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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ROSEMARY COURT PROPERTIES
LLC,

Plaintiff and Respondent,

v.

WADE TREVOR WALKER; HOURI
PARSI,

Defendants and Appellants.

A146745

(San Francisco City & County
Super. Ct. No. CUD13647216)

The issue in this appeal is whether the trial court properly performed its gatekeeper duty in the default process by ensuring that plaintiff Rosemary Court Properties, LLC (Rosemary Court) alleged a proper cause of action. Rosemary Court filed an unlawful detainer action against defendants Houri Parsi and Wade Trevor Walker and later obtained entry of default and a clerk's judgment when defendants failed to pay the court filing fee and, as a result, had their answer stricken. Within days of entry of this default judgment, Houri Parsi moved for the trial court to vacate it. She based her motion in part on the contention that Rosemary Court failed to state an unlawful detainer cause of action because its allegations turned on the unsupported legal conclusion that Parsi had previously terminated her tenancy. The trial court and the appellate division of the superior court rejected Parsi's contention. We granted Parsi's petition to transfer this case to this court. We agree with Parsi and reverse the appellate division's affirmance of the trial court's denial of Parsi's motion.

BACKGROUND

On November 27, 2013, Rosemary Court filed an unlawful detainer action in San Francisco Superior Court regarding a one-bedroom apartment located on Corwin Street in San Francisco (premises). In the form portion of its complaint, verified by Thomas McCormick as property manager for Rosemary Court, Rosemary Court alleged that Parsi and a second defendant, Wade Trevor Walker, who is not a party to this appeal,¹ agreed in 2005 to rent the premises from Rosemary Court for one year, at a rent of \$1,500 a month, pursuant to a written lease that was attached to the complaint (lease). Rosemary Court alleged that the agreement was later changed as follows: “In or about the year 2008 Houri Parsi moved out of the premises thereby ending her tenancy.” Rosemary Court further alleged it served a three-day notice to quit to defendants on November 12, 2013. It also alleged defendants’ tenancy was subject to the San Francisco Residential Rent Stabilization and Arbitration Ordinance, No. 276-79, as amended.²

The written short form lease attached to the complaint is dated September 29, 2005, and is between McCormick as “lessor” and Parsi³ and Walker as “lessee.” It is a one-year lease starting on October 1, 2005, but provides that “[s]hould the lessee hold the premises over beyond the term herein created, such holding shall be from month to month only and under the same provisions as govern this lease at the date of its termination.” It further provides: “Thirty day written notice to be given prior to moving, if not given, any and all deposits including clean-up deposit will be forfeited.”

In an attachment to its complaint, Rosemary Court further outlined the factual and legal basis for its unlawful detainer action. It alleged defendants had breached paragraphs three and six of the lease, which prohibited lessee’s assignment of the lease

¹ Because Walker is not a party to this appeal, we summarize only matters regarding him that are relevant to Parsi’s appeal.

² Chapter 37 of the San Francisco Administrative Code is commonly known as “The Residential Rent Stabilization and Arbitration Ordinance.” (*Da Vinci Group v. San Francisco Residential Rent Etc. Bd.* (1992) 5 Cal.App.4th 24, 27.)

³ The lease identifies Walker and “Houri Andalibian” as lessee. Rosemary Court’s allegations indicate that Andalibian is Parsi.

without Rosemary Court's written consent and required lessee's surrender of the premises at the termination of the tenancy. Rosemary Court based its breach allegation on its contentions that Walker moved his possessions out of the premises on August 25, 2013, and in September 2013 assigned the premises to Parsi without Rosemary Court's written authorization. Parsi subsequently moved her possessions into the premises and occupied it. Rosemary Court continued, "Parsi is not an authorized occupant of the Premises since she has not resided in the Premises for at least a year and as long as seven years prior to the unauthorized assignment in 2013." It further alleged that Parsi previously had lived in another residence under a written lease.⁴

In December 2013, defendants, represented by Parsi, filed an answer with the superior court in which they contended that Parsi had not terminated, and Rosemary Court had no legal grounds to terminate, the lease. Rather than pay the court's required filing fee, defendants submitted an application for a waiver of court fees. However, they did not appear for the February 2014 hearing on their application. The court denied their application on the ground that defendants provided insufficient information, and issued an order stating that defendants had 10 days to pay the filing fee or their court papers would not be processed.

