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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GLEN OAKS ESTATES HOMEOWNERS ASSOCIATION, Plaintiff and Appellant, v. RE/MAX PREMIER PROPERTIES, INC., et al., Defendants and Respondents.	B229946 (Los Angeles County Super. Ct. No. GC 044725)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph De Vanon, Jr., Judge. Affirmed in part; reversed in part.

Castro & Associates, Jose B. Castro, David H. Pierce, Toneata Martocchio, J. Alan Warfield; Law Office of Morton Minikes and Morton Minikes for Plaintiff and Appellant.

Carlson Law Group, Inc., Mark C. Carlson, Jonathan A. Feldheim; Sedgwick LLP and Douglas J. Collodel for Defendants and Respondents Loeffler and Bathke Properties Realtors, Inc., Priscilla Siew-Lin Yim and Margaret M. Huang.

Spile, Siegal, Leff & Goor, LLP, Richard L. Goor, Andrew L. Leff and Michael J. T. Wilson for Defendants and Respondents DG Real Estate, Inc., and Marklin Malone.

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* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of part 2 of the Discussion.

Appellant Glen Oaks Homeowners Association (the HOA) appeals from judgments entered against it after the trial court sustained demurrers to its first amended complaint (FAC). Respondents are two groups of realtors: (1) Loeffler and Bathke Properties Realtors, Inc., doing business as Re/Max Premier Properties, Inc., Priscilla Siew-Lin Yim, and Margaret M. Huang; and (2) DG Real Estate, Inc. (erroneously sued as Dilbeck, Inc.), doing business as Dilbeck Realtors GMAC Real Estate and Marklin Malone.[1] The trial court sustained the demurrers on standing and statute of limitations grounds. We affirm in part and reverse in part.

FACTUAL BACKGROUND[2]

The HOA is a nonprofit, mutual benefit, unincorporated association responsible for the operation, maintenance, and management of the common area serving the five parcels of Glen Oaks Estates. Glen Oaks Estates is located in Pasadena, California. The members of the HOA consist of the owners of the five parcels in Glen Oaks Estates.

The FAC alleges that the Realtors acted as the sellers' agents for the developers of Glen Oaks Estates and assisted the developers in marketing and selling the parcels. The Realtors were dual agents in that they also represented the HOA members as buyers' agents. Re/Max acted as dual agent in the sale of three parcels in Glen Oaks Estates, and Dilbeck acted as dual agent in the sale of one parcel in Glen Oaks Estates.

On or about January 9, 2005, a significant slope failure occurred along parts of the Glen Oaks Estates common slope area and common driveway. In the aftermath of this landslide, a negligence lawsuit was filed against the HOA and two of its members on

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[1] Loeffler and Bathke Properties Realtors, Inc., doing business as Re/Max Premier Properties, Priscilla Siew-Lin Yim, and Margaret M. Huang are referred to hereafter as "Re/Max." DG Real Estate, Inc., doing business as Dilbeck Realtors GMAC Real Estate and Marklin Malone are referred to hereafter as "Dilbeck." Both groups of realtors are collectively referred to hereafter as the "Realtors."

[2] We base the factual summary on the allegations of the FAC, attachments to the FAC, and matters that the trial court judicially noticed.

December 19, 2007: *DePaul v. Glenoaks Estates Homeowners Association* (Super. Ct. L.A. County, 2010, No. GC040069) (*DePaul* case). The HOA filed a cross-complaint in the *DePaul* case against the developers for indemnity and contribution. On September 10, 2008, the developers served verified responses to requests for production of documents in the *DePaul* case. The HOA received a compact disc containing the developers' responsive documents on February 9, 2009.

Among the documents produced by the developers was a letter dated December 28, 2000, from Re/Max to the developers, which the HOA attached to the FAC. The HOA alleges the letter falsely advised the developers that the Department of Real Estate (DRE) did not require a homeowners' association for Glen Oaks Estates. The letter further advised the developers to lower the amount of the homeowners' association monthly dues so that buyers would not "back out" from escrow. The HOA alleges that Re/Max and the developers collaborated to create a false and misleading budget and provided that false budget to the HOA members.

