

**DEBORAH A. LOWGREN, Plaintiff and Appellant, v. GORDON
INMAN et al., Defendants and Respondents.**

B163111

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE
DISTRICT, DIVISION SEVEN**

2004 Cal. App. Unpub. LEXIS 9974

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PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, No. NC028429 c/w NC040311. Elizabeth White, Judge.

DISPOSITION: Affirmed in part, reversed in part and remanded.

COUNSEL: Kenneth A. Bryant and Jerome D. Stark for Plaintiff and Appellant Deborah A. Lowgren.

Procter, McCarthy & Slaughter and Sean D. Cowdrey for Defendants and Respondents Gordon Inman; Inman, Spinosa and Buchan, Inc., dba Landmark Realty Center; Westview Escrow, Inc.; and Properties West Management Co.

Murchison & Cumming and Eric P. Weiss for Defendant and Respondent Darryl Dalcin and Dalcin-Cummins & Associates, Inc.

JUDGES: PERLUSS, P. J.; JOHNSON, J., WOODS, J. concurred.

OPINIONBY: PERLUSS

OPINION:

Deborah A. Lowgren appeals the judgment entered in this construction defect action following the trial court's grant of summary judgment in favor of the building contractor and the developer [*2] of her condominium complex. Lowgren contends the trial court erred in holding her action barred by a general release and, alternatively, by *Code of Civil Procedure section 337.15's* 10-year

statute of repose. n1 Because triable issues of fact exist as to whether Lowgren was fraudulently induced to execute the release and section 337.15 does not bar all of Lowgren's claims, we reverse.

n1 Statutory references are to the Code of Civil Procedure unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

1. Lowgren Purchases the Condominium Unit

On August 31, 1990 Lowgren purchased a condominium at 718 West 37th Street, San Pedro, a four-unit condominium complex developed, constructed and sold by defendants Darryl Dalcin and his related business entity, Dalcin-Cummins & Associates, Inc. (collectively Dalcin) and Gordan Inman and his related business entities, Inman, Spinosa and Buchan, Inc., doing business as Landmark Realty Center, Westview Escrow, Inc. and Property [*3] West Management Company (collectively Inman). Lowgren is the first and only owner of her unit.

2. The Complaint

Lowgren filed this action against Dalcin and Inman on August 28, 2000 asserting claims for breach of warranty, negligence resulting in damage to property, fraud, strict liability and negligent infliction of emotional distress. According to the allegations in the operative second amended complaint, Lowgren's unit was damaged by water leakage at various times from 1991 to 1998 as a result of cracks in the roof, outside walls, windows, steps and floors. In 1991, 1992 and 1993 "numerous water leaks" occurred in her unit "filling buckets of water over a period of days" and causing extensive damage to her unit and her personal property. Dalcin and Inman repaired the cracks in the stucco and window frames at Lowgren's request, assuring her they were "normal settling cracks." Lowgren was impressed with the commitment Dalcin and Inman demonstrated to repairing her property and did not question their assessment.

In 1994 Lowgren experienced "horrific leaking" from her roof. Dalcin and Inman agreed to pay for a roofing contractor to repair the roof; Lowgren alleges the repairs [*4] were only somewhat successful. Problems continued. In 1997 the sliding glass door in Lowgren's bathroom inexplicably shattered. Dalcin and Inman continued to be accommodating, agreeing to repair or pay for repairs to her unit.

3. The Release

Apparently sometime in late 1997 Lowgren discovered new water damage to the office, patio deck and bedroom in her unit. At the request of Dalcin and Inman, Lowgren obtained a contractor's repair estimate. Rather than repair the damage themselves, as they had done on prior occasions, Dalcin and Inman agreed to pay Lowgren the \$ 5,000 estimated cost of repair, but only on the condition she execute a release of claims against them.