In March 2014, the court issued and served a written order to Parsi. The order stated that the court had filed an order denying defendants' fee waiver application and given timely notice to pay the fee, which remained unpaid, and ordered that defendants' answer be stricken.

⁴ Rosemary Court further alleged that on September 15, 2013, Walker delivered to it written notice of his intent to vacate the premises no later than October 10, 2013, but that his surrender of the premises was defective because he failed to return keys and possession of the premises to Rosemary Court and allowed an unauthorized occupant to remain in possession of the premises. It further alleged that Walker made certain misrepresentations to Rosemary Court.

On November 13, 2014, at Rosemary Court's request, the clerk of the superior court entered default against defendants and under Code of Civil Procedure section 1169⁵ entered a clerk's judgment in favor of Rosemary Court, giving it possession of the premises.

After trying ex parte to have the default set aside and the default judgment vacated, defendants, represented again by Parsi, filed a motion to set aside and vacate the default judgment, which Rosemary Court opposed. Defendants argued the default judgment resulted from their excusable mistake or neglect and should be vacated under Code of Civil Procedure section 473, subdivision (b). They contended that Parsi did not understand the failure to pay the filing fee would lead to default and had since sought to pay the fee, attempted to file new answers, conducted legal research and filed for relief from default immediately after its entry. Defendants further contended they learned they were vulnerable to default only when Parsi sought to respond to Rosemary Court's November 2014 request for a trial date. They also contended that Rosemary Court only became aware it could obtain default when Parsi notified its attorney on November 12, 2014, that she was going in ex parte to obtain permission to pay the overdue filing fees, and that the next morning, before Parsi appeared ex parte, Rosemary Court filed its request for default and judgment.

Parsi made another argument in support of defendants' motion, one that is most pertinent to our resolution of her appeal. She contended that, although the parties do not dispute the facts, Rosemary Court failed to state an unlawful detainer cause of action because it relied on the legally unsupported position that she was an " 'unauthorized tenant' " as a result of her living elsewhere for at least one year. Therefore, Parsi argued,

⁵ Code of Civil Procedure section 1169 provides in relevant part: "If, at the time appointed, any defendant served with a summons does not appear and defend, the clerk, upon written application of the plaintiff and proof of the service of summons and complaint, shall enter the default of any defendant so served, and, if requested by the plaintiff, immediately shall enter judgment for restitution of the premises and shall issue a writ of execution thereon. . . . Thereafter, the plaintiff may apply to the court for any other relief demanded in the complaint, including the costs, against the defendant, or defendants, or against one or more of the defendants."

“the complaint, and therefore the Judgment Roll which contains it, is void and should be set aside.”

The court denied Parsi’s motion because “Parsi’s failure to appreciate the significance of the Fee Waiver Denial and Order Striking her Answer for over 7 months and under the circumstances of this case does not constitute mistake, surprise or excusable neglect within the meaning of [Code of Civil Procedure section 473, subdivision (b)].” The court did not address Parsi’s contention that the default judgment should be vacated because of Rosemary Court’s failure to state a cause of action.

Parsi timely appealed the court’s ruling to the appellate division of the superior court. Now represented by counsel, Parsi made similar arguments to the appellate division that she made to the trial court. Her arguments included that the appellate division should reverse the default judgment because Rosemary Court did not allege just cause for eviction as required by the San Francisco Rent Control Ordinance, given that Parsi’s absence from the premises did not terminate her tenancy and she could not be assigned the lease as a cotenant.

The appellate division affirmed the default judgment and the trial court’s order denying Parsi’s motion to set aside and vacate the judgment. It concluded that the trial court did not abuse its discretion by denying Parsi’s motion under Code of Civil Procedure section 473, subdivision (b). Most pertinent to this appeal, the appellate division concluded that the complaint “states a cause of action for unlawful detainer under [Code of Civil Procedure sections] 1161(3) and 1166, as well as the San Francisco Rent Ordinance. Specifically, the complaint alleges that Parsi occupied the premises as an unauthorized subtenant. This allegation falls within the just cause provision of the Rent Ordinance permitting evictions where the tenant holding at the end of the term of the agreement is a subtenant not approved by the landlord. (San Francisco Rent Ordinance § 37.9[, subd.] (a)(7)). Parsi’s challenges to the sufficiency of the evidence in support of those allegations are not reviewable on an appeal from a default judgment.”