The documents produced by the developers also included a DRE "File Abandonment Notice" executed by one of the developers, which declined to file an application for a final public report on Glen Oak Estates. The HOA also attached this to the FAC. The HOA alleges that until it discovered the abandonment notice in the developers' document production, it did not know that the developers and the Realtors were required to provide a final public report to each buyer, which would have included a DRE-approved budget worksheet and "other material transactional disclosures and documents."

The HOA also alleges the Realtors received multiple soil reports by Pioneer Soils Engineering, Inc. (Pioneer), which included analyses of the common areas in Glen Oaks Estates. The analyses were used as the basis for the construction of the common roadway and common area slopes. The Realtors allegedly received material information that Pioneer may not have been validly licensed and that the soil reports were illegal or unreliable. First, Pioneer allegedly admitted that it did not have "errors and omissions" insurance. Second, certain soil reports lacked a signature by an engineer or geologist and/or an official marking of an engineer or geologist. Third, the body of one or more soil reports referenced testing,

investigation, and grading of property in Fullerton rather than at Glen Oaks Estates. And fourth, the body of one or more soil reports referenced a nonexistent Pioneer report. The HOA alleges that the Realtors either did not provide these soils reports to the HOA members, or gave them these soil reports without any warning as to their potential defects.

The gravamen of the claims against the Realtors is that, had they acted fairly, honestly, and consistent with their fiduciary duties, the HOA members would have received an accurate budget and the transactional documents required by law and DRE regulations (such as the public report), and they would have known the soil reports were illegitimate. If the HOA members had this information, they allegedly would not have purchased their homes, would not be embroiled in third party litigation arising from the landslide, and would not be responsible for certain expenses to repair the common areas of Glen Oaks Estates.

PROCEDURAL BACKGROUND

The HOA filed its original complaint on February 25, 2010. After the court sustained the Realtors' demurrers to the complaint, the HOA filed the FAC on June 4, 2010. The FAC alleges four causes of action against the Realtors collectively and two causes of action against Re/Max only.[3]

First, the FAC alleges the Realtors engaged in unfair business practices (Bus. & Prof. Code, § 17200) by violating the Subdivided Lands Act (Bus. & Prof. Code, § 11018.1), which requires that the owner, subdivider, or real estate agent give buyers a public report regarding the property and other transactional documents prior to execution of the sale contract. Second, it alleges the Realtors engaged in unfair business practices through false advertising (Bus. & Prof. Code, §§ 17200, 17500) because they failed to disclose in flyers and other publications that Glen Oaks Estates was a "common interest development" subject to the requirements of the Subdivided Lands Act and the regulations of the DRE. Third, the FAC alleges the Realtors breached their fiduciary duties to the members of the HOA by

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[3] The FAC also alleges causes of action against the developers. The developers are not parties to this appeal.

failing to provide a final public report, a DRE-approved budget, and other required disclosures and transactional documents pursuant to the Subdivided Lands Act. It further alleges that these breaches and/or unfair practices were a substantial factor in the members' purchase of the Glen Oaks Estates parcels because they would not have purchased had they received the required documents; the documents would have revealed the defective condition of the common area roads and slopes.

Fourth, the FAC alleges that Re/Max intentionally misrepresented or concealed material facts from the members of the HOA by advising the developers to lower the monthly HOA dues so that the parcels would not fall out of escrow, and then Re/Max intentionally provided a false budget and deceptively low monthly dues statement to members. Had the members known the budget was inaccurate and misleading, they allegedly would not have purchased their parcels. Fifth, the FAC alleges Re/Max engaged in unfair business practices when it "low-balled" the budget and advised the developers to lower monthly dues. Sixth, and finally, the FAC alleges that the Realtors breached their fiduciary duties to the members by failing to investigate whether the Pioneer soil reports were legitimate or failing to warn the members that the reports might not be legitimate, despite "undeniable" bases for questioning the reliability or validity of the reports.

