory note and deed of trust (executed in July 1995), arising out of the same transaction and occurrence as that alleged in Berman's original complaint, was timely in any event. (See Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal.3d 712, 714, fn. 4 [although "[o]rdinarily the statute of limitations will bar a cross-complaint in the same fashion as if the defendant had brought an independent action, unless the original complaint was filed before the statute of limitations on the cross- complaint had elapsed" because, where the cross- complaint arises out of the same transaction or occurrence as pleaded in the original complaint, it "relates back" to the original complaint].) This "relation back" doctrine also applies when the cross- complaint is later amended to assert new claims arising out of the same transaction or occurrence as alleged in the original complaint. (Sidney v. Superior Court (1988) 198 Cal.App.3d 710, 714-715.)