In January 1998 Lowgren executed a document entitled "General Release of Existing or Future Claims." The document purports to be a general release, covering all claims Lowgren "now has or may have" in the future against Dalcin and Inman "arising out of the contract for the sale and purchase" of her unit. By signing the agreement, the "releaser" purports to waive the protections of

Civil Code section 1542, which is quoted in the document. n2 Although the document contains a place for the [*5] releaser to initial that she "had read the provisions of *Civil Code section 1542*," that space was not initialed by Lowgren. The document does not include the amount of consideration paid for Lowgren's agreement although Lowgren testified she was paid \$ 5,000. Lowgren has alleged her consent to the release was procured by Dalcin's and Inman's fraudulent representations that the release was limited to her then-current claim for water damage to the office, patio deck and bedroom.

n2 *Civil Code section 1542* provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

4. *A Licensed Building Inspector Discovers Latent Defects*

After learning that other occupants of the condominium complex had also experienced problems, in August 2000 Lowgren commissioned a report from a licensed building [*6] inspector. The inspector's report, which Lowgren attached to her complaint, identified numerous latent defects and construction code violations in the construction of the property. The inspector opined that the entire building had been constructed on improperly excavated and compacted soil and that inadequate and improper drainage units and retaining walls had been installed causing severe settling problems. According to the inspector, much of the construction of the building failed to meet even "minimum standards" and a substantial portion of the drainage and settling problems was directly attributable to these defects. Lowgren alleged she was unaware of any of these problems in the soil, drainage or foundation until she obtained the report in August 2000.

5. *The Supplemental Complaint*

The trial court granted Lowgren's request to file a "supplemental complaint" asserting an additional cause of action for negligence (the eighth cause of action) based upon her discovery in 2001 of toxic mold in her home. Lowgren alleged the mold was the result of construction defects and caused her certain respiratory ailments as well as additional property damage.

6. *The Motion for [*7] Summary Judgment*

Dalcin and Inman moved for summary judgment or alternatively summary adjudication, n3 arguing all of Lowgren's claims were barred by the release, the applicable statutes of limitation and the 10-year statute of repose contained in section 337.15.

n3 Inman filed the motion. Dalcin filed a timely notice of joinder, asserting the identical evidence established that Lowgren's claims against Dalcin were also time-barred.

In their moving papers, Dalcin and Inman challenged Lowgren's attempt to avoid the full reach of the general release on a fraudulent inducement theory by arguing that, in light of the plain language of the release, Lowgren's purported reliance on misrepresentations concerning its scope

was unreasonable as a matter of law. Alternatively, Dalcin and Inman argued that all of Lowgren's claims were time-barred by the applicable statutes of limitation or by section 337.15, which proscribes any action against a contractor or developer for property damage arising from construction defects [*8] more than 10 years after the substantial completion of the development or improvement. n4

n4 Section 337.15 provides in part: "(a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following: [P] (1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property. [P] (2) Injury to property, real or personal, arising out of any such latent deficiency. [P] (b) As used in this section, 'latent deficiency' means a deficiency which is not apparent by reasonable inspection."

In her opposition papers Lowgren declared Dalcin and Inman had expressly told her [*9] the release covered only the specific repairs for which she had obtained a contractor's estimate in the amount of \$ 5,000. Lowgren also asserted, based on her expert's report, that Dalcin and Inman knew of the alleged defects in the foundation and construction and deliberately concealed those facts to induce her to purchase the unit and later to sign the release. Lowgren also argued that until 1998 Dalcin and Inman had agreed to honor their warranty by repairing or paying for repairs, thus tolling the various statutes of limitations that might have otherwise been applicable. n5

n5 Although Dalcin and Inman objected to portions of Lowgren's evidence, they failed to obtain any rulings on their objections. Accordingly, the objections are waived. (*Sharon P. v. Arman Ltd. (1999) 21 Cal.4th 1181, 1186-1187, fn. 1; Ali v. L.A. Focus Publication (2003) 112 Cal.App.4th 1477, 1484.*)

Before the motion was heard, Inman (but not Dalcin) withdrew the summary adjudication motion directed [*10] to Lowgren's causes of action for negligence causing property damage and negligent infliction of emotional distress.

After argument the trial court granted summary judgment in favor of both Dalcin and Inman, concluding as a matter of law the action was barred by both the release and the 10-year statute of repose.

CONTENTIONS

Lowgren contends triable issues of fact exist as to whether her consent to the release was fraudulently induced and whether any of her claims is time-barred.

DISCUSSION

1. *Standard of Review*

We review the trial court's grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; § 437c, subd. (c).)