The Realtors demurred to the causes of action in the FAC. The court sustained the demurrers without leave to amend, ruling as follows: "The action against demurring defendants Re/Max and Dilbeck is barred by the statute of limitations. . . . Based on the allegations, it appears that all purchases occurred prior to February 2001 and the slope failure occurred in 2005. The complaint was filed on February 25, 2010, after the expiration of the statute of limitations set forth in CCP 338 and CC 2079.4. Finally, plaintiff lacks standing to assert a claim against moving defendants based on concealment and/or misrepresentation. The complaint alleges that individual members were induced into purchasing lots based on defendants' misrepresentations and concealments (i.e., failure to provide a final public report, DRE approved budget and required disclosures). Such claims belong to the individual homeowners, not plaintiff HOA."

The court entered judgment in favor of the Realtors on October 18, 2010. This timely appeal followed.

STANDARD OF REVIEW

When the trial court sustains a demurrer, we review the complaint de novo to determine whether it contains sufficient facts to state a cause of action. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) "'As a reviewing court we are not bound by the construction placed by the trial court on the pleadings but must make our own independent judgment thereon, even as to matters not expressly ruled upon by the trial court.'" (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 127.) We accept as true all properly pleaded material factual allegations of the complaint and other relevant matters that are properly the subject of judicial notice, and we liberally construe all factual allegations of the complaint with a view to substantial justice between the parties. (*Ibid.*) We also consider any exhibits to the complaint. (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400.)

When the trial court sustains a demurrer without leave to amend, we review that decision for abuse of discretion. (*Hernandez v. City of Pomona*, *supra*, 49 Cal.App.4th at p. 1497.) We will reverse for abuse of discretion if we determine that there is a reasonable possibility the plaintiff can cure the pleading by amendment. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

DISCUSSION

The HOA argues that the trial court erred in sustaining the demurrers because it has standing to pursue the claims of its members, and furthermore, its claims are timely under the discovery rule and/or the doctrine of fraudulent concealment. We address standing and the statute of limitations seriatim.

1. Standing

The HOA contends that it has standing under Civil Code Section 1368.3,[4] or alternatively, under Code of Civil Procedure section 382. We agree that section 1368.3 confers standing.

A. Section 1368.3

The HOA maintains that it has standing to bring this action pursuant to section 1368.3, part of the Davis-Stirling Common Interest Development Act (CIDA). (§ 1350.) In pertinent part, section 1368.3 states that "[a]n association established to manage a common interest development has standing to institute, defend, settle, and intervene in litigation . . . in its own name as the real party in interest and without joining with it the individual owners of the common interest development . . . ."[5] But such associations have standing only in particular matters, specifically "matters pertaining to" (1) "[d]amage to the common area," and (2) "[d]amage to a separate interest that arises out of, or is integrally related to, damage to the common area . . . ." (§ 1368.3, subds. (b), (d).)[6] The HOA argues that while the right violated was "personal to the members" in that the Realtors owed the HOA members a fiduciary duty, their damages consist of a $3-million repair obligation for the common area driveway and slopes. Thus, they contend, the matter "pertain[s] to" damage to the common area. Even if this was not the case, they allege their personal interests have been damaged, and such damage is integrally related to damage to the common area.

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[4] All further statutory references are to the Civil Code unless otherwise indicated.

[5] The FAC alleges that Glen Oaks Estates is a "common interest development" within the meaning of the CIDA. (§ 1351, subds. (c)(3), (k)). At least at this stage, the parties do not dispute that Glen Oaks Estates is a common interest development and that the HOA is an "association established to manage a common interest development."

[6] Section 1368.3 also confers standing in matters pertaining to enforcement of the association's governing documents or "[d]amage to a separate interest that the association is obligated to maintain and repair." (§ 1368.3, subds. (a), (c).) These subdivisions are not relevant for our purposes.

The CIDA defines a "separate interest" as "a separately owned lot, parcel, area, or space." (§ 1351, subd. (*l*)(3).) It defines a "common area" as "the entire common interest development except the separate interests therein." (§ 1351, subd. (b).) The FAC does not allege damage to the HOA members' separately owned lots or parcels. Therefore, the subdivision conferring standing when matters pertain to damage to a "separate interest" that is integrally related to damage to the common area does not apply.

