ALAN KIZOR, Plaintiff and Appellant,
v.
BRU ARCHITECTS et al., Defendants and Respondents.
A125423
COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION THREE
Filed: June 8, 2011
NOT TO BE PUBLISHED IN OFFICIAL REPORTS

(Contra Costa County Super. Ct. No. C06-01533)

Alan Kizor appeals from an adverse summary judgment on his construction defect claims against the architect, contractor and others involved in the design and construction of the home which he purchased from its original owners. Because the defects had caused significant known damage to the former owners, the trial court ruled that any causes of action based on those defects accrued only to the former owners, and that because the former owners had not assigned their claims to Kizor, he is not entitled to assert those claims. We conclude the trial court correctly applied the law as articulated in Krusi v. S.J. Amoroso Construction Co., Inc. (2000) 81 Cal.App.4th 995, 1005 (Krusi) and shall affirm the judgment.

BACKGROUND

John and Miranda Redig[1] hired Bernardo Urquieta of Bernardo Urquieta Architects, Inc. and BRU Architects (jointly, BRU) to design a home in Orinda. The house plan featured unique design elements that included oversized windows and a distinctive zinc alloy roof with a barrel shape and many low-sloped areas. For aesthetic reasons, the design also called for gutters to be integrated into the framing on the inside edge of the walls rather than attached to the exterior of the roof. The Redigs hired Robert J. Lis and his company, RJL Construction (RJL), as general contractor.

During construction—in September 2000—Redig wrote to the roofing materials supplier, Blackwood Associates, Inc. (Blackwood), about leaks and water damage during a recent rainstorm. Redig attributed the leaks to errors made by Alliance Roofing Company, Inc. (Alliance) when it installed the roof. A number of windows installed by Millbrae Glass, Ltd., doing business as Capital Glass Company (Capital Glass), also leaked. In an October 9, 2000 memorandum, Blackwood's D.L. London reported: "Lance and I went out to the site today to investigate report of leaking . . . adding to the problem is the fact that the gutter seams virtually all leak. In addition, it does not appear that the laps of the channel wrap are sealed. This is allowing water from the gutters on the channel wrap, and from the channel wrap onto and behind the C-Channel. From here water flows onto the stucco and into the window frames and then into the house."

The Redigs moved into their new home in the winter of 2000, when construction was almost complete. The leaks continued through the rainy season and caused damage throughout the home. In January 2001 Lis told Blackwood there were leaks in the kitchen, the gutter system, and the master bedroom. In February he informed Blackwood of additional leaks he believed were coming from the roof. Lis and an employee of Alliance, Ray Gump, caulked areas around the windows and roof.

In March 2001, toward the end of the rainy season, Redig wrote to Blackwood that "the leaks in our roof remain unresolved to the best of my knowledge. Bob Lis told me that Ray Gump of Allied was here a week ago today, though I was home most of that day and did not see Ray. Bob stated that Ray took a look at both problem areas but did not see the source of the leaks. Nonetheless, Bob said that Ray added caulking in some areas as additional precaution, hoping that this might resolve the problems. As I understand it, no testing was performed to ensure that the problems are resolved for the short term let alone the long."

Leaking began anew with the onset of the 2001/2002 rainy season. On November 12, 2001, Redig notified Blackwood of a significant leak from a crack in the ceiling. London told Allied that the crack "indicates the potential for some other issues. . . . It is not clear whether whatever caused the crack compromised the integrity of the roof or if the crack merely provided a means for the water to escape" and that "[i]n any case, the situation needs to be checked out and repaired a.s.a.p."

On November 28, 2001, Redig wrote to Lis "to document the status of known leaks at our home." He reported: "There are 4 distinct areas in the home that show evidence of water penetration. . . . [¶] 1. Located in hallway #2, middle of hallway, just outside the master bedroom door. This leak is quite bad. In the first heavy rain of the season, it dumped about a gallon of water on the hallway floor during the early morning hours. . . . [¶] 2. Located in the master bath on/at the west wall (which is shared by the laundry room). Water staining is evident on the wall and small amounts of water have been observed on the limestone flooring at the base of the wall after moderate to heavy rains. . . . [¶] 3. Located in the master bedroom entry area, at the base of the south-east ellipse wall. There is a water stain and cupping of the maple floor boards at the base of this wall. . . . [¶] 4. Located at the front entrance door. This leak is causing water stains and maple floor board cupping just inside the main entry door." A week later Redig reported a fifth leak, this one in "the western most outbuilding (the uphill side). The leak appears to be in the roof of the outbuilding, at the west side or in the north west corner. There is substantial water staining and damage to the plywood walls. . . . Damage to the interior of the building is already significant and getting worse." He also reported that caulking done the previous month had not resolved three of the four previously identified leaks.

