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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

JOE CULLEN et al., Plaintiffs and Appellants, v. PAUL CORWIN et al., Defendants and Respondents.	C067861 (Super. Ct. No. CV36069)

APPEAL from a judgment of the Superior Court of Calaveras County, Grant V. Barrett, sitting as Temporary Judge,† affirmed; and from an order awarding legal fees, John E. Martin, Judge, reversed.

Bernard, Balgley & Bonaccorsi and Elise M. Balgley for Plaintiffs and Appellants.

Richard R. Leuthold for Defendants and Respondents.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of the Factual and Procedural Background and parts I. through III. of the Discussion.

† Pursuant to the California Constitution, article VI, section 21.

Plaintiffs Joe and Marieanne Cullen stated alternate counts[1] that alleged defendants Paul and Geraldine Corwin acted either negligently or fraudulently in failing to disclose the defective condition of the garage roof when the Corwins sold a vacation home to the Cullens.[2]

The Corwins moved for summary judgment on the ground that the statute of limitations had expired. The trial court granted the motion and entered judgment in their favor. It subsequently granted their motion to recover $16,500 in legal fees as costs, pursuant to a provision in the standard form purchase agreement. The Cullens filed a timely notice of appeal from the judgment and order.

The Cullens contend there are triable issues of fact regarding the accrual of their cause of action, and assert the trial court abused its discretion in any event in failing to grant leave to amend their pleading to state a theory of breach of a written contract. They also assert (among other arguments) that there is a procedural bar to the recovery of legal fees because the Corwins failed to agree to mediation, which is a condition precedent under the purchase agreement for recovery of

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[1] Although denominated "causes of action," these are in fact different theories of recovery rather than invasions of more than one primary right. (*Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 735, fn. 2 (*Rio Linda*); 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 34-36, pp. 98-102 (hereafter Witkin).)

[2] The real estate broker and agent, named as additional defendants, are not party to this appeal.

legal fees. We shall affirm the judgment for the reasons stated in the unpublished part of the opinion and reverse the order awarding legal fees.

FACTUAL AND PROCEDURAL BACKGROUND*

Pleadings

The Cullens filed a form complaint in September 2009. They filed a first amended complaint by form pleading in January 2010. In the count asserting general negligence, they alleged "Defendants failed *to properly investigate and disclose* the condition of the garage roof at the property . . . . It was not until Plaintiffs were in possession of the property . . . that the deficiency was revealed. Their discovery of the true defective condition of the roof and a portion of its history was not complete *until less than three years from the filing of this action*." (Italics added.) The Cullens reiterated this delayed discovery in the count asserting fraud (based on the failure to disclose the defect despite a duty to do so), adding that "before *December 2007*, Plaintiffs did not have an understanding of the nature and extent of the damage to the garage roof" and had not discovered "a portion of [the] history" of the defective condition of the roof. (Italics added.)

The pleading artfully omits any other facts regarding the actual date of the transaction, and therefore the issue of the limitations period does not appear on the face of the complaint.

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* See footnote, *ante*, page 1.

This absolved the Cullens of the obligation to plead the factual basis for the claim of delayed discovery. (5 Witkin, *supra*, Pleading, §§ 929-930, pp. 344-346.) The Corwins' answer, however, made the customary boilerplate allegation of the affirmative defense of the statute of limitations, which frames it as a material issue in the case.

The parties posit a three-year statute of limitation for the claim of negligence, though misidentifying the nature of the actual cause of action. The Cullens characterized it below as "an action for injury to real property," and the Corwins agreed in reply that such causes of action are subject to a three-year limitations period (citing Code Civ. Proc., § 338, subd. (b)).[3] However, the Cullens are not alleging that the Corwins *injured* the property in some manner. They are alleging that the Corwins negligently failed to identify and disclose a defect in the property. This is a *negligent misrepresentation*, which is a species of fraud (*Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1184) and thus subject to the same statute of limitations as the Cullens' claim of fraud: three years from discovery of facts that constitute the fraud. (§ 338, subd. (d); 3 Witkin, *supra*, Actions, § 659, p. 870.)

A plaintiff's ignorance of the facts constituting the fraud or negligent misrepresentation of itself is insufficient to

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[3] Undesignated statutory references are to the Code of Civil Procedure.

prevent the accrual of the cause of action. A plaintiff must establish facts showing ignorance and the inability to discover the true facts earlier; "[u]nder this rule, constructive and presumed notice or knowledge are equivalent to knowledge. So, when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry . . . , the statute commences to run." (3 Witkin, *supra*, Actions, § 659, subd. (1), p. 870.)