The allegations of the FAC are sufficient, however, to show the matter pertains to damage to the common areas. The theory alleged in the FAC is that the HOA members would not have purchased their homes in Glen Oaks Estates had the Realtors acted as proper fiduciaries, not concealed information relating to the budget, warned them about the alleged invalid soil reports, and/or complied with the laws requiring them to provide a final report and other transactional documents. But because they did purchase their homes, the FAC alleges the HOA is now embroiled in third party actions arising from the failure of the common area slopes and roadway, and it is responsible for certain expenses to repair the common areas. The causes of action against the Realtors allege damages in an amount over $3 million -- or in the case of the unfair business practices claims, "injury in fact" and "lost money or property"[7] -- that includes, among other things:

- investigative costs associated with the repair and replacement of the damaged common area improvements, pursuant to *Stearman v. Centex Homes* (2000) 78 Cal.App.4th 611;[8]

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[7] The HOA cannot claim damages for the unfair business practices claims because relief under these claims is limited to injunctive relief and restitution. (*Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1288.) Nevertheless, the statutory scheme requires a private party bringing these claims to have "suffered injury in fact" and "lost money or property as a result of" the unfair practices. (Bus. & Prof. Code, §§ 17204, 17535.)

[8] *Stearman v. Centex Homes*, *supra*, 78 Cal.App.4th at page 625 held that the plaintiff could recover expert fees as damages, not costs, when the expert was retained to investigate and formulate a repair plan in a construction defect case.

- the amount to properly landscape the manufactured slopes of common areas that were not landscaped and/or were not properly landscaped with an adequate quantity or correct type of planting materials, irrigation, and drainage systems;
- the amount omitted from the budgetary analysis that is required to stabilize and perform the repair, restoration, and construction of the common areas, common area slopes, and common roadway.

These allegations are sufficient to show the matter pertains to damage to the common area. Section 1368.3 therefore confers standing.

Dilbeck argues that section 1368.3 does not apply because the statute may confer standing to sue a *developer* for damages to the common area, but not a *realtor* like Dilbeck. But the statute does not, by its plain terms, contain a limitation on who the HOA may sue, nor does Dilbeck provide any other authority for this assertion. Both Dilbeck and Re/Max also argue that the HOA does not have standing because realtors owe no duties to third parties who were not parties to the contract of sale, and the HOA was not a party to the contracts between the Realtors and the HOA members. In support, they cite *Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158 (*Coldwell Banker*). In *Coldwell Banker*, a home buyer's minor son sued the seller's real estate broker for breaching various duties of care, including failing to disclose microbial contamination in the home. (*Id.* at p. 161.) The court held that the broker owed a statutory duty of care to the minor's parent, the buyer, but not to the minor, who was not a party to the transaction. The court therefore held that the broker's demurrer to the complaint should have been sustained. (*Id.* at pp. 165-166, 169.)

The Realtors' reliance on *Coldwell Banker* is misplaced. The HOA does not allege that the Realtors owed the HOA any duties, and we are not creating a rule that extends realtors' duty of care beyond parties to the transaction. We are dealing here with a specific legislative grant of standing that permits an association to bring the claims of its members. The stranger to the transaction in *Coldwell Banker* had no such basis for standing. *Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162 (*Windham*) is instructive. The homeowners' association in *Windham* sued the developer of

the association members' condominiums for breach of implied warranty. (*Id.* at p. 1166.) The developer demurred, arguing that the association did not have the requisite privity of contract to maintain a cause of action for breach of implied warranty. (*Id.* at p. 1167.) The court disagreed, holding that the predecessor statute to section 1368.3 supplied the requisite privity.[9] The statute gave "associations the standing to sue as real parties in interest in *all* types of actions for damage to common areas, including breach of implied warranty causes of action," and it thus necessarily granted associations privity of contract to state those causes of action. (*Windham*, at p. 1175.) Similarly, here, the legislative grant of standing confers with it the privity necessary to bring the HOA members' claims.

Having determined that Civil Code section 1368.3 supplies standing, we need not address the HOA's alternative argument that it has standing under Code of Civil Procedure section 382.