2. *Summary Judgment Was Improper Because Triable Issues of Fact Exist as to Whether Lowgren's Consent to the Release Was Procured by Fraud*

""The general rule is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that [*11] its provisions are contrary to his intentions or understanding." [Citations.]" (*Jefferson v. Department of Youth Authority* (2002) 28 Cal.4th 299, 303.) However, when a person is induced to give his or her consent based upon intentional and material misrepresentations by the party seeking his or her agreement, the contract is voidable and may be rescinded at the request of the person whose agreement was fraudulently obtained. (*Ibid.*; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415; *Civ. Code*, § 1689, subd. (b).)

In her complaint Lowgren alleged she was fraudulently induced to enter into the release by the representations of Dalcin and Inman, who requested she obtain repair estimates for the office, patio and upstairs bedroom ceiling and then told her the release relieved them from liability solely with respect to the specific work undertaken by the contractor. In their motion for summary judgment Dalcin and Inman attacked this fraudulent inducement theory, arguing Lowgren's reliance on any representations contravening the "plain language" of the "general release" was unjustified as a matter [*12] of law. (See *Seeger v. Odell* (1941) 18 Cal.2d 409, 414-415 ["justifiable reliance" is essential element of fraud and is ordinarily a question of fact unless evidence supports only one conclusion]; *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503, 198 Cal. Rptr. 551 [same].)

Contrary to the characterization by Dalcin and Inman, the language of the release is anything but plain: Ambiguities, misprints and contradictions pervade the document. First, quite apart from the fact that it identifies the wrong property, n6 the release expressly applies to claims "arising out of the contract for the sale and purchase" of the unit, suggesting it is limited to claims relating solely to the sale transaction itself. Even without that ambiguity, the release is internally inconsistent. One the one hand, it purports to release both known and unknown claims and informs the releaser that, by executing the document, she waives the protections of *Civil Code section 1542* prohibiting a general release from extending to unknown claims. On the other hand, paragraph (c) of the release apparently states (albeit in nearly incoherent language) [*13] that it applies only to those claims known to exist at the time of execution: "Releasers acknowledge that they intend these consequences even as to release but which releasers do *now* know exist" (Italics added.) The document also includes a separate space for the releaser to initial to acknowledge her intent to release unknown claims. That space was not initialed by Lowgren, supporting her assertion that she was told the release applied only to specific damage claims.

n6 The release identifies the property as 778 West 37th Street instead of 718 West 37th Street. Based on this mistake, Lowgren had sought a declaration the release by its terms does

not apply to her. Because Lowgren's own testimony establishes the mistake in the address was simply a typographical error, the denial of Lowgren's declaratory relief claim was proper. The question here is not whether the release covers Lowgren's property, but whether it was unreasonable as a matter of law for her to assert she was induced to enter into the release based on misrepresentations as to its scope.

[*14]

The issue in this appeal is not the proper interpretation of the release but whether, in light of its language and surrounding circumstances, Lowgren's purported reliance on false oral representations by Dalcin and Inman was unreasonable as a matter of law. Had the parties executed an unambiguous general release with a sufficiently clear and specific waiver of all currently unknown claims, we would have no difficulty concluding that all of Lowgren's claims are barred. (See *Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1732-1733.) However, in light of the confusing and contradictory nature of this "form" release apparently drafted by Dalcin, Inman and/or their agents, Lowgren's relative inexperience in real estate matters and the absence of counsel in this transaction, we cannot say that Lowgren's reliance on alleged misrepresentations concerning the scope of the release was necessarily unreasonable. (*Blankenheim v. E. F. Hutton & Co.* (1990) 217 Cal. App. 3d 1463, 266 Cal. Rptr. 593 [it is a "rare" case where reliance can be shown to be unjustified as a matter of law]; *Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Development Corp.* (1995) 32 Cal.App.4th 985, 996 [*15] [language in release stating that plaintiff relies only on promises set forth therein does not foreclose plaintiff as a matter of law from justifiably relying on oral representations not set forth in release]; *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 393, fn. 8 [in light of ambiguities in guarantee agreement, triable issue of fact exists as to whether loan guarantor was justified in relying on bank's false representations concerning the number of loans to be guaranteed]; see also *Gray v. Don Miller & Associates, Inc.*, supra, 35 Cal.3d at p. 503 ["the issue is whether the person claiming reliance was justified in believing the representation in light of *his own knowledge and experience*" (italics added)].)