DISCUSSION

Parsi argues that we must reverse the default judgment for the same reasons that she argued below: First, Rosemary Court’s complaint fails to state a cause of action for unlawful detainer and, second, the trial court abused its discretion by denying her motion for relief from default under Code of Civil Procedure section 473, subdivision (b). We agree with Parsi’s first argument and reverse on that ground. Therefore, we do not further address her second argument.

“ ‘ “General standards of appellate review apply to appeals . . . transferred for decision to the Courts of Appeal.” ’ ” (*People v. Disandro* (2010) 186 Cal.App.4th 593, 599.) Earlier this year, we addressed the trial courts’ responsibilities regarding the default process in *Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1015 (*Grappo*). We reminded the trial courts “that however burdened they be, they must vigilantly attend to their duty in connection with the default process, ‘to act as gatekeeper, ensuring that only the appropriate claims get through.’ ” (*Id.* at p. 1000.) Among other things, we instructed that in circumstances such as those presented here, where a party directly challenges a default judgment, “[i]f the complaint does not state a cause of action or the allegations do not support a claim for relief, a default judgment is erroneous and ‘cannot stand.’ ” (*Kim [v. Westmoore Partners, Inc.]* (2011) 201 Cal.App.4th [267,] 282 [(*Kim*)] [default judgment reversed where complaint failed to state cognizable claims against defendants]; see *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 829; *Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 749 [defendants who defaulted did not admit corporation was their alter ego where complaint was insufficient in pleading elements to justify disregard of corporate entity].) As *Falahati* succinctly put it, ‘It is well established a default judgment cannot properly be based on a complaint which fails to state a cause of action against the party defaulted because, as Witkin explains, “[a]

defendant who fails to answer admits only facts that are well pleaded.” ’ ’ (Id. at p. 1015.)⁶

Here, Parsi directly challenged the default judgment via her motion to vacate the judgment within a matter of days after the clerk of the superior court entered the judgment, before the judgment became final. (See *People v. Jackson* (1967) 67 Cal.2d 96, 98 [“A judgment becomes final when all avenues of direct review are exhausted,” including the availability of appeal]; Cal. Rules of Court, rule 8.104 [generally providing 60 to 180 days to file a notice of appeal of a judgment, depending on the circumstances].) Therefore, the court, as part of its gatekeeper duties, had to determine whether Rosemary Court had stated a cause of action for unlawful detainer against Parsi.

Although Parsi argued that Rosemary Court had not stated a cause of action, the trial court did not address the issue in its written order, but its denial of Parsi’s motion itself indicates it rejected her argument. The appellate division concluded that Rosemary Court stated an unlawful detainer cause of action based on the factual allegations that Parsi received an assignment of the lease from Walker that Rosemary Court did not authorize, a violation of the lease. We disagree that Rosemary Court stated a cause of action for unlawful detainer against Parsi. As pled, its unlawful detainer claim, including its allegation of an improper assignment, rests on its allegation that “[i]n or about the year 2008 Houri Parsi moved out of the premises” and subsequently lived elsewhere, and its unsupported legal conclusion that she “thereby end[ed] her tenancy.”

⁶ The panel in *Grappo* disagreed about whether a party *collaterally* attacking a default judgment after it becomes final is entitled to relief from a judgment on the ground that the complaint fails to state cause of action. (Compare *Grappo, supra*, 11 Cal.App.5th at p. 1015 with *id.* at p. 1023 (dis. opn. of Stewart, J.)) There was no disagreement that a party *directly* challenging a default judgment before it became final, as Parsi did by her motion to vacate the judgment, is entitled to such relief. (See *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 661 [distinguishing between a direct challenge and collateral attack on a judgment].) We reject Rosemary Court’s contention that we should follow those courts that have held a party attacking a default is not entitled to this relief. Indeed, the case upon which Rosemary Court primarily relies, *Molen v. Friedman* (1998) 64 Cal.App.4th 1149, involved a collateral attack on a default judgment after it became final. (*Id.* at p. 1153.)

