ARUNDEL HOMEOWNERS ASSOCIATION, INC., Plaintiff and Appellant,
v.
ARUNDEL GREEN PARTNERS et al., Defendants and Respondents.
A130312
COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FOUR
Dated: September 20, 2011
NOT TO BE PUBLISHED IN OFFICIAL REPORTS

(San Francisco City & County Super. Ct. No. CGC09490288)

I.
INTRODUCTION

The homeowners association (the HOA) of a 31-unit condominium complex known as The Arundel filed a complaint against Arundel Green Partners and related entities[1] (collectively, Arundel Green), alleging defective construction. The trial court granted Arundel Green's motion for judgment on the pleadings on the ground that the HOA's entire complaint was barred by the 10-year statute of limitations set forth in Code of Civil Procedure section 337.15 (section 337.15). Thereafter, relying on Lantzy v. Centex Homes (2003),31 Cal.4th 363 (Lantzy), the HOA brought motions for a new trial and to amend its complaint to allege additional facts establishing equitable estoppel.[2] The trial court denied the HOA's motions, finding "there was no reasonable possibility presented by [the HOA] to the Court that there could be an allegation of equitable estoppel." The HOA appeals, claiming that since its "motions for new trial and to amend its complaint adequately alleged and demonstrated equitable estoppel, the trial court erred and its judgment should be reversed." We disagree and affirm.

II.
FACTS AND PROCEDURAL HISTORY

In 1998, Arundel Green, the project developer, converted 31 units at 1438 Green Street, San Francisco, to condominiums. A "Certificate of Final Completion and Occupancy" was issued by the City's Department of Building Inspection in April 1998. A "Notice of Completion" was subsequently recorded with the assessor's office in June of the same year. The HOA was organized in March 1998. Its governing documents obligate the HOA to manage, maintain, and repair The Arundel's common areas for the use and enjoyment of the HOA's members and guests.

Eight years later, in April 2006, the HOA, through its counsel, issued a "Notice of Commencement of Legal Proceedings" pursuant to the version of Civil Code section 1375 in effect at the time. Civil Code section 1375 et seq. was passed by the Legislature in 1995 and is known as the "Calderon Act." The Calderon Act's purpose is to encourage settlement of construction and design defect disputes and to discourage unnecessary litigation. (El Escorial Owners' Assn. v. DLC Plastering, Inc. (2007) 154 Cal.App.4th 1337, 1354.) Accordingly, a common interest development association must satisfy all of the requirements of the Calderon Act before it may file a complaint for damages based on design or construction defects against a builder, developer, or general contractor of a common interest development. (Civ. Code, § 1375, subd. (a).) To commence the "Calderon Process," an association serves a "Notice of Commencement of Legal Proceedings" (Calderon Notice), as was done by the HOA in this case. (Civ. Code, § 1375, subds. (a), (b).) The Calderon Notice must list the alleged defects and describe the "results of the defects." (Civ. Code, § 1375, subds. (b)(2), (3).) Service of the Calderon Notice triggers a period of time, not to exceed 180 days, during which "the association, the respondent, and all other participating parties shall try to resolve the dispute through the processes set forth in [section 1375]." (Civ. Code, § 1375, subd. (c).)

The "Notice of Commencement of Legal Proceedings" served by the HOA identified a litany of claimed deficiencies, including defective cabinets, waterproofing membranes, wall-cladding, plumbing, electrical wiring, roofing (including slope, drainage and flashings), fire-rated ceilings, and chimney flues. Six weeks later, in a letter dated May 31, 2006, Arundel Green confirmed an agreement that "all response deadlines that arise from your service on April 5, 2006, of a Notice of Commencement of Legal Proceedings concerning alleged construction defects in the Arundel will be deferred." Furthermore, "no deadlines will be reinstated unless or until one party through its attorneys gives written notice to the other parties of such reinstatement." In the interim, it was explained that there would be a meeting with the general building contractor Charles Zakskorn of ZCON Builders (ZCON) to exchange information which would be treated as settlement negotiations.

The parties thereafter embarked on three years of settlement negotiations during which time various elements of the HOA claims were investigated and repair proposals were discussed. Eventually, the HOA advised Arundel Green in June 2009—11 years after the project was completed—that Arundel Green's most recent settlement offer was unacceptable and that the HOA would file its lawsuit. The letter went on to state that Arundel Green would then have the opportunity "to test the legal basis upon which you contend applicable statutes of limitation have run."

The HOA's complaint for damages against Arundel Green and ZCON was filed on July 10, 2009. Arundel Green filed its answer on October 19, 2009, raising the 10-year statute of limitation set forth in section 337.15 as an affirmative defense.

Arundel Green subsequently filed a motion for judgment on the pleadings seeking dismissal of the HOA's complaint based on the 10-year statute of limitation set forth in section 337.15. In opposition, the HOA did not contend that the complaint was filed

within the 10-year period. Instead, the HOA argued that the invocation of the Calderon Process, and the parties' agreement to defer "all response deadlines" while settlement negotiations were undertaken, was sufficient to toll the statute of limitation for an indefinite period of time. The trial court rejected this argument and granted Arundel Green's motion for judgment on the pleadings on August 5, 2010.[3] At no time during briefing or argument of Arundel Green's motion for judgment on the pleadings did the HOA seek permission to amend its complaint to allege an equitable estoppel.

The HOA then filed two motions; one for a new trial and one to amend its complaint. This time the HOA sought to plead around the statute of limitations by invoking the doctrine of equitable estoppel. As the HOA argued before the court, "[W]hat [the HOA] is now asking the Court is not to reverse any of that adjudication of the applicability of the Calderon Act's tolling provisions, but rather to allow plaintiff to more clearly allege . . . that there were facts that would give rise to an equitable estoppel." The HOA's argument was based on Lantzy, supra, 31 Cal.4th 363, where the Supreme Court held that a defendant whose conduct induced a plaintiff to refrain from filing suit within the 10-year period set out by section 337.15 might be equitably estopped to assert that the limitations period has expired. (Id. at p. 367.) To support the HOA's argument that it should be permitted to amend its complaint to allege equitable estoppel, the HOA claimed that it had deferred filing its lawsuit within the 10-year limitations period based on its reliance "on the developer's agreement to defer the running or to stop the running of that statute of repose to enable the parties to conduct good-faith negotiations in an attempt to fix the problems." The HOA claimed that it was not until after the statute of limitations ran that the HOA realized Arundel Green would not keep its promises; and after this realization, the HOA promptly brought its lawsuit. Based on these facts, HOA argued to the court that "a reasonable possibility [exists] that plaintiffs could, if granted leave to amend, then allege facts specifically raising an equitable estoppel under the Lantzy case."

By order filed on October 15, 2010, the trial court denied the HOA's motion for a new trial and its request to amend its complaint. The court found that the HOA had "not sufficiently allege[d] allegations to support an equitable estoppel theory to circumvent the [10-]year statute of repose under . . . § 337.15[, subdivision] (a)." The HOA filed its notice of appeal on November 5, 2010.[4]

III.
DISCUSSION

As noted, Arundel Green's motion for judgment on the pleadings was granted on the ground that the HOA's entire complaint was barred by the 10-year statute of limitations set forth in section 337.15. The Legislature's enactment of section 337.15 established the "general rule that no action for latent construction defects may be commenced more than 10 years after 'substantial completion' of the construction project. [Citations.]" (Lantzy, supra, 31 Cal.4th at p. 366, fn. omitted.) The Legislature's unambiguous intention was to put a temporal limit on liability for individuals and entities engaged in the development and construction of improvements to real property. (Gaggero v. County of San Diego (2004),124 Cal.App.4th 609.) The statute reflects the

legitimate concern that in light of expanding concepts of liability, the construction industry could be imperiled unless a statute of repose was enacted. (Acosta v. Glenfed Development Corp. (2005),128 Cal.App.4th 1278; see also, Gundogdu v. King Mai, Inc. (2009),171 Cal.App.4th 310.) In enacting section 337.15, the Legislature meant for "the generous 10-year period . . . to be firm and final." (Lantzy, supra, 31 Cal.4th at p. 377.)

The HOA claims that it adduced sufficient facts to establish that "Arundel Green's promises and statements reasonably induced [the HOA] to refrain from suing before the passage of the statute of limitations," therefore "estoppel acts to bar Arundel Green's reliance on [section 337.15] as a defense." The HOA's claim must be evaluated in light of our Supreme Court's decision in Lantzy, supra, 31 Cal.4th 363. In Lantzy, homeowners sued Centex Homes for defects in their homes. (Id. at p. 367.) It was undisputed that the homeowners' suit was untimely under the 10-year limitation period in section 337.15 unless the limitations period was subject to equitable tolling or equitable estoppel. (Lantzy, supra, at p. 368, fn. 3.) The Supreme Court held that, although the statute was not subject to equitable tolling, a defendant could, under certain circumstances, be equitably estopped to assert the statute's 10-year limitation period. (Id. at p. 367.)