Evidence

The Cullens bought the subject property in *April 2002*. At the time, the Corwins provided a disclosure statement that noted there were cracks in the decking on the garage roof resulting in leakage. A home inspector that the broker had commissioned also noted unspecified water damage in the ceiling. However, when the Cullens asked about patching in the garage ceiling, the Corwins attributed this to the need to keep the caulking around the railing posts on the deck in good order and did not indicate any ongoing problem with leakage. The Cullens disregarded the disclosure as a result.

In *March 2005*, the Cullens began to notice water pooling on the garage roof, which leaked "a lot" and damaged the sheetrock on the ceiling and the walls. They filed a claim with their insurer, who agreed to pay for replacement of the sheetrock. The Cullens were not aware of the cause of the leaks. They received about $1,000 on their insurance claim. They found it difficult to get a contractor to come and evaluate the roof, but in the summer of 2005 one finally gave them an opinion that the

roof was bowing because it lacked a beam to support the weight of the concrete deck.

In *August 2005*, an attorney representing the Cullens sent a letter to the Corwins. In the letter, the attorney asserted, "At the time of the purchase, Mr. Cullen was told that the patching on the garage ceiling was not the sign of any serious water intrusion, but that he simply needed to keep caulking material around the wooden posts. This has proved to be completely false. . . . [¶] It now develops that water stands on the roof. . . . It appears that this problem *has been going on since the* [*deck*] *was built*. In fact, *the builder had to replace a beam in the garage. The beam is now bowed*. [¶] The net result is that repairs are necessary to the property. The cost is estimated to be in the range of $30,000 . . . . [¶] In any event . . . [t]he Corwins had to have been well aware of the defect and did not disclose it." (Italics added.)

In parallel declarations in support of their opposition to the summary judgment motion, the Cullens make the murky allegation that "[i]t was not until substantially later, *toward the end of 2006*, that [they] learned the nature of [the Corwins'] issues with the garage roof while they owned the subject property."[4] (Italics added.) In his deposition testimony, Joe Cullen stated he had spoken with a neighbor about the problems he was having with the roof, though he could not

[4] This contradicts plaintiffs' allegation that they did not acquire this knowledge until "December 2007."

recall the exact month. The neighbor told him that the Corwins had ongoing problems with the roof from its original construction. They had forced the builder to make repairs, and contrary to the builder's recommendation insisted that he reconstruct it as a flat roof. The neighbor also had repeated the secondhand hearsay from a couple of carpenters who were residents of the community and had worked on the roof; they said that it was not properly engineered to support the weight of a concrete deck. The Cullens completed their repairs in August 2007.

The trial court cited the August 2005 letter from the Cullens' attorney in granting summary judgment in favor of the Corwins. It pointed to the assertions that the Cullens were then aware of a history of leaks since the home was built, and thus they were aware at that time of the undisclosed defect.

This is the extent of the record pertinent to the issue of the statute of limitations. We include facts pertinent to the appeal from the order awarding legal fees in part IV. of the Discussion.

DISCUSSION*

I. Standard of Review

Under our de novo review of a motion for summary judgment (*Rio Linda*, *supra*, 52 Cal.App.4th at pp. 734-735), we first

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* See footnote, *ante*, page 1.

identify the material issues as framed in the pleadings. We then determine whether the evidence of the moving parties entitles them prima facie to judgment in their behalf on these issues. Finally, we consider whether any of the opposing evidence creates a factual conflict with respect to any of these issues, which only a trier of fact can resolve. (*Ibid.*) We can merge the latter two steps in this case, because even if the parties dispute their *legal* significance, they do not claim there are any disputes about material historical facts.

II. Statute of Limitations

The reasoning of the Cullens boils down to this: "It was not until substantially later, *toward the end of 2006,* that [they] learned the nature of the Corwins' issues with the garage roof while they owned the subject property . . . . [¶] The net import of the factual scenario was that, as of 2005, the Cullens knew they had a leaky roof and that they had not been told of any water intrusion prior to their purchase of the property. They proceeded to . . . find the necessary professionals to do the investigation and necessary repairs and learned that the roof had been problematic for the Corwins for the duration of their ownership. *Within three years of that sequence of events*, this litigation was filed." (Italics added.) In the Cullens' view, the cause of action did not accrue until their "2006-2007 discovery of the true history of the roof and their damages in having the roof repaired." They also argue that a jury must decide the issue of the limitations period.