Redig suffered a relapse of leukemia around that time, and the Redigs decided to sell their house. On December 26, 2001, they executed a "completion agreement" with Lis to prepare the house for sale. The work was to be completed by January 31, 2002 for a cost of $20,000. The agreement specified that "[a]ll leaks to all building structures must be fixed. Further rains must verify that no leaks exist in any part of the structures, including outbuildings." The contract did not encompass alterations to the gutter system or the roof design.

The Redigs initially listed their home for sale for $3.95 million but later reduced the price to $3.5 million. Kizor offered $2.75 million for the home. After Kizor rejected two counteroffers, the Redigs accepted Kizor's offer.

The Redigs then provided Kizor a supplemental disclosure statement that documented the five known leak areas and described the corrective measures taken to correct the leaks, which included caulking windows and the threshold, installing safety drains, increasing the grade at the front door threshold, repairing a door in the dining room, replacing skylight screws, and roof repair. Kizor hired Peter Eva of Skyline Roofing to assess the roof. Eva inspected the roof on August 5, 2002, with Kizor present. He noted four or five different areas where leaks had been repaired with sealant, which he pointed out to Kizor. His written report identified three areas of serious concern.[2]

After receiving Eva's report, Kizor terminated the sale contract. On August 8, 2002, he wrote to Redig that he was "surprised and disappointed with the findings of Skyline Roofing. Nevertheless, I appreciate Peter Eva's independence, professional

experience, candor and concern about the flat slope of the roof, the location of the gutters on top of the walls, signs of water pooling, and ultimately the potential issue of trying to identify the source of a future leak. [¶] Today, Peter spoke with your general contractor, Mr. Lis. Since that conversation, he advised that his conversation was friendly, but that his concerns were not assuaged. . . . [¶] The roof, in combination with the views from an independent stucco contractor, have obviously given us pause. I did not want to tackle much in the way of remediation which is why we have been looking at newer homes. . . . Before I sign off, I feel obligated to share our enthusiasm for your vision and the home's many unique features, but at this juncture, for the reasons stated above, we have decided to look elsewhere."

Kizor and his wife continued to search for a home in the area, but without success. Ultimately, Redig persuaded them to reconsider buying his home. Blackwood's Lance Wong assured Kizor that he and other roofing professionals had given special attention to the roof's low-slope areas and gutters to safeguard it against failure, and that these custom measures, combined with proper materials and installation, "serve as the basis for a structurally sound and fully functioning roof system." Wong wrote that "[i]f there were an issue with this roof, it would show itself relatively quickly as there is very little space between the roof surface and the inner ceiling materials, unlike a typical house with attic space. The different areas of the roof have withstood the test of time to date, with all installer related issues having been taken care of quite some time ago."

At the Redigs' suggestion, Kizor also met with the contractors to address his concerns about the roof. His realtor, Bob Solomon, attended the meeting. He testified that at the meeting Kizor expressed "concerns that, due to the design of the interior downspouts, if there was a future leak, it would be expensive to fix."[3]

Kizor subsequently offered to purchase the Redig home for $2.675 million. On September 3, 2002, the Redigs accepted the offer, and included an addendum in the sale contract protecting themselves from liability for further problems with the roof: "Seller has no responsibility for the condition of roof and stucco and buyer absolves seller of any liability in connection therewith." Miranda Redig testified that she and her husband were concerned about the risk of liability for problems with the roof or the stucco because "it took a while to fix them. And we are not there, we don't know what the next season is going to be, you know, we can't tell." The Redigs did not assign any claims related to the condition of their home to Kizor.

Four years after purchasing the home, Kizor filed an action alleging that the home "was designed with weatherproofing and other latent construction and design defects, resulting in leaks and other direct and consequential property damage and other injuries . . . . Manifestation of the construction defects has been progressive and continuing . . . ." The complaint alleges at length that the house was riddled with design and construction defects that caused extensive leaks and related damage. The complaint pleads causes of action for negligence against BRU, Lis and RJL, and fraud and deceit against Lis and RJL.[4] Subsequently, Blackwood, Alliance and Capitol Glass were joined as codefendants, and cross-complaints were also filed.

Defendants eventually moved for summary judgment. The court granted the motion in favor of all defendants, and subsequently denied Kizor's motions for leave to file an amended complaint, for clarification and/or reconsideration of the summary judgment ruling, and for a new trial. This appeal timely followed.

ANALYSIS

I. Summary Judgment

A. Standard of Review

" 'To secure summary judgment, a moving defendant may prove an affirmative defense, disprove at least one essential element of the plaintiffs cause of action [citations] or show that an element of the cause of action cannot be established. [Citation.] The defendant "must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial." [Citation.] [¶] The moving defendant bears the burden of proving the absence of any triable issue of material fact, even though the burden of proof as to a particular issue may be on the plaintiff at trial. [Citation.] . . . Once the moving party has met its burden, the opposing party bears the burden of presenting evidence that there is any triable issue of fact as to any essential element of a cause of action.' " (Ochoa v. Pacific Gas & Electric Co. (1998),61 Cal.App.4th 1480.)

