Wire Cut Co. Inc., et al. v. Milton M. Thomas, et al.
8:23-cv-01535-JVS-ADS

TENTATIVE Order Regarding Motion to Partially Dismiss Third Amended Complaint [58]

Before the Court is Defendants Milton M. Thomas and Tina L. Thomas's (collectively, "Defendants") Motion to Partially Dismiss the Third Amended Complaint ("TAC"). (Mot., Dkt. No. 58.) Plaintiffs Wire Cut Company, Inc. ("Wire Cut"), Sydney Omar ("Omar"), and Greentree SoCal Investments ("Greentree") (collectively, "Plaintiffs") opposed. (Opp'n, Dkt. No. 62.) Defendants replied. (Reply, Dkt. No. 66.)

For the following reasons, the Court **DENIES** the motion.

I. BACKGROUND

The following factual background is taken from Plaintiffs' TAC.

In 2019, Omar began negotiating with Defendants for the purchase of Wire Cut and the real property on which Wire Cut operated ("Caballero Blvd Property"). (TAC ¶ 11, Dkt. No. 54.) The parties intended for the purchase of Wire Cut Company to be contemporaneous with the purchase of the Caballero Blvd Property. (Id.) To that end, the parties entered into two written agreements, one for the purchase of Wire Cut ("Stock Purchase Agreement"), and the other for the purchase of the real property ("Purchase/Sale Agreement"). (Id. ¶ 12.)

The original Purchase/Sale Agreement, dated February 7, 2020, set forth a $3.5 million purchase price and contained language requiring that the sale of Wire Cut Company's stock be finalized concurrently with the sale of the Caballero Blvd Property. (Id. ¶ 15.) The original Stock Purchase Agreement contained an identical requirement. (Id. ¶ 13.) Defendants represented in the Purchase/Sale Agreement that "[t]here has been no release or threat of release of any Hazardous Materials at or from the Property." (Id. ¶ 16; id., Ex. B at 5.) The Agreement also required that "within three (3) business days after execution of this Agreement, SELLER shall deliver to BUYER copies of any material reports, studies, or other

relevant documentation pertaining to the Property that is in the possession of the SELLER." (Id. ¶ 17; id., Ex. B at 3, Dkt. No. 54-2.)

Due to issues "relating mainly to the Covid 19 pandemic," a concurrent sale could not be realized. (Id. ¶ 18.) On April 24, 2020, the parties amended the Purchase/Sale Agreement to reflect a separate timeline from the real property transaction, with the "clear continuing intent that the two transactions were inextricably tied together." (Id. ¶ 19.) On August 20, 2020, Omar purchased Wire Cut. (Id. ¶ 18.)

In July 2021, Plaintiffs' new lender conducted a "Phase I" investigation of the Caballero Blvd Property. (Id. ¶ 20.) The investigation revealed that at least two prior occupants "likely have used and disposed of chemical constituents" that would "likely have caused contamination to the soil and groundwater at the Property." (Id.) Plaintiffs' lender then recommended a "Phase II" investigation, which confirmed chemical contamination in the Caballero Blvd Property's soils. (Id. ¶ 21.)

The Phase II investigation led Plaintiffs' lender, which was "poised and ready" to fund the purchase, to "hold off" on providing the loan for which Omar qualified. (Id. ¶ 22.) The discovery of the chemical contamination was the only condition preventing the subject loan from funding. (Id.) Plaintiffs' lender required further soil and groundwater investigation prior to granting the loan. (Id. ¶ 23.) This led Defendants to conduct comprehensive testing beginning in March 2022. (Id.) During this period, and continuing for approximately nine months, the parties extended and amended the Purchase/Sale Agreement multiple times. (Id.)

On February 2, 2022, Defendants disclosed to Plaintiffs the existence of a prior Phase I report, dated May 31, 1996 ("1996 Report"). (Id. ¶ 24.) The 1996 Report identified prior industrial tenants and the same concerns identified in Plaintiffs' lender's Phase I report. (Id. ¶ 25.) Defendants had not disclosed the 1996 Report to Plaintiffs before February 2, 2022. (Id.) Defendants had the report in their possession since approximately May 31, 1996. (Id. ¶ 26.)

In December 2022, Defendants informed Plaintiffs that they would no longer agree to extend the escrow under the Purchase/Sale Agreement, but they offered

Plaintiffs a "Right of First Refusal." (Id. ¶ 66.) Plaintiffs then terminated the escrow in order to secure their deposit. (Id.)