The Cullens cite the inapposite *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, which involved the issue of the separate accrual of independent (though related) wrongs against a plaintiff on the part of two different parties (the embezzling employee and the negligent misrepresentation on the part of the referring agency that failed properly to investigate the employee's background). (*Id.* at pp. 1313, 1323.) We do not have independent invasions of a primary right in *this* case—it is premised *solely* on the failure to disclose a defective condition during the sale of property.

By August 2005, the Cullens were aware the roof leaked "a lot" (and Joe Cullen also admitted in his deposition that a contractor identified the flaw in the construction of the roof) and they had not received any disclosure of previous leaks in the course of their purchase of the property. They were also sufficiently certain of the failure of the Corwins to disclose earlier leaks that they engaged the services of an attorney to demand compensation for the cost of repairs; the Cullens apparently were thus already in possession of sufficient information to claim that the Corwins were liable for a culpable nondisclosure. Moreover, while Joe Cullen's deposition testimony could not recall the exact date that he learned from the neighbor about the earlier problems with the roof, the August 2005 letter from his attorney includes facts demonstrating this conversation must have already taken place, because it adverts to an awareness that the problem dated back

to the original construction of the garage, and had already involved replacement of a beam. The Cullens cannot create a triable issue of fact with a contradictory allegation in their pleadings (*Rainer v. Grossman* (1973) 31 Cal.App.3d 539, 541-542 [motion for summary judgment "pierces" pleadings]), or in declarations, without explaining the de facto admissions of earlier knowledge contained in the letter and the deposition testimony (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1521-1523 [declarations cannot create conflict with other discovery evidence that is tantamount to an admission, without explanation].)

Contrary to the assertion of the Cullens, it is proper to grant summary judgment even on the issue of the running of the statute of limitations when a reasonable person can draw only one conclusion from the evidence. (*Snow v. A. H. Robins Co.* (1985) 165 Cal.App.3d 120, 128.) As a matter of law, the Cullens were aware in *August 2005* of sufficient facts to file an action against the Corwins. Their cause of action in fraud thus accrued at that time, well outside the three-year statute of limitations applicable to their alternate theories.

III. Leave to Amend

The Cullens claim the trial court abused its discretion in failing to grant them leave to amend their complaint to state a cause of action for breach of a written contract, to which a four-year statute of limitations applies. (§ 337.)

This claim founders on two insurmountable problems. First, more than four years elapsed between the August 2005 letter and the September 2009 complaint. Second, the three-year statute of limitations applies to any cause of action *premised on* fraud or negligent misrepresentation, regardless of the label that a plaintiff applies to it. (3 Witkin, *supra*, Actions, § 653, p. 864.) Accordingly, there would not have been any point in granting them leave to amend. [THE REMAINDER OF THE OPINION IS TO BE PUBLISHED]

IV. Legal Fees

The parties' standard form purchase agreement provides for the prevailing party in any dispute to recover legal fees. However, this right is subject to a condition precedent that reads, "If, for any dispute . . . to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, *or refuses to mediate after* [*the making of*] *a request* . . . , then that party shall not be entitled to recover attorney[] fees . . . ." (*Lange v. Schilling* (2008) 163 Cal.App.4th 1412, 1416-1417 [describing contingent effect of this standardized contractual language], italics added (*Lange*).)

In her declaration in opposition to the request for an award of legal fees as costs, the attorney for the Cullens asserted that in 2010 she had twice requested mediation of the litigation in accordance with the trial court's suggestions, but counsel for the Corwins adamantly rejected the two requests.

At the latter point, defense counsel had billed only about $4,300 in legal fees.

In his responsive declaration, defense counsel asserted the Cullens' failure to provide responses to discovery requests was a proper basis for his refusal to agree to mediation. His clients' "position was quite simple. [The Corwins] wanted to participate in a mediation but they wanted discovery responses and depositions to take place so that they could file a Motion for Summary Judgment to avoid mediation, settlement conference and trial." Defense counsel believed mediation would have been "meaningful" only in the event that the trial court denied the motion for summary judgment. He had also asserted in one of his letters to the Cullens that mediation without discovery responses would be a "waste of time." Finally, he pointed out that the Cullens had not offered mediation to the Corwins prior to the resort to court.

The trial court granted the request for legal fees by the Corwins, tersely rejecting the argument of the Cullens with only the observation that "There is an insufficient showing of refusal to mediate." It found a reasonable attorney fee rate was $300 per hour, and a reasonable amount of time expended was 55 hours.

The Cullens, as noted in our introduction, renew this basis for objection on appeal (among others). As it is determinative, we do not need to discuss the remainder.

