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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CAROLYN VICKERS, INC.,

Plaintiff and Appellant,

v.

UNOCAL CORPORATION et al.,

Defendants and Respondents.

2d Civil No. B234041  
(Super. Ct. No. CV090210A)  
(San Luis Obispo County)

A parcel of property was contaminated by an oil leak from a pipeline in 1981. The owner sold the property without disclosing the contamination. The property was sold again in 2006. In 2007, the owner learned of the contamination and filed a lawsuit against the oil companies who operated the pipeline. They demurred on the ground that the action was barred by a three-year statute of limitations for injury to real property. (Code Civ. Proc., § 338, subd., (b).) The trial court sustained the demurrer without leave to amend. We affirm.

FACTS

Appellant Carolyn Vickers, Inc. (CVI) filed a tort action against Unocal Corporation, Union Oil Company of California, Unocal Pipeline Company and Chevron Corporation, Conoco Phillips Company and Conoco Phillips Pipeline Company (collectively respondents). Also named in the complaint were Phyllis Madonna and several title companies, none of whom are parties to the appeal.

The complaint stems from Phyllis Madonna and Alex Madonna's ownership of 4.1 acres of real property in San Luis Obispo County, known as "Tract 1259." They subdivided the property into 17 parcels which were zoned for construction of single family residences. Four oil pipelines ran across portions of Tract 1259. These pipelines were allegedly owned and operated by Unocal, Union Oil of California and/or Unocal Pipeline.

In 1981, one of the Madonnas' employees was operating a backhoe on the property and struck a pipeline, causing an oil spill. It was not properly remediated, and it contaminated portions of Tract 1259 and the groundwater. In 2005, Phyllis Madonna sold the property to Alan Little Ventures (ALV). She did not disclose the presence of the pipelines or the oil spill and contamination.

In 2006, ALV sold lots 5 and 9 to CVI. In 2007, ALV and CVI discovered that several lots and groundwater had been contaminated by oil. Among them was lot 5. ALV agreed to assign to CVI any rights it had against the defendants related to lots 2 and 4.

In 2009, CVI filed a 69-page complaint, alleging 16 causes of action against various defendants. As to respondents, it alleged causes of action for negligence, public nuisance, private nuisance and trespass on lots 2, 4, 5 and 9. CVI claimed damages for the purchase of lots 2, 4, 5 and 9, including accrued interest on the loans; the cost of sale or development of the lots; lost business opportunities and profits; the costs of remediation; and legal fees.

Respondents demurred and moved to strike portions of CVI's complaint. They alleged that the causes of action were time-barred by the three-year statute of limitations. The injury occurred in 1981, over twenty-five years earlier. Respondents requested the court to strike most of CVI's requested damages except for the cost of compliance with clean-up or any monitoring requirements. It alleged that the majority of damages were either not recoverable under causes of action for negligence, trespass and nuisance, or too remote in time.

CVI filed opposition to the demurrer, arguing that the "discovery rule" applied, thus the three-year statute of limitations did not begin to run until May 2007. It asserted that, even if the discovery rule was inapplicable, its claims for nuisance and trespass were continuing, so the statute of limitations had not run as to those two causes of action. CVI also raised a public policy argument that respondents should be required to remediate their contamination of the land. Respondents filed a response, noting that CVI had stated in the complaint that the Madonnas had notice in 1981, thus CVI's claims were time-barred on the face of the complaint.

Respondents also noted that CVI's complaint did not allege all the elements necessary for *continuing* nuisance and trespass. The first time that CVI first argued that these torts were continuing was in its opposition to the demurrer. Respondents asserted that only the continuing torts could survive the time-bar, provided CVI amended its complaint as to those causes of action.

The trial court sustained respondents' demurrer without leave to amend as to CVI's claims for negligence, permanent nuisance and permanent trespass. Its claims for continuing nuisance and continuing trespass were sustained with leave to amend. The court ruled that the motions to strike damages had been rendered moot by its ruling on the demurrer. It cautioned CVI that its recovery would be limited, should it choose to pursue its claims for continuing nuisance and trespass.

CVI filed a request for dismissal, asking that its causes of action against respondents be dismissed with prejudice, stating that its request was made in order to expedite an appeal.<sup>1</sup> The dismissal was entered several days later. This effectively eliminated CVI's claims for continuing nuisance and continuing trespass.

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<sup>1</sup> A plaintiff may appeal from a voluntary dismissal with prejudice when the court ruled against the plaintiff, who dismissed that claim and any pending claims with prejudice to expedite appellate review. (*Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1012; *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 974-975; *Denney v. Lawrence* (1994) 22 Cal.App.4th 927, 930, fn.1; *Ashland Chemical Co. v. Provence* (1982) 129 Cal.App.3d 790, 793.)

## DISCUSSION

### *Standard of Review*

When reviewing a dismissal of a complaint after a demurrer has been sustained without leave to amend, we accept the factual allegations of the complaint as true and review the pleading de novo to determine whether the facts as pleaded state a cause of action. (*Medina v. Hillshore Partners* (1995) 40 Cal.App.4th 477, 481; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) If we determine that an amendment would cure the defect, we conclude the trial court abused its discretion and reverse. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The plaintiff bears the burden of establishing that the complaint could have been amended. (*Ibid.*; *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.)

### *Injury to Real Property*

There is a three-year statute of limitations for injury to real property. (Code Civ. Proc., § 338, subd. (b); *Chevron U.S.A. Inc. v. Superior Court* (1994) 44 Cal.App.4th 1009, 1017.) The injury is considered to be to the property itself, rather than to the property owner. (*Beck Development Co. v. Southern Pacific Trans. Co.* (1996) 44 Cal.App.4th 1160, 1216.) Thus, the running of the statute bars claims by the owner and all subsequent owners. (*Ibid.*)

"[F]or [statute of] limitations purposes, the gravamen of a soil contamination claim is that the real property, not any particular owner, has been injured by a condition that has been created, whether deliberately or negligently. The limitations period is not revived each time the property changes owners or occupants." (*McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 75; *Camsi IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1534-1535.)

The discovery rule operates to postpone the commencement of the statute of limitations. (*Wilshire Westwood Associates v. Atlantic Richfield Co.* (1993) 20 Cal.App.4th 732, 740.) It provides that a cause of action does not accrue until a plaintiff discovers the injury and its negligent cause; or could have discovered the injury and its

cause through the exercise of reasonable diligence. (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1150.)

CVI stated in its complaint that Madonna first became aware of the oil spill in April 1981. The three-year statute of limitations therefore expired in April 1984. It was not revived when ALV or CVI purchased the property, or when they made their discovery in 2007. The trial court properly concluded that CVI was not entitled to the benefit of the discovery rule because Madonna was immediately aware of the oil spill and the statute had run long before CVI purchased the property.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

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COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Barry T. LaBarbera, Judge  
Superior Court County of San Luis Obispo

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Defendants and Respondents Unocal Corporation.