2. Statute of Limitations*

The HOA argues that this action is not barred by the statute of limitations because the discovery rule and the doctrine of fraudulent concealment apply. The Realtors argue that the two-year statute of limitations in section 2079.4 bars this action. Alternatively, they argue that the three-year statute of limitations for fraud bars this action, even if the discovery rule applies. We hold that the HOA has sufficiently alleged the timeliness of some but not all claims through the discovery rule and fraudulent concealment.

A. Sections 2079 and 2079.4

The Realtors' argument that sections 2079 and 2079.4 apply is unavailing. As we discuss below, the wrongs alleged in the FAC are not breaches of section 2079, and thus the statute of limitations for breaches of section 2079 (§ 2079.4) does not apply.

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[9] Civil Code section 1368.3 was formerly codified in Code of Civil Procedure section 383, subdivision (a); it was renumbered to section 1368.3 in 2004 without substantive change. (Cal. Law Revision Com. com., 8 West's Ann. Civil Code (2007 ed.) foll. § 1368.3, p. 334.)

* See footnote, *ante*, page 1.

Section 2079, subdivision (a), states that a real estate broker or salesperson owes a duty "to a prospective purchaser of residential real property . . . to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with that broker to find and obtain a buyer." Section 2079.4 provides for a two-year statute of limitations, beginning from the date of possession, for breach of the broker's duty to inspect and disclose under section 2079. (*Loken v. Century 21-Award Properties* (1995) 36 Cal.App.4th 263, 270.) The discovery rule does not toll this statute of limitations. (§ 2079.4 [providing that "[i]n no event" shall the statute of limitations exceed two years].)

By its plain terms, the duty imposed by section 2079 is a limited one. "Section 2079 codifies a negligence standard of care for one particular task that the law imposes on brokers -- the obligation (by a seller's agent) to visually inspect the property and disclose the results of that inspection to the buyer." (*Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 763.) Moreover, the statutory duty is owed by the seller's agent -- a "broker [who] has a written contract with the seller to find or obtain a buyer," or a broker "who acts in cooperation with that broker to find and obtain a buyer." (§ 2079.) Courts have consistently characterized the duty stated in section 2079 as a nonfiduciary one owed by a *seller's* agent to a buyer, not a duty owed by the buyer's own agent to the buyer. (*Michel v. Moore & Associates, Inc.*, *supra*, at p. 763; *Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 412 (*Assilzadeh*); *Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 23-24 (*Field*); *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562, fn. 3 (*Salahutdin*).)

In this case, the FAC does not allege a breach of the statutory duty of the seller's agent to visually inspect the property. Rather, the FAC alleges the Realtors breached their *fiduciary duties* as *buyer's* agents by failing to disclose certain transactional documents, concealing facts relating to the HOA budget, and failing to advise regarding the purportedly invalid soil reports. It moreover alleges that this conduct constituted unfair business

practices and, as to Re/Max, fraud. This conduct is plainly outside the limited scope of section 2079, and therefore the statute of limitations for claims under section 2079 does not apply. (*Field*, *supra*, 63 Cal.App.4th at p. 27, fn. 12 ["The statute of limitations in section 2079.4 should only apply in negligence or negligent misrepresentation actions brought against a nonfiduciary broker for failure to visually inspect or disclose. It should not apply to actions brought against a fiduciary broker . . ."].)

It is established that the fiduciary duty owed by the buyer's agent to the buyer is separate and "substantially more extensive than the *nonfiduciary* duty codified in section 2079." (*Field*, *supra*, 63 Cal.App.4th at p. 25; see also *Michel v. Moore & Associates, Inc.*, *supra*, 156 Cal.App.4th at p. 763; *Assilzadeh*, *supra*, 82 Cal.App.4th at p. 414; *Salahutdin*, *supra*, 24 Cal.App.4th at p. 562, fn. 3 ["At issue here is not the inspection and disclosure duties of a seller's broker to the buyer . . . . Rather it is the broker's *fiduciary duty to his own client* . . ."].) In *Field*, *supra*, 63 Cal.App.4th at pages 24-25, the court examined the history and legislative intent of section 2079 at length, noting the difference between the fiduciary duties owed by agents to their clients, and the separate duty codified in section 2079. The court explained that the statutory scheme expressly declared it was "not the intent of the Legislature to modify or restrict existing duties owed by real estate licensees" in enacting section 2079. (§ 2079.12, subd. (b); see also *Field*, *supra*, 63 Cal.App.4th at p. 27.) The court ultimately determined that applying the two-year statute of limitations of section 2079.4 to claims of breach of fiduciary duty by a buyer's broker would be contrary to the Legislature's expressed intent, and it would restrict the ability of buyers to obtain redress for fiduciary duties owed by their own brokers that existed before the enactment of section 2079.4. (*Field*, *supra*, at p. 25.)