We review the trial court's determination of the *legal basis* for an award of legal fees de novo as a question of law. (*Lange*, *supra*, 163 Cal.App.4th at p. 1416; *Van Slyke v. Gibson* (2007) 146 Cal.App.4th 1296, 1299; *Honey Baked Hams, Inc. v. Dickens* (1995) 37 Cal.App.4th 421, 424 (*Honey Baked*) [disapproved as to analysis of Civ. Code, § 1717 in *Santisas v. Goodin* (1998) 17 Cal.4th 599, 614, fn. 8].)[5] We determine this issue based on the historical facts for which there is substantial evidence in support. (*Van Slyke v. Gibson*, *supra*, 146 Cal.App.4th at p. 1300 [deferring to trial court's resolution of weight of evidence and credibility].)

Frei was the first case to consider the portion of this provision highlighted above in the standard California agreement for property sales. (*Frei*, *supra*, 124 Cal.App.4th at p. 1508.) It concluded, "The new provision barring recovery of [legal] fees by a prevailing party who refuses a request for mediation *means what it says* and will be enforced." (*Ibid.*, italics added.) It found there was an absence of substantial evidence to support the trial court's finding that the prevailing party

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[5] *Frei v. Davey* (2004) 124 Cal.App.4th 1506 (*Frei*) initially states the correct standard of review for the legal basis of an award of fees (*id.* at p. 1511). However, in discussing whether the evidence was sufficient to establish that the Daveys satisfied the contractual condition precedent for mediation, *Frei* switched to a standard of abuse of discretion. (*Id.* at p. 1512.) This applies to a trial court's determination of the *amount* of legal fees in an award (*Honey Baked*, *supra*, 37 Cal.App.4th at p. 429), which was in fact the issue in the case that *Frei* cited in support (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 545).

had not refused to mediate (or, more properly, that historical facts on which the trial court based its decision did not support its *legal* finding that the prevailing party was entitled to recover legal fees). (*Id.* at pp. 1513-1514.) It also rejected a number of legal theories the prevailing party offered to excuse its failure to mediate. (*Id.* at pp. 1514-1518.)

Only the last of these has tangential relevance to the present case. *Frei* concluded the failure of the plaintiff to request mediation *before* bringing suit was *excused* under a different provision allowing for the filing of an action in order to obtain a lis pendens, and therefore did not negate the duty to respond to the request for mediation. (*Frei*, *supra*, 124 Cal.App.4th at pp. 1517-1518.) *Frei* did not consider this point in the context of an initiation of litigation such as in the case at bar that did *not* come within the provision for a lis pendens, and thus is not authority for the inverse proposition that an initiation of litigation otherwise *does* negate any duty to participate in mediation, as the Corwins argue without any supporting authority. (*Honey Baked*, *supra*, 37 Cal.App.4th at p. 427.) This inverse proposition runs afoul of the language of the parties' standard form purchase agreement at issue here: "If . . . any party *commences* an action without first attempting to resolve the matter through mediation, *OR refuses to mediate* after [the making of] a request . . . , then that party shall not be entitled to recover attorney[] fees . . . ." (Uppercase type & italics added.) The parallel structure of this language

simply is not susceptible of a reasonable interpretation that a mediation request must precede the initiation of the litigation.

This leaves the alternate arguments that the Corwins were entitled to demand discovery responses first because they wished to pursue their motion for summary judgment to make mediation more "meaningful," and because mediation without discovery responses was a "waste of time." The Corwins are entitled to act on these convictions as a matter of strategy. The Corwins, however, do not explain how the *contractual language* allows for these as excuses to the requirement of assenting to mediation in order to recover their legal fees. The requirement "is designed to encourage mediation *at the earliest possible time*" (*Lange*, *supra*, 163 Cal.App.4th at p. 1418, italics added); opponents accordingly are not entitled to postpone it until they feel that they have marshaled the strongest possible support for their positions in litigation *and* mediation. Moreover, there is a strong public policy in the promotion of mediation "'as a preferable *alternative* to judicial proceedings'" in a less expensive and more expeditious forum. (*Id.* at p. 1417, italics added.) The costly and time-consuming procedures connected with discovery are thus not a necessary adjunct to mediation proceedings that a party can demand before participating. These excuses are therefore inadequate as a matter of interpretation of the contractual provision in light of the policy it promotes.

The record lacks any historic facts establishing an assent to the requests for mediation or a legally warranted reason to

decline. The Corwins consequently are not entitled to recover their legal fees.

DISPOSITION

The judgment is affirmed. The order awarding legal fees to defendants Corwin is reversed. Neither party shall recover costs of appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

(*CERTIFIED FOR PARTIAL PUBLICATION*)

BUTZ, J.

We concur:

RAYE, P. J.

DUARTE, J.