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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

DENISE FIORENTINO,  
Plaintiff and Appellant,

v.

JOHN T. OSBORN,  
Defendant and Respondent.

A132962

(Alameda County  
Super. Ct. No. FG11559469)

In 1995, Albert Knopp executed the Albert C. Knopp Living Trust (Trust) and transferred all of his real and personal property to the Trust. Knopp died on February 3, 2010. Knopp never married or had children of his own, but he left behind several nieces and nephews, including Denise Fiorentino, John Osborn, and Joseph Gutierrez. Pursuant to the amended terms of the Trust, Fiorentino received a total of \$15,000. She then sought to impose a constructive trust in her favor upon certain real property Osborn received as the residual beneficiary of the Trust. She now appeals from the judgment dismissing her complaint. We affirm the trial court's judgment.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On April 14, 2011, Fiorentino filed her first amended action for imposition of constructive trust (FAC). The Trust, which was attached as exhibit A to the FAC, named Knopp as trustee and provided for Knopp's maintenance during his lifetime and for distribution of all remaining assets to Gutierrez, on Knopp's death. Knopp had the absolute right to amend or revoke the trust during his lifetime.

In the last years of his life, Knopp stated that he intended to change the terms of the Trust to benefit various members of his family. Specifically, Knopp told Fiorentino that he had arranged his financial affairs so that Fiorentino would have a place to live for the duration of her life—in one of several apartments on Locust Street in Newark, or in one of two houses on Orlando Avenue in Hayward. Fiorentino alleged that she had cared for Knopp during the last years of his life and had lived in one of the apartments, owned by Knopp, for 23 years.

In March 2009, Knopp was admitted to Kaiser Hospital in Hayward for treatment of a thyroid condition. Knopp was emaciated and weak. Osborn was listed on the medical records as the responsible next of kin. Osborn's wife filled out a trust amendment form in favor of her husband. Under this amendment, dated March 9, 2009 (First Amendment), Osborn was named the sole beneficiary of the Trust upon Knopp's death.

On March 9, 2009, Osborn arranged for a notary to travel to the intensive care unit at Kaiser Hospital, where Knopp was a patient. Osborn presented the First Amendment to Knopp for signature. No attorney was consulted or present. No other family members were informed of this transaction and no one other than Osborn and his wife had knowledge of the change. Fiorentino alleged that Knopp was wholly dependent on Osborn, and “[a]s an in-hospital patient [Knopp] was highly susceptible to the influence of [Osborn] . . . making the action one undertaken without testamentary capacity or intent.”

A document in Knopp's handwriting was attached to the First Amendment. This handwritten document was also notarized on March 9, 2009, and stated: “The following instructs for to be carried out by John Osborn, my trustee, to the people named below to one check a year for a period of three years in the following amounts: [¶] \$20,000 to Brandon Gutierrez [¶] \$5,000 to Joseph Gutierrez [¶] \$5,000 to Denise Fiorentino [¶] \$3,000 to Tommie Lynn Osborn [¶] \$2,000 to Daniel Osborn [¶] John Osborn who will be managing the Living Trust to receive \$25,000 a year as payment for his services.

[¶] John Osborn will decide after three years the amount of money to be distributed to the above named people, including the Trustee, John Osborn.”

Between March 9, 2009, and March 13, 2009, Osborn contacted his attorney, Jerome D. Handley, to determine if the First Amendment and the handwritten attachment were adequate and legally binding documents.<sup>1</sup> Handley informed Osborn that there should be full restatement of the Trust. On March 13, 2009, Knopp was released from Kaiser Hospital into Osborn’s care, as the responsible next of kin. At the time of release, Knopp was still weak and dependent on Osborn for transportation. Osborn took Knopp to a notary public, located across the street from Kaiser Hospital, to obtain execution of the restatement of trust (Restatement).