The Realtors argue that sections 2079 and 2079.4 should apply because they were dual agents, i.e., representing both the sellers and the HOA members as buyers. The fact that they were dual agents does not change our conclusion. *Assilzadeh*, *supra*, 82 Cal.App.4th at page 414, provides instruction. *Assilzadeh* dealt with dual agents. The court noted the limited duties set forth in section 2079 and nonetheless explained that dual agents owe further fiduciary obligations to both the buyer and seller. (*Ibid.*) The court proceeded

to describe the scope of those fiduciary obligations, relying on the *Field* court's description of the extensive fiduciary obligations that agents owe their buyer clients. (*Id.* at pp. 414-415.)

In sum, section 2079 does not replace dual agents' fiduciary obligations to their buyer clients. Section 2079.4 is the statute of limitations only for breaches of that section. The FAC does not allege a breach of section 2079. The two-year statute of limitations in section 2079.4 thus does not apply.

B. The Applicable Statute of Limitations and the Discovery Rule/Fraudulent Concealment

The earliest statute of limitations to apply to the HOA's claims is the three-year statute for its fraud (misrepresentation or concealment) claim against Re/Max. (Code Civ. Proc., § 338, subd. (d).) The claims for unfair business practices (Bus. & Prof. Code, §§ 17200, 17500) are governed by a four-year statute of limitations. (*Id.* § 17208.) The breach of fiduciary duty claims are governed by the four-year catchall statute of limitations in Code of Civil Procedure section 343. (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230.)

The statute of limitations generally commences running when a cause of action accrues, and generally a cause of action accrues on the date of injury. (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931.) An exception to this general rule is the "discovery rule," which holds that the statute begins to run when plaintiffs discover, or through the exercise of reasonable diligence could have discovered, the facts constituting their cause of action. (Code Civ. Proc., § 338, subd. (d); *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397; *Field*, *supra*, 63 Cal.App.4th at p. 25.) A "close cousin" of the discovery rule is the principle of fraudulent concealment. (*Bernson v. Browning-Ferris Industries*, *supra*, at p. 931.) This principle holds that a defendant's fraudulent concealment of a cause of action tolls the statute of limitations, but only for that period of time when the claim is undiscovered by the plaintiff, or until such time as the plaintiff, through the exercise of reasonable diligence, should have discovered it. (*Ibid.*) "In order to establish fraudulent concealment, the complaint must show: (1) when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for

failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry." (*Baker v. Beech Aircraft Corp.* (1974) 39 Cal.App.3d 315, 321.)

In the case of either delayed discovery or fraudulent concealment, "a plaintiff may not disregard reasonably available avenues of inquiry which, if vigorously pursued, might yield the desired information." (*Bernson v. Browning-Ferris Industries*, *supra*, 7 Cal.4th at p. 936.) The limitations period begins when the plaintiffs have notice of or information regarding circumstances sufficient to put a reasonable person on inquiry. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110 (*Jolly*).) The plaintiffs need not be aware of the specific facts necessary to establish their claims. (*Ibid.*) The parties may learn those through pretrial discovery. (*Ibid.*) As our Supreme Court explained in *Jolly*, "[o]nce 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." (*Id.* at p. 1111.)