After describing the principles of equitable estoppel, the Lantzy court enunciated a four-part test to determine whether equitable estoppel would apply in a construction defect case, and thereby estop a defendant from asserting the statute of limitations as a defense to the action. According to Lantzy, equitable estoppel is established when: 1) a person who is potentially liable for a construction defect represents, while the limitations period is still running, that all actionable damage has been or will be repaired, thus making it unnecessary to sue; 2) the plaintiff reasonably relies on this representation to refrain from bringing a timely action; 3) the representation proves false after the limitations period has expired; and 4) the plaintiff proceeds diligently once the truth is discovered. (Lantzy, supra, 31 Cal.4th at p. 384.)

To support its argument that the HOA should be permitted to amend its complaint in order to satisfy the four-part Lantzy test, the HOA submitted a proposed first amended complaint (FAC) supported by the declaration of an HOA board member, Darien Pope. The declaration describes a series of negotiations between the parties regarding potential repairs, which included the performance of "several repairs, including the replacement of screws in the kitchen cabinets of my unit (#3E), as a test of appropriate repair methods, leading the [HOA] to believe that all of the promised repairs would be made." Although the declarant candidly acknowledges that the HOA and Arundel Green never "reached final agreement as to who should be ultimately responsible if the promised repairs failed," the HOA nevertheless believed "based on their representations and conduct that the Developers and Contractor would make repairs to the Project to remedy the defects identified by them." When the HOA "realized in June of 2009 that the balance of these repairs were not forthcoming," it diligently filed this lawsuit.

The proposed FAC alleged that Arundel Green "made representations to [the HOA] that lead [the HOA] to believe that the defects would be remedied or repaired . . .

without the need for legal action." (Underscoring omitted.) In reliance on these representations the HOA "delayed legal action against them." (Ibid.) When the HOA "realized that defendants had not [sic] intention of repairing or replacing the Project Defects . . . [the HOA] diligently filed the present action." (Ibid.) The proposed FAC is silent as to the precise wording of the representations which allegedly led the HOA to the conclusion that it should refrain from filing its lawsuit within the 10-year limitations period. It is also silent as to precisely when these alleged representations were made.

The facts proffered by the HOA in support of its attempt to amend its complaint to allege equitable estoppel are similar to the facts found insufficient to support an equitable estoppel in Lantzy. In Lantzy, the plaintiffs' complaint had alleged that defendants had " 'attempted to make repairs' " or claimed " 'the defective windows were not defective' " and urged plaintiffs not to file a lawsuit. (Lantzy, supra, 31 Cal.4th at p. 385.) The Supreme Court concluded that plaintiffs' allegations were insufficient to support their claim of equitable estoppel because "[t]he complaint is devoid of any indication that defendants' conduct actually and reasonably induced plaintiffs to forbear suing within the 10-year period of section 337.15." (Id. at p. 385, original italics.) Furthermore, the court emphasized that in evaluating whether a defendant's specific statement or conduct was sufficient to warrant an estoppel, "[t]he defendant's statement or conduct must amount to a misrepresentation bearing on the necessity of bringing a timely suit; the defendant's mere denial of legal liability does not set up an estoppel. [Citations.]" (Id. at p. 384, fn. 18, original italics.)

The Lantzy court further found there was no reasonable possibility that the deficiencies in plaintiffs' complaint could be remedied by amendment. The court observed that the facts offered by plaintiffs "must have been within plaintiffs' personal knowledge at the time they filed their lawsuit;" and "[n]o reason appears why these assertions, if true, were not presented sooner." (Lantzy, supra, 31 Cal.4th at p. 387.) The court concluded the trial court properly dismissed plaintiffs' claims without leave to amend because "there is no reasonable possibility plaintiffs can assert new, credible facts" establishing equitable estoppel. (Ibid.)

Here the HOA's proposed FAC, like the complaint in Lantzy, basically claims the HOA reasonably believed there would be an amicable settlement without litigation based on three years of ongoing settlement negotiations and the performance of test repairs in one of the condominiums addressing minor problems (replacement of screws in the kitchen cabinets). There simply are no allegations that Arundel Green made any affirmative statement or promise that would lull the HOA into a reasonable belief that its claims would be resolved without filing a lawsuit. " 'Clearly, an estoppel to plead the statute does not arise in every case in which there are negotiations for a settlement of the controversy.' " (Lobrovich v Georgison (1956) 144 Cal.App.2d 567, 573.) "To permit one who has knowledge of the law to attempt to negotiate a settlement and subsequently plead estoppel would not only destroy the effect of the legislative statutes of limitation but would seriously impair the climate and effectiveness of the present method of encouraging settlement without litigation." (Kuntsman v. Mirizzi (1965),234 Cal.App.2d 753.) Moreover, the HOA has failed to cite any authorities, and we have not found any ourselves, holding that the mere making of repairs to address minor issues,

without more, estops a defendant from asserting the statute of limitations. Indeed, we believe such a rule would discourage defendants from attempting to address easily fixed problems, frustrating the parties' ability to settle discreet issues without litigation.