The Restatement, attached as exhibit D to the FAC, provided that Osborn was to succeed Knopp as trustee. The Restatement also provided that, on Knopp’s death, the trustee was to make the same specific distributions outlined in the handwritten document, including a distribution of \$15,000, over three years, to Fiorentino. The remainder of the trust property was to be distributed to Osborn. Fiorentino alleges that Handley did not meet or counsel Knopp and that the Restatement was “procured and caused to be drafted entirely and directly by [Osborn] . . . .” Fiorentino further alleges: “At the time of execution the influence of [Osborn] on [Knopp] was so intimidating and the pressure so great that [Knopp] did not have sufficient willpower to resist the pressure. No opportunity was allowed for [Knopp] to rest or recuperate from his hospital stay, but he was taken directly to the notary in his severely weakened condition. When [Knopp] should have been cared for, [Osborn] took advantage of him. This breached a fiduciary relationship. The personal self interest of [Osborn] substituted for the will and testamentary intent of [Knopp.] The purported restatement of trust could not be read and fully understood by [Knopp] under these circumstances, specifically to differentiate between the meaning of naming [Osborn] a trustee and designating [Osborn] as sole residual heir. This purported restatement of trust named [Osborn] as successor trustee

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<sup>1</sup> Osborn had prior dealings with Handley, but Knopp had not.

and as 95% beneficiary of the corpus of the [Trust] in contrast to the handwritten document . . . which specified [Osborn] as fiduciary only.”

After Knopp died, Osborn “made the monetary payments set out in the restatement of trust . . . to the various family members . . . .” Gutierrez filed suit challenging the validity of the trust amendments. The contest was “settled by the parties with an agreed upon payment of a monetary amount by [Osborn] to [Gutierrez].” Osborn instructed Fiorentino to vacate the apartment in which she had lived for 23 years.

Based on the above allegations, Fiorentino sought an order that Osborn held the Trust assets as constructive trustee “because he has obtained the assets wrongfully,” “because he has obtained the assets through the application of undue influence,” and “because he has obtained the assets through a violation of trust established by the handwritten document . . . .” She further alleged she “has standing to seek this ruling because she is an aggrieved party under the [First Amendment] and the [Restatement.]”

Osborn responded to the FAC by filing a demurrer and a motion to strike. In his memorandum of points and authorities supporting the demurrer, Osborn pointed out that Fiorentino had accepted distribution of \$15,000 to her under the Restatement that she claimed had been created by undue influence or fraud. Osborn also argued that Fiorentino had no further right to any Trust property, since even if the First Amendment and Restatement were obtained by fraud or undue influence, she would not have taken anything under the terms of the original Trust. Osborn asked the trial court to take judicial notice of a signed receipt indicating that Fiorentino had received \$15,000 from Osborn, acting as trustee.

Fiorentino opposed the demurrer. She asserted: “[Fiorentino’s] status to sue arises because she is an intestate heir, is named as a beneficiary in the Handwritten Document and by being a named beneficiary under the Restatement. . . . [¶] . . . [¶] If the written documents are found invalid [Fiorentino] would obtain an interest in the property through intestacy.” She also claimed a right to Trust property because “[Knopp] told many persons that he intended that [Fiorentino] benefit in this testamentary documents by providing her a place to live for the duration of her life . . . .” (Capitalization omitted.)

On June 17, 2011, after the motion was argued, the trial court sustained Osborn's demurrer. The trial court's order provided: "In order to establish her entitlement to the imposition of a constructive trust, [Fiorentino] is required to plead facts establishing that [Osborn] obtained possession of her property through fraud or breach of fiduciary duty. . . . In this case, [Fiorentino's FAC] fails to state a cause of action against [Osborn] as a matter of law because [Fiorentino] expressly acknowledges in paragraph 7 of the [FAC] that if [Osborn] had not committed fraud in March 2009, [Gutierrez] stood to receive all of the property in the Trust as the 'sole trustee and sole beneficiary.' [Fiorentino's] allegations in the [FAC] that Knopp told her on various occasions that he intended to change the terms of the Trust so that she would receive some of his property is insufficient to support her claim of standing because she does not allege that Knopp ever did make changes to the Trust prior to 2009."

Thereafter, the trial court entered a judgment dismissing Fiorentino's FAC with prejudice. Fiorentino filed a timely notice of appeal.

## II. DISCUSSION

In her opening brief on appeal, Fiorentino argues that this case is not about fraud and that the demurrer was improperly sustained because undue influence was adequately pleaded. Specifically, she contends: "The [FAC] robustly pleads facts that establish the wrongful taking of the trust estate of Knopp through the exercise of undue influence by [Osborn], which is justiciable under Civil Code [section] 2224."