"In reviewing the propriety of a summary judgment, the appellate court must resolve all doubts in favor of the party opposing the judgment. [Citation.] The reviewing court conducts a de novo examination to see whether there are any genuine issues of material fact or whether the moving party is entitled to summary judgment as a matter of law." (M.B. v. City of San Diego (1991),233 Cal.App.3d 699.) "We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citation.] However, to defeat the motion for summary judgment, the plaintiff must show ' "specific facts," ' and cannot rely upon the allegations of the pleadings." (Horn v. Cushman & Wakefield Western, Inc. (1999),72 Cal.App.4th 798.) "While '[s]ummary judgment is a drastic procedure, should be used with caution [citation] and should be granted only if there is no issue of triable fact' [citation], it is also true '[j]ustice requires that a defendant be as much entitled to be rid of an unmeritorious lawsuit as a plaintiff is entitled to maintain a good one.' [Citation.] 'A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiffs asserted causes of action can prevail.' " (M.B. v. City of San Diego, supra, at p. 704.)

B. The Negligence Claims

Based on undisputed facts the trial court found that "substantial water leaks became obvious in many parts of the main house and an outbuilding during the winters of 2000-2001 and 2001-2002, i.e., while the Redigs owned this Residence. . . . The Redigs began a series of meetings and investigations as to the cause of the leaks, and undertook a series of 'fixes.' . . . That these measures were necessary was evidence enough something was wrong with the weatherproofing of the residence during the Redigs['] ownership." Relying on Krusi, supra, 81 Cal.App.4th 995 and Siegel v. Anderson Homes, Inc. (2004),118 Cal.App.4th 995 (Siegel), the court concluded the causes of action arising from the leaks accrued to the Redigs, not Kizor. We reach the same conclusion.

Krusi is the key case. The plaintiffs there bought an eight-year-old commercial building. The seller knew the building had leaked persistently over the years, but believed the leaks had been repaired. (Krusi, supra, 81 Cal.App.4th at p. 997.) The seller also knew that gypsum subflooring on the second floor was deteriorating, but said that it, too, had been repaired before the sale. The leaks increased in frequency and magnitude after the building was sold. Contractors retained by the buyer reported that the leaks and flooring problems were caused by defects in the building's design and construction. One opined that the defects were not evident without an invasive inspection and would not be apparent to a layperson. An engineer reported that various flooring materials in the building had been damaged because of the deteriorating gypsum subflooring. The buyers sued the building's architects and contractors. (Id. at p. 998.) In affirming summary judgment in favor of the defendants, the appellate court explained: "It is clear that a cause of action for damage to real property accrues when the defendant's act causes ' "immediate and permanent injury" ' to the property or, to put it another way, when there is 'actual and appreciable harm' to the property. . . . This rule is, of course, simply a corollary of the general rule regarding accrual of causes of action. [Citation.] We are aware of no reason why it should not apply . . . to actions alleging negligence in the design, engineering or construction of buildings. [¶] Thus, if, as, and when an owner of

a building suffers harm because of inadequate design of, or engineering or construction work performed on a building, a cause of action accrues to that owner. To be sure, it may choose to deliberately transfer that cause of action to another, but without some clear manifestation of such an intention, the cause of action is not transferred to a subsequent owner." (Id. at p. 1005.)

Krusi makes clear that once a cause of action for property damage arises in favor of a property owner, another cause of action against the same defendant does not accrue to a subsequent purchaser—"unless, of course, the damage suffered by that subsequent owner is fundamentally different from the earlier type. Thus, if owner number one has an obviously leaky roof and suffers damage to its building on account thereof, a cause of action accrues to it against the defendant or defendants whose deficient design or construction work caused the defect. But, if that condition goes essentially unremedied over a period of years, owners two and three of the same building have no such right of action against those defendants, unless such was explicitly (and properly) transferred to them by owner number one. But owners two and three could well have a cause of action against those same defendants for, e.g., damage caused by an earthquake if it could be shown that inadequate seismic safeguards were designed and constructed into the building. Such is, patently, a new and different cause of action." (Krusi, supra, 81 Cal.App.4th at p. 1006.) Because it was undisputed that the prior owner knew about the leaks and damaged subflooring before the sale, the negligence claim accrued to the building's prior owners, not the subsequent buyers.