3. The Statute of Repose Contained in Section 337.15 Bars Lowgren's Property Damage Claims but Not Her Fraud or Personal Injury Claims

Section 337.15 precludes any action for injury to real or personal property brought against any person involved in the design, supervision or construction of an improvement to real property unless the lawsuit is filed within 10 years after "substantial completion" of the development [*16] or improvement. Unlike statutes of limitation applicable to construction defects, which begin to run only when the defect was or should have reasonably been discovered, n7 the 10-year period in section 337.15 is a statute of repose, imposing an "absolute requirement" that a lawsuit to recover damages for latent defects be brought within 10 years of substantial completion of the construction, whether or not the defect was or even could have been discovered within that period. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 369; *Regents of University of California v. Hartford Accident & Indemnity Co.* (1978) 21 Cal.3d 624, 630-631, 147 Cal. Rptr. 486 (Regents).)

n7 The statutes of limitations applicable to construction defects are generally three or four years, depending on whether the theory is for tortious injury to property (§ 338, subs. (b) & (c) [three years]) or breach of warranty (§ 337, subd. 1 [four years]).

Lowgren, who filed her lawsuit in August 2000, does [*17] not dispute that the condominium unit was substantially completed by at least March 1990 when a certificate of occupancy was filed. (*Eden v. Van Tine* (1978) 83 Cal. App. 3d 879, 884, 148 Cal. Rptr. 215 ["substantial completion" need not coincide with first delivery or first occupancy of improvement; thus the project was "substantially completed" upon recordation of "notice of completion" even though it preceded first delivery or first occupancy].) Instead, she asserts her claims are exempt from the bar of section 337.15. We partially agree.

By its terms, section 337.15 does not apply to actions for personal injury. (§ 337.15, subd. (a)(1), (2).) Nor does the statute apply to suits based on "willful misconduct or fraudulent concealment." (§ 337.15, subd. (f).) Thus, Lowgren's personal injury claims (her seventh cause of action for negligent infliction of emotional distress and her eighth cause of action for negligence causing personal injuries) and her fraudulent concealment claim are not barred by section 337.15. Lowgren's reliance on section 337.15, subdivision (e), to salvage her claims for breach of warranty, strict liability and negligent damage to property [*18] (fifth cause of action), however, is misplaced.

Section 337.15, subdivision (e), provides that the statute "shall not be asserted by way of defense by any person in actual possession or control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause" of the damage for which recovery is sought. Lowgren does not argue the deficiency that is the proximate cause of the damage to her unit manifested itself in April 1991 or earlier, while Dalcin and Inman remained in possession and control of the development. Indeed, such an admission would likely defeat all of her claims under the applicable three-and four-year statutes of limitations. Instead, she argues subdivision (e) delays the running of the statute until the developer relinquishes possession and control of the property. Under this interpretation, the 10-year limit did not begin to run until April 1991, when Dalcin and Inman sold the last unit and relinquished "control" of the development. Nothing in the statutory language, however, supports her "tolling" argument. By its terms, subdivision (e) operates only to exempt from section 337.15's protections one [*19] in possession and control at the time of the proximate cause of the injury. (*Regents, supra*, 21 Cal.3d at p. 632; *Eden v. Van Tine, supra*, 83 Cal. App. 3d at pp. 885-886.)

Second, Lowgren suggests section 337.15, subdivision (e), applies because Dalcin and Inman were in "possession and control" of the entire condominium complex at the time the "latent defect" was constructed, installed or built into the improvement and thus are not entitled to use the statute to shield themselves from liability. But, of course, "all contractors, developers, etc. are in control of the project at some stage of its development and [Lowgren's] application of [subdivision (e)] would deny them the defense intended. . . . [Section 337.15, subdivision (e)] does not refer to the person in possession or control at time of construction, but to the person in possession or control at the time that the deficiency becomes the proximate cause of the damage." (*Eden v. Van Tine, supra*, 83 Cal. App. 3d at p. 886.) To hold otherwise would defeat the statutory purpose and render the entire scheme a nullity. (*Ibid.*) n8

n8 Because Inman withdrew his summary adjudication motion with respect to the fifth cause of action for negligence causing damage to property, that cause of action remains viable as to Inman until resolved in a subsequent motion or at trial.