Civil Code section 2224 provides: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, *for the benefit of the person who would otherwise have had it.*" (Italics added.) Civil Code section 2223 provides: "One who wrongfully detains a thing is an involuntary trustee thereof, *for the benefit of the owner.*" (Italics added.) The fatal flaw in Fiorentino's pleading is that it fails to establish she was the rightful owner of any property obtained by Osborn.

A. *Standard of Review*

“On appeal from an order of dismissal after an order sustaining a demurrer, the standard of review is de novo: we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.] First, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. Next, we treat the demurrer as admitting all material facts properly pleaded. Then we determine whether the complaint states facts sufficient to constitute a cause of action. [Citations.] [¶] We do not, however, assume the truth of contentions, deductions, or conclusions of law. [Citation.]” (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439–440.)

A complaint is properly subject to demurrer if judicially noticeable facts render it defective. (See *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) “Under the doctrine of truthful pleading, the courts ‘will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed.’ [Citation.] ‘False allegations of fact, inconsistent with annexed documentary exhibits [citation] or contrary to facts judicially noticed [citation], may be disregarded . . . .’ [Citations.]” (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400; accord *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102 [allegations in conflict with judicially noticeable facts are null].) However, “‘[t]he hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable.’ [Citations.]” (*Silguero v. Creteguard, Inc.* (2010) 187 Cal.App.4th 60, 64 [denying request for judicial notice of deposition testimony].)

“[I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) “The plaintiff

‘bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law’ and ‘must show the complaint alleges facts sufficient to establish every element of [the] cause of action.’ [Citation.]” (*Sui v. Price* (2011) 196 Cal.App.4th 933, 938.)

B. *Analysis*

Fiorentino is correct that the theories of undue influence and fraud are distinct grounds for establishing a constructive trust. (*Estate of Newhall* (1923) 190 Cal. 709, 718; *David v. Hermann* (2005) 129 Cal.App.4th 672, 685; Civil Code, § 2224.) She devotes the entirety of her briefs to explaining why she adequately pled that Osborn exerted undue influence over Knopp. But, what she continues to overlook is that, regardless of whether the theory is fraud or undue influence, she has failed to plead facts entitling her to the establishment of a constructive trust.

“A constructive trust is an equitable remedy to compel the transfer of property by one who is not justly entitled to it to one who is. [Citation.] A constructive trust may only be imposed when three conditions are met: the existence of a res, the plaintiff’s right to the res, and the defendant’s acquisition of the res by some wrongful act. [Citation.]” (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1332; accord, *Calistoga Civic Club v. City of Calistoga* (1983) 143 Cal.App.3d 111, 116.)

The trial court properly sustained Osborn’s demurrer to the FAC because Fiorentino failed to plead that she had a right to any property acquired by Osborn. Osborn correctly points out that, “[u]nder the 1995 trust . . . Gutierrez was the sole trustee and sole beneficiary. Through changes, which she claims were made by way of undue influence, [Fiorentino] obtained \$15,000 under the 2009 modifications. If these changes were made through undue influence they were invalid and [Fiorentino] would be back to the terms of the 1995 [T]rust.”

Despite the trial court’s clear statement identifying this fundamental defect in Fiorentino’s pleadings, Fiorentino does not substantively address this issue in either her opening brief or her reply brief. Instead, she attempts to incorporate arguments contained

in her opposition to the demurrer. But, “[i]t is well settled that the Court of Appeal does not permit incorporation by reference of documents filed in the trial court. [Citations.]” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 294, fn. 20.) Thus, because Fiorentino has failed to meet her burden to show that the demurrer was sustained erroneously, we must affirm the trial court’s judgment. (See *Sui v. Price, supra*, 196 Cal.App.4th at p. 938; *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 527.)