Krusi is dispositive here. As in that case, Kizor's claims against the defendants are based on design and construction defects that caused significant apparent water intrusion while the former owners owned the house. Repairs were attempted through two consecutive rainy seasons with at best uncertain results, and the Redigs remained sufficiently concerned about leaks to require a release from any liability for future problems with the roof and stucco. In short, the undisputed evidence establishes that the Redigs were aware of the significant water intrusion problems during their ownership. Under Krusi, the cause of action against the various defendants for water intrusion damage due to design and construction defects thus vested in the Redigs during their ownership. "[T]he cause of action belongs to the owner who first discovered, or ought to have discovered, the property damage. It is only then that some entity capable of maintaining a legal claim will have suffered a compensable injury, e.g., the cost of repair and/or the loss in the property's value . . . ." (Siegel, supra, 118 Cal.App.4th at p. 1009; see also Mills v. Forestex Co. (2003),108 Cal.App.4th 625 [attempts to repair warped siding evidenced that damage was sufficiently appreciable that owners were on inquiry notice and cause of action accrued].) The Redigs did not assign their cause of action to Kizor.

Citing the Redigs' completion agreement with Lis to prepare the home for sale and Lis's testimony that he believed his repairs fixed the leaks, Kizor argues Krusi does not control because "[o]nce those repairs were performed and accepted by the Redigs, no cause of action remained to sue the contractors for the cost of repairing the leaks." He contends that whether the repairs were adequate, and thus whether the Redigs had a cause of action after Lis completed them, are questions of fact that require a trial. At the core of this argument is the premise that the leaks that occurred after Kizor bought the house were caused by defects that somehow differed from the defects that caused the leakage that the Redigs experienced and which, in his view, Lis repaired. The claim cannot be squared with Kizor's complaint, which explicitly describes a continuation of the exact same problems the Redigs experienced. It identifies both design and construction problems that cause rainwater to run down behind the stucco and penetrate the house, and alleges that the repair efforts were "clearly done after the completion of the Residence, and did not address the root causes of the leaks and in fact [were] not the proper way to address those issues." These allegations constitute a binding judicial admission. (Heater v. Southwood Psychiatric Center (1996),42 Cal.App.4th 1068, fn. 10.) Even if the leaks that occurred during Kizor's ownership originated from different areas of the roof or gutter, appeared in different areas of the home, or were of a different magnitude, the damage was not "fundamentally different" (Krusi, supra, 81 Cal.App.4th at p. 1006) from the water intrusion damage that plagued the Redigs.

Lis's testimony that he believed his repair work successfully addressed the leaks does not create a triable issue of a material fact. The seller in Krusi also believed the leaks had been repaired prior to sale, but that had no bearing on whether the negligence claim against the builders accrued during his ownership. (Krusi, supra, 81 Cal.App.4th at pp. 997-998.) Lis's belief that the repairs were successful is not evidence that the leakage was in fact eliminated. To the contrary, the undisputed evidence is that leaking resumed with the next rainy season. The Redigs continued to have concerns about the roof and gutters, which were weighty enough for them to add a provision to the sale contract insulating them from liability for further problems. Despite the repairs, they had notice or information of circumstances that would put a reasonable person on inquiry. (Jolly v. Eli Lilly & Co. (1988),44 Cal.3d 1103.) Kizor offered no evidence to support his hypothesis that there were two distinct defects that manifested identically, one of which appeared before the repairs and one after. Such speculation is insufficient to establish a triable issue of material fact sufficient to defeat summary judgment. (Sangster v. Paetkau (1998),68 Cal.App.4th 151; Burton v. Security Pacific Nat. Bank (1988),197 Cal.App.3d 972.)

Similarly, Krusi's impact is not avoided by Kizor's suggestion that the leaks that occurred during the Redigs' ownership were mere symptoms of the defects, insufficient to give rise to a cause of action based on the underlying but as yet undetermined cause of the defects, the allegedly negligent design and construction. Keru Investments, Inc. v. Cube Co., Inc. (1998),63 Cal.App.4th 1412 (Keru), a decision relied on by the court in Krusi, explains why this argument fails. Keru held that a party who bought a building after it was badly damaged in an earthquake had no right to assert a claim against the engineer and contractor who had performed allegedly faulty seismic retrofit work for the building's prior owner. " '[T]he purpose of the [real party in interest] statute is readily discernible . . . . It is to save a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of other claimants to the same demand.' [Citations.] It is evident that the cause of action for negligent construction against [the defendant] was held by the [prior owner] and not the party to whom it transferred the property after the cause of action accrued. . . . [¶] . . . The injury was sustained by the [prior owner] which owned the property when the earthquake devastated the building. Respondents cannot claim to own the cause of action simply because they discovered the reason for the damage after the building was transferred. Under respondent's reasoning, every party who purchased a hulk of a building would automatically have a right to bring a lawsuit if they could find some previously unknown factor which contributed to the building's destruction. That is simply not the law." (Keru, supra, 63 Cal.App.4th at pp. 1424-1425, italics added; see also Krusi, supra, 81 Cal.App.4th at p. 1003.)