In reviewing a default judgment, a court admits all properly pleaded material facts, “ “but not contentions, deductions, or conclusions of fact or law.” ’ ’ (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) Furthermore, when a party attaches an agreement to a complaint and incorporates it by reference, as did Rosemary Court with the lease, we consider the terms of the agreement in determining whether a cause of action has been pleaded. (See, e.g., *Circle Star Center Associates, L.P. v. Liberate Technologies* (2007) 147 Cal.App.4th 1203, 1206 & fn. 1 [considering a lease incorporated by reference into a complaint in evaluating the merits of a demurrer].) Indeed, “[w]hen a plaintiff attaches a written agreement to his complaint, and incorporates it by reference into his cause of action, the terms of that written agreement take precedence over any contradictory allegations in the body of the complaint.” (*Kim, supra*, 201 Cal.App.4th at p. 282.)

Rosemary Court alleged in its complaint that it was entitled to possession of the premises under the San Francisco Residential Rent Stabilization and Arbitration Ordinance because Parsi was an “unauthorized occupant” of them. The parties do not provide us with the version of the ordinance in effect at the time of their dispute. The present ordinance provides that “[a] landlord shall not endeavor to recover possession of a rental unit unless: [¶] . . . [¶] (7) The tenant holding over at the end of the oral or written agreement is a subtenant not approved by the landlord” (S.F. Admin. Code, § 37.9, subd. (a)(7).) The appellate division of the superior court appears to have relied on this or a similar provision to conclude that Rosemary Court stated an unlawful detainer cause of action based on Rosemary Court’s allegation that Parsi occupied the premises via an unauthorized lease assignment from Walker. The appellate division also reached this conclusion based on Code of Civil Procedure sections 1161(3), which allows a lessor to take possession of a premises via an unlawful detainer action for such things as a lessee’s violation of the covenant not to assign or sublet, among other things, and section 1166, which governs the general contents and requirements for an unlawful detainer complaint. Regardless of the legal provision that Rosemary Court asserts is applicable here, however, it relied in its unlawful detainer cause of action first and foremost on its allegation that Parsi terminated her tenancy by moving out of the

premises around 2008 and subsequently living elsewhere and, therefore, had no basis for her reoccupancy of the premises in 2013 other than Walker's unauthorized assignment of the lease to her. This, therefore, is the focus of our analysis.

Specifically, Rosemary Court alleged that Parsi, although originally a colessee with Walker under the terms of the 2005 lease, (1) terminated her leasehold interest by moving out of the premises around 2008 from one to seven years and taking up residence elsewhere via another lease and (2) subsequently reoccupied the premises in September 2013 by an assignment of the lease from Walker that Rosemary Court did not authorize, which was a violation the lease. We examine each of these contentions.

First, it is apparent that, as pled, Rosemary Court's contention that Parsi "terminated" her leasehold interest is a legal conclusion, not an allegation of fact as Rosemary Court contends. Rosemary Court did not allege that Parsi directly terminated her lease, such as by giving Rosemary Court written notice that she was doing so as is called for by the lease ("Thirty day written notice to be given prior to moving") and California law (Civ. Code, § 1946 ["as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days' written notice therefor at any time"]). Rather, Rosemary Court alleged that Parsi, by moving out of the premises and living elsewhere, terminated her tenancy. This termination allegation is a legal conclusion rather than an allegation of fact. (See, e.g., *Taliaferro v. Davis* (1963) 216 Cal.App.2d 398, 413 [appellant's assertion that certain acts constituted "breaches" of an agreement that resulted "in a failure of consideration" amounted to a "bare untenable legal conclusion"]; *Shadoan v. World Sav. & Loan Assn.* (1990) 219 Cal.App.3d 97, 103 ["To allege that the contract was unconscionable states no more than a legal conclusion"]; *Aubry v. Tri-City Hospital Dist.* (1989) 6 Cal.App.4th 260, 270 [under the circumstances, complaint allegations that one entity was a "dummy corporation" and an "alter ego" of another entity "amount to no more than legal conclusions insufficient to invoke the pleading assumption of their truthfulness"].)