It is the plaintiff's burden to establish facts showing that the discovery rule or the doctrine of fraudulent concealment applies, including facts which allow a legitimate inference that the delay was reasonable. (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 833; *Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 299.) When there has been a belated discovery of the cause of action, whether the plaintiffs exercised reasonable diligence or had constructive notice is a question for the trier of fact, if the facts alleged are susceptible to opposing inferences. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1320; *Saliter v. Pierce Brothers Mortuaries*, *supra*, at p. 300.) When, however, the allegations bearing on the issue would support only one legitimate inference, the question becomes one of law. (*Saliter v. Pierce Brothers Mortuaries*, *supra*, at p. 300.)

Breach of fiduciary duty and fraud claims are subject to the discovery rule, but the discovery rule does not apply to unfair business practices claims. (Code Civ. Proc., § 338, subd. (d); *Salenga v. Mitsubishi Motors Credit of America, Inc.* (2010) 183 Cal.App.4th 986, 996; *Snapp & Associates Ins. Services, Inc. v. Robertson* (2002) 96 Cal.App.4th 884,

891 (*Snapp*); *Field*, *supra*, 63 Cal.App.4th at p. 25.)[10] The doctrine of fraudulent concealment applies to any type of cause of action. (*Snapp*, at p. 890.)

The HOA argues that its claims are timely because the statute of limitations was tolled under both the discovery rule and the doctrine of fraudulent concealment. It alleges that, following the slope failure and landslide in 2005, its reasonable and diligent investigation disclosed *only* construction defects and the failure of neighboring properties to provide lateral support, but not the failure of the Realtors to provide an accurate budget, provide material documents in compliance with DRE regulations, or disclose the illegitimacy of the soil reports. If further alleges the Realtors fraudulently concealed material facts and it did not discover these facts, and could not have discovered them through the exercise of reasonable diligence, until February 2009, when it received the developers' production of documents in the *DePaul* case. One alleged concealed fact was the December 2000 letter from Re/Max to the developers that advised the developers to low-ball the budget for the HOA dues, as well as advised them that the DRE did not require a homeowners' association for Glen Oaks Estates. The other alleged concealed fact was the File Abandonment Notice declining to file an application for a final public report on Glen Oaks Estates, which was executed by one of the developer defendants. The HOA alleges that within one year of receiving the developers' discovery, it reexamined and investigated the transactions with the Realtors, discovered the alleged torts and unlawful acts by the Realtors, and filed this action on February 25, 2010.

We begin with the discovery rule and hold that the HOA has sufficiently alleged tolling under the discovery rule for some but not all claims. To review, the relevant claims are (1) breach of fiduciary duty for violating the Subdivided Lands Acts by failing to

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10 The courts of appeal are split on whether the discovery rule applies to unfair competition claims. (Compare *Snapp*, *supra*, 96 Cal.App.4th at p. 891 with *Broberg v. The Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912, 920.) Our Supreme Court has not resolved the question (*Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 634, fn. 7), but has granted review of the issue, among others, in *Aryeh v. Canon Business Solutions, Inc.* (2010) 185 Cal.App.4th 1159, review granted October 20, 2010, S184929.

provide required documents and disclosures, (2) misrepresentation/concealment for failing to provide an accurate budget (against Re/Max only), and (3) breach of fiduciary duty relating to the soil reports. The Realtors argue that the statute of limitations began to run in 2005 when the landslide occurred. We agree with the Realtors that, as a matter of law, the landslide put the HOA on notice of the alleged breach of fiduciary duty claim relating to the soil reports. A landslide would have put a reasonable person on notice that perhaps the soil was defective in some way, and one obvious avenue of inquiry would have been the soil reports prepared when the sales transaction occurred. A reasonably diligent investigation would have led to the purportedly illegitimate soil reports. Accordingly, the statute began to run on the breach of fiduciary duty relating to the soil reports when the landslide occurred on January 9, 2005. The limitations period expired on January 9, 2009. This claim is thus time barred.

But we cannot say as a matter of law that the landslide should have led the HOA members to suspect their Realtors failed to provide certain required disclosures, or should have led them to suspect that their Realtors provided an inaccurate budget. These alleged wrongs are more removed from the landslide than the soil reports. For the time being, the allegations that the HOA members discovered these wrongs during the discovery process in the *DePaul* case suffice. Accordingly, the HOA has sufficiently alleged that the discovery rule applies to the remaining breach of fiduciary duty claim and the misrepresentation/concealment claim.