In any event, even if we refer to the arguments raised in her opposition below, it remains clear that Fiorentino has not adequately pled her entitlement to any property obtained by Osborn. She has not demonstrated entitlement to real property by alleging that Knopp told her “he had arranged his financial affairs so that [Fiorentino] would have a place to live for the duration of her life . . . .” The original Trust document did not so provide, and Fiorentino has not alleged that Knopp ever executed any other document to accomplish this result.<sup>2</sup>

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<sup>2</sup> Although nowhere alleged in the FAC, if Fiorentino is attempting to enforce an oral agreement to devise real property, such an attempt would likewise fail because she has not alleged facts to show that the statute of frauds would not bar the claim. (See Prob. Code, former § 150, added by Stats. 1990, ch. 79, § 14, p. 463 and repealed by Stats. 2000, ch. 17, § 2, p. 71, eff. Jan. 1, 2001; Prob. Code, § 21700, added by Stats. 2000, ch. 17, § 8, p. 75, eff. Jan. 1, 2001.) Fiorentino does not allege when the discussion with Knopp took place. As far as we can tell, the alleged discussion occurred sometime between 1995 and 2009. Section 21700, subdivision (c), provides: “A contract to make a will or devise or other instrument, or not to revoke a will or devise or other instrument, or to die intestate, if made prior to the effective date of this section, shall be construed under the law applicable to the contract prior to the effective date of this section.” Prior to January 1, 2001, a contract to make a will was required to be in writing. (Prob. Code, former § 150.) After January 1, 2001, Probate Code section 21700, subdivision (a)(4), has provided: “A contract to make a will or devise or other instrument, or not to revoke a will or devise or other instrument, or to die intestate, if made after the effective date of this statute, can be established only by one of the following: [¶] . . . [¶] (4) Clear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity.” In addition, Fiorentino has not alleged any consideration or that she began caring for Knopp after he promised to leave real property to her. (See Civ. Code, § 1550; *Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1185 [“[p]romissory estoppel applies whenever a ‘promise which the promissor should reasonably expect to induce action or

Nor does Fiorentino’s status as issue of Knopp’s deceased parents assist her. (See Prob. Code, § 6402, subd. (c) [“[i]f there is no surviving issue or parent, [the intestate estate passes] to the issue of the parents”].) Since she does not even suggest that the original Trust, which held ownership of the property she now seeks, was defective, she does not explain how she could benefit from intestate succession. Simply put, Fiorentino’s FAC concedes that she received all that she can show entitlement to under either of the 2009 amendments—\$15,000.<sup>3</sup> And, \$15,000 was more than the amount she stood to take under the original Trust—zero. Thus, Fiorentino has not pled, and apparently cannot plead, that Osborn acquired any property to which *she* is entitled.

The circumstances presented in this case are not dissimilar from those at issue in *Harkness v. Harkness* (1962) 205 Cal.App.2d 510 (*Harkness*). In *Harkness*, the decedent had married his maid at the end of his life, while he was ill. Prior to the marriage, the decedent had executed a will leaving his estate to his two sons and grandchildren. Immediately after the marriage, however, the decedent executed a new will, which provided minor gifts to his grandchildren, and provided that the residue of his estate would be split, in equal thirds, between his sons and his new wife. After his death, the decedent’s sons sued to impose a constructive trust on property received by the decedent’s widow from the decedent’s estate. (*Id.* at pp. 511–512.) The court noted that the sons had not contested the will. “On the contrary they are the executors and in a sense vouching for the integrity of the instrument through whose provisions they are administering the estate.” (*Id.* at p. 512.) The court also observed that the validity of the marriage was not contested. And, the sons had conceded, in their complaint, that, if the will were set aside, the defendant would receive approximately the same amount, as an omitted spouse under Probate Code former section 221, as she would under the will. (*Id.*

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forbearance on the part of the promisee or a third person and which does induce such action or forbearance’ would result in an ‘injustice’ if the promise were not enforced”].)

<sup>3</sup> Respondent argues that Fiorentino is estopped from challenging the Restatement, since she accepted benefits under its terms. He cites no authority in support of this argument, and it is in any event unnecessary for us to reach it.

at pp. 512, 515.) Thus, the reviewing court held that “[p]laintiff . . . has failed to make any showing that would justify equity in declaring defendant an involuntary or constructive trustee of any property she may receive under decedent’s will.” (*Id.* at p. 514.)

In this case, Fiorentino has similarly failed to allege her right to any property held by Osborn as a result of the contested amendments. The trial court properly sustained Osborn’s demurrer to the FAC. As Fiorentino has not shown how her allegations can be amended to state a cause of action, the trial court did not abuse its discretion in denying leave to amend.

### III. DISPOSITION

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Needham, J.