[*20]

4. *Triable Issues of Fact Exist as to Whether Lowgren's Fraud Claim Is Time-Barred by the Applicable Statute of Limitations*

The three-year statute of limitation applicable to fraud claims begins to run as soon as the plaintiff discovers or should have discovered the facts constituting the fraud. (§ 338, subd. (d); *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397; *Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1373.) Actual knowledge of the fraud is not required, nor is it necessary that the plaintiff know the facts that give rise to a legal cause of action. (*Norgart*, at p. 397.) Rather, "the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.* (1998) 44 Cal.3d 1103, 1110-1111, 245 Cal. Rptr. 658; see also [*21] *Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 875, 191 Cal. Rptr. 619 [once plaintiff becomes "aware of facts which would make a reasonably prudent person suspicious" that a wrong has occurred, he or she has a "duty to investigate further, and [is] charged with knowledge of matters which would have been revealed by such an investigation"].) The level of awareness necessary to trigger inquiry notice is generally a question of fact; it can be resolved as a matter of law only where the facts are susceptible to a single legitimate inference -- that the plaintiff knew or should have known of facts sufficient to put a reasonable person on inquiry that a wrong had occurred causing injury. (*Jolly*, at p. 1112; *San Francisco United School Dist. v. W. R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1325-1326.)

Dalcin and Inman contend the fraud claim accrued as early as 1991 when cracks began to appear in the stucco and no later than 1994 when Lowgren experienced "horrific leaking" and discovered cracks in her roof. In her opposition, however, Lowgren asserted that cracks in her roof and walls did not suggest the entire structure was substandard and built [*22] on a defective foundation, nor did the roofing contractor hired to repair the roof give such an indication. Moreover, Lowgren provided evidence that none of the other residents of the complex who also experienced leaking suspected that Dalcin's and Inman's representations that the cracks were "normal settling" cracks were false. Whether the leaking from Lowgren's roof in 1994 was sufficient to put a reasonable person on inquiry notice that, if pursued, would have uncovered the defective foundation and hence the fraud (be it the alleged misrepresentations as to the cracks or the alleged nondisclosure of known defects) is a disputed question properly reserved for the trier of fact. (*Balfour, Guthrie & Co. v. Hansen* (1964) 227 Cal. App. 2d 173, 191, 38 Cal. Rptr. 525 [whether buyer, who had no experience in construction, should have become suspicious by the placement of the steel as to whether the structure was built according to specifications was an issue for the trier of fact]; *Tarrant v. Butler* (1960) 180 Cal. App. 2d 235, 242, 4 Cal. Rptr. 230 [the "question here is whether the defects of construction . . . established as a matter of law that [*23] plaintiffs had a duty to make . . . a critical examination of their building in order to ascertain whether it was constructed in lawful condition for human occupancy. Our answer must be that the question [is] one of fact".])

5. *The Statutes of Limitation Applicable to the Seventh Cause of Action for Negligent Infliction of Emotional Distress and the Eighth Cause of Action for Negligence Were Not Addressed in the*

Motion for Summary Judgment/Summary Adjudication and Therefore Neither Dalcin Nor Inman Has Met Its Burden of Proof Permitting Resolution of Those Claims as a Matter of Law

The summary judgment/summary adjudication motion filed by Inman and joined by Dalcin did not address whether Lowgren's seventh cause of action for negligent infliction of emotional distress and eighth cause of action for negligence causing personal injuries (respiratory ailments) are barred by the applicable statute of limitations. Accordingly, whatever merit Lowgren's claims and Dalcin and Inman's affirmative defenses may have, Dalcin and Inman's moving papers were deficient in establishing entitlement to adjudication of those claims as a matter of law. (§ 437c, subds. (c) & (f)(1).)

[*24] DISPOSITION

The judgment is reversed. On remand the trial court is directed to deny the summary judgment motions; to grant the summary adjudication motions with respect to the first cause of action for breach of warranty, the third cause of action for declaratory relief, the sixth cause of action for strict liability and, as to Dalcin alone, the fifth cause of action for negligence resulting in property damage; and to deny the summary adjudication motions with respect to all other causes of action. Each party is to bear his, her and its own costs on appeal.

PERLUSS, P.J.

We concur:

JOHNSON, J.

WOODS, J.