Plaintiffs' TAC alleges ten causes of action: (1) Cost Recovery under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") 42 U.S.C. § 9607(a); (2) Declaratory Judgment under CERCLA 42 U.S.C. § 9613(g)(2); (3) Breach of Contract and Contractual Indemnity, Stock Purchase Agreement; (4) Breach of Written Contract, Purchase/Sale Agreement; (5) Private Nuisance; ; (6) Public Nuisance; ; (7) Trespass; (8) Negligent Misrepresentation; (9) Implied Equitable Indemnity; and (10) Declaratory Relief. (See generally TAC.)

II. LEGAL STANDARD

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Nor must the Court "'accept as true a legal conclusion couched as a factual allegation.'" Id. at 678–80 (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

III. DISCUSSION

Defendants move only to dismiss Plaintiffs' fourth cause of action for breach of the Purchase/Sale Agreement. (See generally Mot.) The elements for a breach of contract action under California law are: (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damages to plaintiff as a result of the breach. See CDF Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239 (2008) (stating elements). The Court will analyze each element below.

The instant motion does not challenge the breach of contract claim on the basis of the existence of a contract or its breach. Instead, Defendants move to dismiss primarily on the grounds that (1) Plaintiffs failed to allege performance or excuse and (2) there is no causation between breach and damages.[1]

A. Existence of a Contract

As to the first element, Plaintiffs sufficiently allege the existence of a written contract. Plaintiffs allege that Omar, later substituted by Greentree, entered into the Purchase/Sale Agreement with the Defendants on February 7, 2020. (TAC ¶¶ 15, 62.) Plaintiffs also attach a copy of the contract to the TAC. (Id., Ex. B.) Defendants' motion does not contest the sufficiency of this element. (See Mot.)

B. Plaintiffs' Performance or Excuse for Nonperformance

TAC states, "Plaintiff Omar and Plaintiff Greentree have performed and/or have been excused from performance of all conditions, covenants and promises required on their part to be performed in accordance with the terms and conditions of the Purchase/Sale Agreement." (TAC ¶ 67.) Plaintiffs also allege that Defendants' failures to abate the hazardous conditions on the property prevented Plaintiffs from being able to finance the purchase. (TAC ¶ 69.) Plaintiffs further allege that Defendants' representation that there had been no release of hazardous

[1] To the extent that Defendants argue that the breach of contract claim is barred by waiver, the Court finds the argument unpersuasive. The one case Defendants cite in support, Leiter v. Eltinge, 246 Cal. App. 2d 306, 317 (1966), is distinguishable. In Leiter, the plaintiff moved forward with a real estate purchase by "accepting the late tender of performance" by the defendant, "indicat[ing] an election to affirm the contract." Where the plaintiff in Leiter waived the defendant's breach of the covenant providing time was of the essence, Plaintiffs here did not so directly affirm Defendants' breach to constitute a waiver, such as making the purchase payment despite the contamination.

materials at the property, along with their failure to disclose the 1996 Report, rendered it impossible for Plaintiffs to secure a loan. (TAC ¶¶ 70–72.)

Defendants assert that Plaintiffs neither fully performed under the contract nor were excused from performance. (Mot. at 12.) Defendants contend that the Complaint makes conclusory allegations regarding Plaintiffs' performance, but it "is conspicuously silent as to any specific allegation that Plaintiffs tendered the $3.5 million purchase price for the Property." (Id. at 14.) Defendants argue that Plaintiffs' failure to secure a loan was due to the Caballero Blvd Property's contamination, rather than the lack of the 1996 Report. (Id. at 15.) Defendants argue that their obligation to produce the 1996 Report and Plaintiffs' obligation to secure financing for the purchase were independent conditions. (Reply at 2–3.) According to their argument, even if Defendants breached their obligation to produce the 1996 Report, that breach did not excuse Plaintiffs of their obligation to secure financing. (Id. at 4.)

Plaintiffs respond that a material breach excuses performance by the nonbreaching party, and the question of whether a breach is material is a question of fact. (Opp'n at 7.) Plaintiffs allege that because Defendants' material breaches "occurred prior to Plaintiffs' time for performance," Plaintiffs were "excused from being able to secure a loan for the purchase of the Caballero Blvd Property." (Id.) In particular, Plaintiffs argue that the term of the Purchase/Sale Agreement that "there has been no release or threat of release, of any Hazardous Materials, at or from the Property" was a material misrepresentation "of and relating to the very facts that prevented Plaintiffs from being able to close on the loan they had secured" and excused them from having to do so. Additionally, Plaintiffs allege another material breach in Defendants' "fail[ure] to abate the continuing nuisance/trespass emanating from Defendants fee title interest." (Id. at 8.)