We move next to the HOA's fraudulent concealment theory, which may apply to the unfair business practices claims. To review, the unfair business practices claims are for (1) violating the Subdivided Lands Act by failing to disclose a public report and other transactional documents, (2) failing to disclose in advertising that the parcels were subject to the Subdivided Lands Act, and (3) low-balling the budget (against Re/Max only). We hold that the FAC has sufficiently alleged fraudulent concealment as to some but not all claims.

The allegations of fraudulent concealment are insufficient as to Dilbeck because they are not stated with the requisite particularity. To toll the statute of limitations, "the fraud must be alleged with the usual particularity required in such actions. The existence of such

fraud must be alleged clearly and unequivocally, and must not rest upon inferences." (*Bank of America v. Williams* (1948) 89 Cal.App.2d 21, 25.) The FAC contains no specific allegations whatsoever that Dilbeck did anything to fraudulently conceal the purportedly material information. The allegedly concealed information was the budget letter from Re/Max to the developers and the File Abandonment Notice, which was executed only by the developer and does not evidence any involvement by either Dilbeck or Re/Max. The conclusory allegations in the FAC that "Defendants" concealed these things are insufficient as to Dilbeck. Because the landslide is the event from which the HOA's alleged injuries arise, we use that date -- January 9, 2005 -- as the trigger for the statute of limitations. The statute of limitations therefore expired on January 9, 2009. The unfair business practices claims against Dilbeck are time barred.

As to Re/Max, the FAC sufficiently alleges that Re/Max fraudulently concealed the budget letter it authored and sent to the developers, which would have purportedly put the HOA members on notice of their unfair business practices claim for low-balling the budget. This claim is thus timely. But the allegations regarding concealment of the File Abandonment Notice, as with Dilbeck, are insufficient. Again, the FAC states in a conclusory manner that "Defendants" concealed and withheld the document, but it does not contain specific allegations as to Re/Max, and Re/Max's handprint is not on the document, as with the budget letter. The two remaining unfair business practices claims against Re/Max therefore also became time barred on January 9, 2009.

The question remains whether it is reasonably possible the deficient tolling allegations can be cured by amendment such that it was an abuse of discretion to deny leave to amend. The burden is on plaintiffs to demonstrate an abuse of discretion by showing how they can amend their complaint and how that amendment will change the legal effect of the pleading. (*Goodman v. Kennedy*, *supra*, 18 Cal.3d at p. 349.) The HOA has not addressed how it could amend its complaint, given that the trial court impliedly found the tolling allegations insufficient. We therefore hold there was no abuse of discretion in denying leave to amend the tolling allegations.

* * *

To summarize:

The HOA has sufficiently alleged standing for all claims. Moreover, it has sufficiently alleged the timeliness under the discovery rule of the breach of fiduciary duty claim for violating the Subdivided Lands Act (the seventh cause of action) and the misrepresentation claim (the eighth cause of action). However, the HOA has not sufficiently alleged the timeliness of the breach of fiduciary duty claim relating to the soil reports (the ninth cause of action), nor should it be granted leave to amend this allegation.

The HOA has insufficiently alleged the timeliness of all the unfair business practices claims against Dilbeck, and as to Re/Max, two of the unfair business practices claims (the fifth and sixth causes of action). The HOA should not be granted leave to amend these tolling allegations. Therefore, the only remaining unfair business practices claim is against Re/Max for low-balling the budget (the 10th cause action).

DISPOSITION

The judgments of dismissal are affirmed in part and reversed in part. The trial court shall vacate its order sustaining Dilbeck's demurrer without leave to amend and enter a new order sustaining the demurrer to the fifth, sixth, and ninth causes of action without leave to amend, and overruling the demurrer to seventh cause of action. The trial court shall vacate its order sustaining Re/Max's demurrer without leave to amend and enter a new order sustaining the demurrer to the fifth, sixth, and ninth causes of action without leave to amend, and overruling the demurrer to the seventh, eighth, and 10th causes of action. The matter shall proceed in accordance with the views expressed in this opinion. The parties shall bear their own costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J. GRIMES, J.