Further, we find no support for Rosemary Court's assertion of the legal conclusion that Parsi's moving out of the premises terminated her leasehold interest. By the terms of

the lease, the “lessee,” defined as Parsi and Walker without distinction between them, if they continued their tenancy after the first year of the lease, extended their leasehold interest in the premises as a month-to-month tenancy. (See also *Schmitt v. Felix* (1958) 157 Cal.App.2d 642, 646 [“ ‘When a tenant under a lease remains in possession of the leased premises with the permission of the lessor from month to month after the term expires a new tenancy is not created but the original tenancy is deemed to have been extended’ ”].) Moreover, nothing in the lease provides that Parsi would terminate her leasehold interest if she vacated the premises for any period of time while Walker continued to live there. Nor are we aware of any law, nor does Rosemary Court cite any law, that mandates such a termination as a matter of law. Therefore, Rosemary Court fails to establish that it stated a cause of action.⁷

The insufficiency of Rosemary Court’s allegations for purposes of a default judgment are similar to those discussed in *Kim*. Kim obtained a default judgment based in part on his complaint allegations that defendants had just in the previous year breached their contractual duties to repay him loans as indicated in seven promissory notes. (*Kim, supra*, 201 Cal.App.4th at pp. 274–276, 278.) The court denied a motion to vacate the default judgment by certain defendants, who appealed and the appellate court reversed. It

⁷ Furthermore, as Parsi pointed out to the appellate division, Rosemary Court does not allege facts sufficient to establish that Parsi somehow abandoned the premises and that such abandonment led to her leasehold interest being terminated. “An abandonment takes place when the lessee leaves the premises vacant with the avowed intention not to be bound by his lease” and it “terminates the lessee’s rights and liabilities only if the lessor accepts the surrender of the property.” (*Kassan v. Stout* (1973) 9 Cal.3d 39, 42, 43.) Rosemary Court does not make any such allegations.

Also, although not an issue before us nor one that we must decide to resolve this appeal, to the extent Walker maintained physical possession of the premises, Parsi may have remained in constructive possession of them as a colessee. (See *Schmitt v. Felix, supra*, 157 Cal.App.2d at p. 646 [colessee of premises who was not physically in possession of the leased premises and had not terminated tenancy was liable for rent because of constructive possession due to other colessee’s physical possession of the premises], quoted in *Jeffrey Kavin, Inc. v. Frye* (2012) 204 Cal.App.4th 35, 48.)

concluded Kim did not state a valid cause of action because by their own terms, breach of six promissory notes would have had to occur some years before and breach of the seventh note was contingent on a specific event occurring, none of which Kim alleged had taken place. (*Id.* at pp. 282–283.)

Here, Rosemary Court’s allegations that Parsi moved out of the premises and lived elsewhere for a time do not constitute termination under the lease or any law that we are aware of and, therefore, do not support Rosemary Court’s legal conclusion that Parsi terminated her leasehold interest. Rosemary Court relied on Walker’s purportedly unauthorized assignment of the lease to Parsi for its unlawful detainer cause of action, but regardless of any such assignment, by Rosemary Court’s own allegations, including the terms of the lease incorporated into the complaint by reference, Parsi was a colessee of a month-to-month tenancy who had moved out of the premises for a time, which remained occupied by Walker, and then moved back into the premises around the time that Walker moved out. These allegations establish only that Parsi was a colessee of the premises with an ongoing right to a month-to-month tenancy. Therefore, Rosemary Court did not state an unlawful detainer cause of action against Parsi.

DISPOSITION

The appellate division of the superior court’s affirmance of the trial court’s denial of Parsi’s motion to vacate the default judgment is reversed. We remand this matter to the appellate division with the instruction that it order the default judgment vacated and remand this matter to the trial court for further proceedings consistent with this opinion. (Cal. Rules of Court, rule 8.1018(c).) Parsi is awarded costs of appeal.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.