Contrary to Defendants' argument, their breach need not have been a dependent condition to excuse Plaintiffs' performance. It is true that "[w]hen one party fails to perform a dependent obligation, the other party is excused from performing its own obligations under the contract." Colaco v. Cavotec SA, 25 Cal. App. 5th 172, 1182–83 (2018) (citing Kaupke v. Lemoore Canal & Irr., 20 Cal. App. 2d 554, 557–58 (1937)). It is also true, however, that "[w]hen a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the

contract." Brown v. Grimes, 192 Cal. App. 4th 265, 277 (2011) (citing 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 813, 814, p. 906). "Whether a partial breach of a contract is material depends on 'the importance or seriousness thereof and the probability of the injured party getting substantial performance.'" Id. at 278 (citing 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 852, pp. 938–940). California abides by the rule that "[w]hether a breach is so material as to constitute cause for the injured party to terminate a contract is ordinarily a question for the trier of fact." Superior Motels, Inc. v. Rinn Motor Hotels, Inc., 195 Cal. App. 3d 1032, 1051–52 (1987) (quoting Whitney Inv. Co. v. Westview Dev. Co., 273 Cal. App. 2d 594, 601 (1969)).

The Court need not get tied up in the question of whether the alleged breaches are dependent conditions because Plaintiffs allege that they are material. At the pleading stage, this is sufficient to survive the inquiry, and it is not such a clear-cut question that "reasonable minds cannot differ on the issue of materiality," such that "the issue may be resolved as a matter of law." Underwriters Clearing House, Inc. v. Natomas Co., 184 Cal. App. 3d 1520, 1527 (Ct. App. 1986).

C. Defendants' Breach

As to the third element, Plaintiffs sufficiently allege Defendants' breach. Plaintiffs essentially allege three different ways that Defendants breached the Purchase/Sale Agreement. First, Plaintiffs allege that Defendants breached the agreement by representing at the point of signing that "there has been no release or threat of release, of any Hazardous Materials, at or from the Property" and that "Seller has no knowledge of or any basis to expect . . . a potential obligation to undertake or bear the cost of any Environmental, Health and Safety Liabilities with respect to the Property." (TAC ¶ 68(a).) Next, Plaintiffs allege that Defendants breached the agreement by failing to produce the 1996 Report within three days of executing the agreement. (Id. ¶ 68(b).) Finally, Plaintiffs allege that the existence of contamination at the Caballero Blvd Property is itself a breach because it prevented Plaintiffs from being able to finance their purchase. (Id. ¶ 68(c).) The facts alleging Defendants' failure to produce the 1996 Report and the existence of contamination, taken as true, are enough to "state a claim to relief that is plausible on its face." See Twombly, 550 U.S. at 570.

D. Plaintiffs' Damages Resulting from Defendants' Breach

The fourth element requires a causal connection between Defendants' alleged breach and Plaintiffs' alleged damages. Plaintiffs allege the following damages in their Fourth Cause of Action:

> 76. Plaintiffs allege, on information and belief, that Plaintiffs Omar and Greentree have suffered contractual damages arising out of the breach of the Purchase/Sale Agreement of at least Three Million Five Hundred Thousand Dollars ($3,500,000), which include diminution in value of the stock of Wire Cut Company, lost profits and other costs associated with relocating the Wire Cut Company business at the termination of the existing lease as a result of the presence of the contamination in the soil and in the groundwater at the Property and because of Defendants' material misrepresentations/omissions and breach of such Purchase/Sale Agreement.

(TAC ¶ 76.) Plaintiffs support their claim for damages by alleging that they "have been injured, incurring costs and suffering damages, including those environmental consultants' and attorneys' fees associated with Plaintiffs' own site assessment and investigation efforts and the coordination and oversight of Defendants' ongoing investigation and remediation of contamination" at the Caballero Blvd Property. (Id. ¶ 73.) They also claim "lost profits Plaintiff Omar and Plaintiff Greentree have suffered, by foregoing the purchase of alternative real property investments, during the time the Property was in escrow" pending Plaintiffs' purchase. (Id.) Finally, Plaintiffs claim the "diminished value of the stock of Wire Cut Company resulting from [the] contamination and from Plaintiffs' inability to purchase the Property, and the need to relocate the business . . . because of such contamination." (Id. ¶ 74.)