The HOA claims that it reasonably relied upon the May 31, 2006 letter from Arundel Green to the HOA confirming deferral of responsive time deadlines when it delayed filing suit. However, as the HOA acknowledges, the letter was subject to conflicting interpretations as to whether it reflected the parties' agreement to defer all litigation deadlines, or whether it reflected an agreement to dispense with the deadlines imposed by the Calderon Process. As the legal implications of the letter are unclear, we believe the HOA should have conducted its own due diligence on the issue. We agree with the court's observation in Lesko v. Superior Court (1982),127 Cal.App.3d 476, that "[s]urely, the reasonable thing for real parties to have done as the negotiations dragged on for three years would have been to send a stipulation to petitioner extending time . . . . If petitioner signed the stipulation, there could be no problem regarding dismissal . . . . If on the other hand, petitioner would not sign such a stipulation, then real parties would have been alerted to the necessity" of filing suit. (Id. at p. 487;Gundogdu v. King Mai, Inc., supra, 171 Cal.App.4th. at p. 317.)

In filing its motion for leave to amend, the HOA had the burden to demonstrate the manner in which its complaint could be amended to set up a claim for equitable estoppel. (Gould v. Maryland Sound Industries, Inc. (1995),31 Cal.App.4th 1137.) "Allegations must be factual and specific, not vague or conclusionary. [Citation.]" (Rakestraw v. California Physicians' Service (2000) 81 Cal.App.4th 39, 44.) Inspection of the vague allegations in the HOA's proposed FAC leads us to conclude that the HOA has failed to meet this burden. Like the complaint in Lantzy, the proposed amended complaint before us does not identify any specific conduct by Arundel Green that is an alleged basis for estoppel, nor does it plead facts indicating that Arundel Green's conduct "actually and reasonably induced " the HOA "to forbear suing within" the 10-year limitations period. (Lantzy, supra, 31 Cal.4th at p. 385, original italics.) Nor, given the facts of this case, do we perceive any "reasonable possibility [the HOA] can assert new, credible facts suggesting that [Arundel Green is] equitably estopped to assert the 10-year statute of limitations for latent construction defects." (Id. at p. 387; see also Peregrine Funding, Inc. v. Shepard Mullin Richter & Hampton LLP (2005),133 Cal.App.4th 658 [where no facts alleged showing any "specific conduct by [defendant] that they claim induced them to delay filing suit" trial court properly dismissed claim on demurrer without leave to amend].) Consequently, we agree with the trial court's conclusion that "there was no reasonable possibility presented by [the HOA] to the Court that there could be an allegation of equitable estoppel."

IV.
DISPOSITION

The judgment of dismissal is affirmed.

RUVOLO, P. J.

We concur:

SEPULVEDA, J.

RIVERA, J.

Notes:

[1.] Defendant Arundel Green Partners is a limited partnership, that, acting by and through its general partner defendant Arundel Holdings, Inc., implemented and oversaw the development and construction of The Arundel.

[2.] Briefly, Lantzy established that a defendant may be estopped from asserting the 10-year limitations period set forth in section 337.15 if the defendant's representation or other conduct caused the plaintiff to refrain from filing a timely suit and the plaintiff's reliance on the defendant's conduct was reasonable. (Lantzy, supra, at p. 367.)

[3.] ZCON, The Arundel's general contractor, filed a demurrer based on section 337.15 on the grounds the HOA's complaint was filed more than 10 years after the building was substantially complete. The trial court sustained ZCON's demurrer without leave to amend, and subsequently entered judgment for ZCON on March 23, 2010. The HOA has not appealed this ruling.

[4.] Arundel Green argues this appeal is premature and must be dismissed. The record reflects that while the HOA filed its notice of appeal on November 5, 2010, the judgment was not entered until November 8, 2010 and the notice of entry of judgment was not entered until November 16, 2010. We are entitled to treat the HOA's premature notice of appeal as if it was filed from the subsequently entered judgment. (See Cal. Rules of Court, rule 8.104(d)(2); Jackson v. Fitzgibbons (2005),127 Cal.App.4th 329, fn. 3.)