Kizor attempts to distinguish Krusi because "the undisputed facts in this case do not show 'overwhelmingly' that Kizor knew the Redigs' property suffered from design or construction defects when he purchased the home." He cites evidence that he was assured any problems with the roof had been permanently addressed. But while there was evidence in Krusi that the plaintiff had notice of the defect before purchasing the property, the decision does not turn on the subsequent purchaser's knowledge at the time of the purchase. What mattered in Krusi was that the former owners knew or should have known their home leaked persistently and were, at a minimum, on inquiry notice of the reasons for the leakage. (Jolly v. Eli Lilly & Co., supra, 44 Cal.3d at p. 111 ["so long as a suspicion exists, it is clear that the plaintiff must go find the facts; he or she cannot wait for the facts to find him or her"].) Thus, here the relevant questions are (1) whether the damage was sufficiently appreciable during the Redigs' ownership to put a reasonable person on inquiry notice, and (2) "whether the causes of action that accrued to prior owners of the building were the same as [those] alleged by appellants." (Krusi, supra, 81 Cal.App.4th at pp. 1005, 1007; Mills v. Forestex Co., supra, 108 Cal.App.4th at p. 647; Siegel, supra, 118 Cal.App.4th at p. 1009.) Whether Kizor was aware of the alleged design and construction defects when he bought the house is of no consequence. [5]

This rule is entirely equitable. If a defect in the design or construction of property has not caused appreciable harm giving rise to a cause of action at the time the property is sold, the purchaser who owns

the property when the claim first becomes actionable acquires the right to seek redress from those responsible for the defect. (Siegel, supra, 118 Cal.App.4th at p. 1009.) The party who owns the property when the defect causes actionable damage acquires the right to sue those responsible, either before or after selling the property. (Vaughn v. Dame Construction Co. (1990),223 Cal.App.3d 144.) The damage caused by the defect reduces the value of the property and, if not corrected before sale of the property, presumably affects the price that a buyer pays for the property. Permitting the buyer to sue those responsible for the defect in that situation would threaten to permit either what would amount to a double recovery by the buyer or, if the seller also sought relief from those responsible, duplicate liability of the responsible parties. If an actionable defect was known to the seller but not disclosed to the buyer, so that the buyer overpaid, the buyer is not without a remedy. That remedy, however, is not a duplicative right to sue those responsible for the defect, but a claim against the seller (or others) for failing to make proper disclosure. (Siegel, supra, 118 Cal.App.4th at p. 1009.)

Kizor argues that more recent cases, most notably Siegel, have undermined the ruling in Krusi. But while Siegel (and other subsequent cases) questioned the breadth of certain language in the Krusi opinion, neither that case nor any other cited by Kizor has questioned its holding. To the contrary, each of the cases, under varying factual scenarios, has reconfirmed the Krusi analysis. Siegel held that the purchaser of a home had a cause of action against the builder where the home sustained structural damage before the original owner sold it to the plaintiff, but the damage was neither discovered nor reasonably discoverable until after the sale. (Siegel, supra, 118 Cal.App.4th at p. 996.) After making an exhaustive analysis of Krusi and its predecessors,[6] the court concluded that a "cause of action belongs to the owner who first discovered, or ought to have discovered, the property damage. It is only then that some entity capable of maintaining a legal claim will have suffered a compensable injury, e.g., the cost of repair and/or the loss in the property's value (inasmuch as the owner has a duty to disclose the damage to potential buyers). [¶] This rule is entirely consistent with the results in both Keru and Krusi (if not with their statements of the rule)" because discovery occurred during the prior ownership in both cases. (Siegel, supra, at p. 1009.)[7]

Finally, Kizor maintains the Krusi accrual rule is inapplicable because the Redigs acted as "owner/builders," and thereby "took on the duties of a developer, who builds real property improvements to be placed in the stream of commerce." However, there is no evidence that the Redigs built their home for the purpose of sale; in fact, it is undisputed that they intended to live in the home and sold it only because Redig became gravely ill. Moreover, the distinction between those who build with the intent to resell and those who do not is not determinative. As Krusi observes, "in this day and age, it is next to impossible to predict with any degree of certainty what sort of property is constructed principally for resale and what is not. Thus, in three of the four principle cases involved, Huang, Sumitomo Bank, and Keru, the properties constructed were multifamily projects (in two of them apartments, in one a condominium complex). In Vaughn it was a single condominium. Here, it is an office building. We are highly dubious as to the ability of either a court or a jury to declare which of these types of improved real property is more or less likely to be intended for resale. We are equally dubious regarding the proposition . . . that different rules of law should apply depending on that fact. . . ." (Krusi, supra, 81 Cal.App.4th at pp. 1004-1005.) In all events, Kizor did not offer or factually develop this theory at the summary judgment stage. He may not do so now to create a triable issue. (Mills v. Forestex Co., supra, 108 Cal.App.4th at p. 651.)

We conclude that the trial court correctly granted summary judgment on the negligence cause of action.

C. The Fraud And Deceit Claims

Kizor's complaint alleged that Lis and RJL intentionally concealed or negligently failed to disclose the true problems with the roof and windows in order to induce him to purchase the Redig home. Kizor

alleged that these defendants "examined the Residence in July or August of 2002, and represented in a letter to Mark Solomon, the realtor representing the original owners and Sellers of the Residence . . . that approximately 70% of the stucco of the Residence needed repair, and that the preliminary budget for the repairs was $15,000. Lis and RJL Construction knew or had reason to know that the stucco was being evaluated preparatory to sale to a buyer such as Kizor [and] knew that prospective buyers such as Kizor would learn of his estimate, and would rely upon it as describing the nature and extent of the problems with the Residence and what it would take to fix them. Lis and RJL Construction failed to state the root causes of the cracking stucco and the fact that it was likely to recur after repairs were made, and that the root causes and cracking would lead to further damage to the other parts of the house."

Our review of the record confirms the ruling was sound. RJL adduced evidence that Lis was never asked about the source of the stucco cracking, or whether he thought the roof would leak in the future. Kizor failed to submit any evidence to dispute these facts, or to support his dubious allegation that prospective buyers (such as himself) would rely on Lis's estimate for the repair of cracked stucco "as describing the nature and extent of the problems with the Residence" as a whole. The only evidence, as opposed to allegations, that Kizor cited in this regard is Lis's testimony that he believed the repairs he had made to known leaks were "intended to be permanent." But there was no evidence that Lis communicated this belief to anyone, or that Lis believed (much less said) that the house would remain watertight. Nor did Kizor adduce evidence that the estimate for the stucco repair job was inaccurate or encompassed work other than stucco repair. In short, Kizor failed to submit any evidence of an actionable misrepresentation and the court properly summarily adjudicated this cause of action.

II. The Post-summary Judgment Motions

A. Background

After the court granted summary judgment but before judgment was entered, Kizor moved to amend his complaint to add causes of action for "Negligence and Negligent Repair" against BRU, Lis, RJL, Blackwood, and Alliance, and to add BRU, Alliance and Blackwood as defendants to the deceit claim. The next day he filed a motion for "clarification and/or reconsideration" of the summary judgment order. The motion to amend was set for a hearing on January 6, 2009, but was continued several times, finally to March 24.

On January 20, 2009, the trial court held a hearing on Kizor's motion for clarification or reconsideration. At that hearing, the parties also argued the merits of Kizor's motion to amend. The court declined to revisit its summary judgment ruling. Its written order stated: "[T]here is no need to clarify the obvious fact that the order granting summary judgment dealt with all claims against the moving defendants; an order granting summary judgment necessarily addresses all claims. Plaintiff cannot rely on claims which he acknowledges he 'did not clearly plead,' and which he only 'began to understand' after reviewing the Court's tentative rulings. [Citations.] . . . [¶] Plaintiffs alternative motion for reconsideration is denied. Plaintiff has failed to demonstrate that there are 'new' facts justifying reconsideration. (See Garcia v. Hejmadi (1997),58 Cal.App.4th 674 [the party seeking reconsideration is held to 'a strict requirement of diligence'].) The Court notes that plaintiff filed supplemental opposition papers on November 4, 2008, after the last of the depositions that he now contends revealed new facts. The Court also notes that plaintiff did not seek a continuance of the hearing on the motion for summary judgment, either for the purpose of amending his complaint or for the purpose of conducting further discovery under Code of Civil Procedure section 4[3]7c, subdivision (h)."

The court entered judgment for BRU, Capitol Glass, Alliance Roofing and Blackwood, and Lis/RJL on March 19, 2009. Kizor then moved for a new trial as to BRU, Blackwood and RJL.[8] The court denied these motions as well. It explained: "Denied for the reasons stated in the ruling on the motion for

summary judgment. This appears to be nothing more than a motion for reconsideration which is untimely, and for which there is no legal basis."

Kizor challenges the denial of his motions to amend and for a new trial. Although his notice of appeal also specifies the motion for clarification, it is not addressed in his opening brief. We therefore deem any challenge to it waived and confine our attention to the trial court's rulings on the other motions.

B. Motion to Amend

"The rules governing appellate review of pleading issues are well settled: the trial court is vested with broad discretion when presented with a motion for leave to file an amended pleading and may consider such factors as whether the proffered pleading states facts which could have been pleaded earlier, and whether a party has established a reasonable excuse for the delay. [Citations.] An order granting or denying leave to amend a pleading will not be disturbed absent a showing that the trial court abused its discretion. [Citation.] The test for abuse of discretion is whether the trial court's decision is arbitrary, capricious or without basis in reason." (A.N. v. County of Los Angeles (2009),171 Cal.App.4th 1058; Branick v. Downey Savings & Loan Assn. (2006),39 Cal.4th 235.)

Kizor claims the trial court failed to exercise its discretion, requiring reversal, because it did not hold a hearing or make an explicit ruling on his motion to amend the complaint to add a "negligent repair" theory and add Blackwood as a fraud defendant. The argument fails. Kizor and the other parties did argue the merits of that motion at the January 20, 2009 hearing on the motion for clarification or reconsideration. We therefore disagree that the lack of a separate hearing on the motion to amend "constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights"—an assertion for which, we note, he provides no relevant authority. Moreover, the order denying Kizor's reconsideration motion reveals plainly that the court viewed Kizor's delay as fatal to his attempt to amend: Kizor "did not seek a continuance of the hearing on the motion for summary judgment, either for the purpose of amending his complaint or for the purpose of conducting further discovery under Code of Civil Procedure section 4[3]7c(h)." (Italics added.) Unjustified delay alone is a sufficient ground to warrant the denial of a motion to amend, even if the proposed amendment might otherwise pass muster. (Huff v. Wilkins (2006),138 Cal.App.4th 732.) We see no likelihood that the court would have granted leave to amend had it held a hearing or made an explicit ruling on the motion before it entered judgment. As a practical matter, a hearing and order were not necessary once the motion to amend was rendered moot by the entry of judgment.

Kizor's failure to seek leave to amend before the summary judgment hearing legally doomed his belated attempt to amend after summary judgment had been granted. A party cannot oppose summary judgment on matters outside the pleadings. Therefore, "[i]f the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion." (Distefano v. Forester (2001),85 Cal.App.4th 1249; Leibert v. Transworld Systems, Inc. (1995),32 Cal.App.4th 1693; 580 Folsom Associates v. Prometheus Development Co. (1990),223 Cal.App.3d 1.) Kizor did not do so, even though he acknowledges his new claims were based on discovery obtained weeks before his deadline for opposing the summary judgment motions. It was well within the court's broad discretion to deny the motion.

C. Motion for New Trial

Code of Civil Procedure section 657 sets forth the grounds on which a court can grant a new trial. They are: (1) irregularity in the proceedings; (2) jury misconduct; (3) accident or surprise that "ordinary prudence could not have guarded against"; (4) newly discovered evidence; (5) excessive or inadequate damages; (6) insufficient evidence or a verdict against the law; and (7) legal error. (Code Civ. Proc.,

§657.) "The right to a new trial is purely statutory, and a motion for a new trial can be granted only on one of the grounds enumerated in the statute." (Fomco, Inc. v. Joe Maggio, Inc. (1961),55 Cal.2d 162.)

Kizor's motion for a new trial on the negligence claim was premised on legal error—specifically, on his contention that the court erred in granting summary judgment on the basis of the Krusi accrual rule. As the trial court observed, his arguments in support of a new trial simply rehashed his opposition to the summary judgment motions. We have already concluded the trial court properly rejected those arguments when it granted summary judgment. (Section I.B., ante.) That ruling was no less correct the second time around.

Kizor's bid for a new trial to add Blackwood as a defendant to his fraud and deceit claim is also meritless. Kizor says he accidentally neglected to add Blackwood to his fraud claim when he added it as a "Doe" defendant to the negligence claim, and that the court should have granted a new trial motion so that judgment would not be entered "based merely on a pleading technicality." But an "inadvertent pleading error" is not one of the enumerated grounds for a new trial. Having no authority to grant the motion, the court properly denied it. (Fomco, Inc. v. Joe Maggio, Inc., supra, 55 Cal.2d at p. 166.)

DISPOSITION

The appeal is dismissed as to Capitol Glass. In all other respects the judgment is affirmed. Respondents shall recover their costs on appeal.

Pollak, J.

We concur:

McGuiness, P. J.

Jenkins, J.

Notes:

[1.] References in this opinion to "Redig" are to John Redig.

[2.]According to the written report: "1. The building does not have any eaves and the gutter is located above the exterior wall. Although there appears to be a flashing under the gutter, it has caulked joints. When this caulking fails in a few years time any leak in the gutter and flashing will result in water intrusion above the wall. Maintenance on the flashing is not possible as it is built into the roof under the gutter. [¶] 2. Approximately 60% of the metal panels have been installed on a roof slope of one inch in twelve inches or less. Most manufacturers do not recommend this low slope. Most manufacturers require a minimum of three inches in twelve inches. The low slope creates a situation where the performance of the roof depends on caulking and the underlayment to a large degree. Once these components fail, the roof fails. [¶] 3. The underlayment is a very crucial component of this roofing system because of the design of the roof. Without doing destructive testing, it is impossible to see what has been used as an underlayment, and how it has been installed. This underlayment will also have holes in it from the fasteners that hold the panel in place." Eva concluded that, although the roofing materials appeared to be of good quality and the installation appeared fair, the design of roof "requires a very high level of installation and material performance, which is not practical in my opinion."

[3.]Solomon testified as follows: "I don't know if that was when Mr. Kizor expressed it, but I do recall something about the downspouts as being a concern. [¶] Q: Was there any discussion by anyone that there had already been leaks through the interior downspouts at the Redig Home? . . . [¶] A: I don't remember that at all. [¶] Q: This was all discussion about what may happen in the future with respect to the interior downspouts? [¶] A: Just - it was all part of a concern with the design of the roof or needing further explanation as to the design of the roof to alleviate - one obvious concern would be if there's a design flaw we have [an] interior downspout . . . . [¶] Q: And were there any discussions as to what had happened during the past rainy season at the Redig home? [¶] A: I don't specifically remember what John said, but John never expressed any problems with the roof. . . . [¶] So to the best of your understanding and your recollection, Alan Kizor was voicing concern that the interior downspouts might leak in the future; is that correct? [¶] A: No, that's not what I said. [¶] He was concerned with feeling uncomfortable, based on his expert person, with the design of the roof, and since it was a fairly sophisticated complicated design, both with the roof and the downspouts, he had concerns. [¶] Q: Right. What were the concerns? . . . [¶] A: There were areas that were flat which might have some standing water and the downspouts were in the interior of the house. [¶] Q: And why is that a concern, that the downspouts were in the interior of the house? . . . [¶] A: Well, if you have concerns with the design of the roof and then the problem proceeds to affect the downspouts, the downspouts are in the walls. [¶] Q: Right. [¶] A: And it could get expensive to fix it. [¶] Q: Expensive to fix what? [¶] A: If there's a leak in the downspouts. . . . [¶] Q: And the simple question is, was one of the concerns that, due to the design of the interior downspouts, if there was a future leak, it would be expensive to fix? . . . [¶] A: That's correct."

[4.] The complaint also pleads a cause of action for unfair competition against BRU, Lis and RJL. Early in the proceedings this cause of action was dismissed without prejudice.

[5.] Arguably the undisputed evidence here establishes that Kizor was on notice of defects in the design and construction after he read Eva's roof report, regardless of any assurances he later received about the condition of the roof. We need not decide this issue, however, because the undisputed evidence establishes that the Redigs were aware of the leaking.

[6.] Principally Huang v. Garner (1984),157 Cal.App.3d 404, Sumitomo Bank v. Taurus Developers, Inc. (1986),185 Cal.App.3d 211, Vaughn v. Dame Construction Co., supra, 223 Cal.App.3d 144, and Keru, supra, 63 Cal.App.4th 1412.

[7.]Similarly, nothing in Standard Fire Ins. Co. v. Spectrum Community Assn. (2006),141 Cal.App.4th 1117 undercuts the Krusi analysis. While questioning "whether some of the limiting language of Krusi may be imprecise or overbroad," the court held that Krusi does not exclude the possibility that a homeowners association, as a subsequent owner, could have a cause of action against the architects, contractors and engineers for different damage from that suffered by the prior owner, or the developer that owned the property while the allegedly defective work was performed. (Id. at pp. 1143-1144.)

Jasmine Networks, Inc. v. Superior Court (2009),180 Cal.App.4th 980 also is not to the contrary. That case rejected the notion of a "current ownership rule" in an action for misappropriation of a trade secret. (Id. at p. 986.) The court held that one who sells a trade secret does not lose the right to sue for its prior misappropriation if he or she sold at a diminished value or suffered some other measurable harm because of the alleged theft. In the passage Kizor relies on, the court commented that concerns about multiple or inconsistent liability might be best served by joinder, intervention, consolidation, coordination, or similar procedures. (Id. at pp. 994-996.)

[8.]He did not, however, move for a new trial as to Capitol Glass. Accordingly, Kizor's time to appeal from the judgment in favor of Capitol Glass ran 60 days from its service of notice of entry of judgment on March 30, 2009. (Cal. Rules of Court, rule 8.104(a)(2).) As Kizor did not file his notice of appeal until

June 11, 2009, the appeal is untimely as to Capitol Glass and must be dismissed. (Hollister Convalescent Hospital, Inc. v. Rico (1975),15 Cal.3d 660.)