1. Causation

Defendants argue that "there is no logical or plausible causal connection between the alleged damages" and the alleged breach. (Mot. at 16.) Defendants give particular attention to the fact that the 1996 Report revealed information that Plaintiffs' lender already discovered during their own Phase I investigation. (Id. at 16–17.) Defendants argue that the actual cause of Plaintiffs' failure to obtain

financing was "on account of contamination the lender's own due diligence had discovered." (Id. at 17.)

Plaintiffs respond that Defendants' argument fails to recognize the alleged breaches that occurred before Plaintiffs' lender discovered the contamination. (Opp'n at 12.) Plaintiffs point to the TAC's allegation that "the existence of undisclosed Hazardous Substances as well as Defendants' failures to abate such Hazardous Substances-related nuisance/trespass at the Caballero Blvd Property have prevented Plaintiffs from being able to finance the purchase of the Property, thereby thwarting any opportunity to purchase/own such Property." (TAC ¶ 69.)

At its core, the Complaint alleges the presence of contamination on the property in violation of the contract terms, "[t]here has been no release or threat of release of any Hazardous Materials at or from the Property." One need not strain to follow the causal chain alleged by Plaintiffs that the contamination prevented the financing of the property, and the inability to purchase and operate the purchased company there resulted in environmental consultant costs, attorneys' fees, and lost profits with respect to relocating the business. But for the contamination, Plaintiffs would not have sustained these damages. On stock value diminution, the pleading falls short of alleging causation, but the Complaint need not sustain every damages theory in order to survive the motion to dismiss. The question remaining, then, is whether the remaining damages may be sought at all.

2. Type of Damages

Defendants argue in their motion that the types of damages Plaintiffs seek are improper. (Mot. at 17.) Specifically, Defendants argue, without citing any authority, that Plaintiffs cannot recover damages for the diminution of Wire Cut's stock and the costs of relocating the company. (Id.) Defendants also argue that Plaintiffs cannot claim lost profits in a breach of a real-property purchase agreement if the buyer never acquired title to the property. (Id.) Plaintiffs respond that "appreciation damages can be recoverable where the other party misrepresents the facts or otherwise obstructs or disrupts the object of the contract." (Opp'n at 13.)

California Civil Code § 3306 sets forth the damages available for breach of a real estate contract:

> The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, the expenses properly incurred in preparing to enter upon the land, consequential damages according to proof, and interest.

Cal. Civ. Code § 3306.

As established *supra*, Plaintiffs did not make a payment under the contract that they seek to now recover as damages. They do, however, seek other types of damages provided for in the statute, such as expenses and consequential damages including lost profits. Lost profits are available in California breach-of-contract cases dealing with real property transactions "as part of consequential damages under [Cal. Civ. Code § 3306] upon a proper showing." Greenwich S.F., LLC v. Wong, 190 Cal. App. 4th 739, 758 (2010). Plaintiffs have the burden of proving that their loss of profits was "foreseeable and proximately caused by the breach of contract," as well as proving "their occurrence and their extent." See Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist., 34 Cal. 4th 960, 969, 975 (2004).

Plaintiffs here seek a kind of lost profits different from what California courts have historically considered. Indeed, as Defendants cite, California courts have rejected lost profits recovery "where the profits were expected from the resale of a piece of property . . . never acquired by the defrauded party." Kenly v. Ukegawa, 16 Cal. App. 4th 49, 53–54 (1993). The lost profits sought by Plaintiffs do not relate to the resale of the property, but other properties: "foregoing the purchase of alternative real property investments, during the time the Property was in escrow." This is an even more tenuous proposition than that of lost profits for the resale of an unacquired property, and one that cannot be reasonably deemed foreseeable to sustain a claim. But to the extent that lost profits stem from the impact to the business Plaintiffs purchased in connection with the Caballero Blvd Property, the Complaint makes a stronger showing. The Complaint alleges that the stock purchase and real property agreements were intended to be part of the same transaction, and Defendants were on notice that the purpose of the Caballero Blvd

Property was to operate the business. It is foreseeable, then, that contamination of the property in violation of the contract would have a negative impact on that business.

Accordingly, Plaintiffs have stated a claim for damages resulting from Defendants' alleged breach. Whether Plaintiffs can prove their damages and the causal link to Defendants' alleged breach is a question for litigation, but the TAC's facts "state a claim to relief that is plausible on its face." See Twombly, 550 U.S. at 570.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the motion.

IT IS SO ORDERED.

The Court **VACATES** the April 15, 2024, hearing. Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. on Tuesday, April 16, 2024, stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted