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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

BARBARA DOBARD,
Plaintiff and Appellant,

v.

SHARON TORRES et al.,
Defendants and Respondents.

A136956

(Alameda County
Super. Ct. No. HG11610392)

Plaintiff Barbara Dobard, appearing in propria persona, sued defendants Sharon Torres, Rick Poulin, and Allstate Insurance Company (collectively Allstate) as a third party claimant, following an automobile accident with an Allstate policy holder. After granting Dobard two additional chances to file a viable complaint, the trial court sustained Allstate’s demurrer to her second amended complaint without leave to amend and entered judgment against her. We affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND¹

Dobard filed a complaint against Allstate following an automobile accident with an Allstate policyholder. In addition to suing the company, she also named as defendants, Sharon Torres and Rick Poulin, the claims adjuster and manager assigned to Dobard’s claim, respectively. Dobard alleged causes of action for “motor vehicle,” general negligence, and products liability, and sought “damages arising from reckless disregards [*sic*] to plaintiff, intentional infliction of emotional distress.” She further

¹ Because this is an appeal from a dismissal following the sustaining of a demurrer without leave to amend, the facts are those alleged in the operative pleadings.

alleged “malicious disrespectful, hostility, abuse actions incompetent, overlooked, carelessness” in the complaint, and sought punitive damages.

Allstate interposed a demurrer and made a motion to strike the complaint. Both were dropped from the calendar as moot after Dobard filed a 56-page first amended complaint, accompanied by a 27-page “Memorandum of Points and Authorities” in support of the complaint and jury trial demand. Allstate again interposed a demurrer and made a motion to strike.

On June 1, 2012, the trial court sustained the demurrer on the ground Dobard failed to state any viable cause of action and granted limited leave to amend as her causes of action for fraud, failure to pay benefits under the insurance policy, misrepresentation, and intentional infliction of emotional distress. The trial court issued a detailed written order, noting at the outset that its tentative ruling had not been contested. The order also discussed the shortcomings in the amended complaint and specified what Dobard would have to allege as to the causes of action as to which leave to amend was granted. The court dismissed much of the motion to strike as moot in light of the demurrer ruling and granted the motion as to Dobard’s punitive damages claim with leave to amend.

Two weeks later, on June 18, 2012, Dobard filed a ten-page second amended complaint, alleging two causes of action, one entitled “Tortious Fraud-Deceit” (enumerated as the “Sixteenth Cause of Action”) and the other, “Misrepresentation” (enumerated as the “Seventeenth Cause of Action”). Allstate again interposed a demurrer and filed a motion to strike.

This time, Dobard appeared and contested the court’s tentative ruling. Following the hearing on August 24, 2012, the court issued a written ruling sustaining Allstate’s demurrer without leave to amend. The court dropped the motion to strike as moot in light of the ruling on the demurrer. The court entered judgment of dismissal on September 25, 2012, and the clerk gave notice of entry on September 26. Dobard filed a timely notice of appeal on October 29, 2012.

DISCUSSION

“When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint’s properly pleaded or implied factual allegations. [Citation.] . . . In addition, we give the complaint a reasonable interpretation, and read it in context.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) “ ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.’ ” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, quoting *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

We “review the complaint de novo to determine whether it contains facts sufficient to state a cause of action under any legal theory” and, if the complaint is lacking, “we then consider whether the court abused its discretion in denying leave to amend the complaint.” (*In re Estate of Dito* (2011) 198 Cal.App.4th 791, 800.) “We will reverse for abuse of discretion if we determine that there is a reasonable possibility the plaintiff can cure the pleading by amendment.” (*Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.* (2012) 203 Cal.App.4th 913, 919.) “The burden of proving such reasonable possibility is squarely on the plaintiff.” (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

Fraud and Misrepresentation Causes of Action

As in her various pleadings, Dobard devotes much of her opening brief on appeal to recounting the injuries and property damage she claims to have sustained as a result of an automobile collision with an Allstate insured. She is plainly not happy with Allstate’s actions taken on behalf of its insured, and complains the company never conducted an adequate investigation into her claimed injuries and damages. She has not, however, addressed the legal shortcomings in the fraud and negligence causes of action advanced in her second amended complaint.

“ ‘Fraud is an intentional tort, the elements of which are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.’ [Citation.]” (*Conrad v. Bank of America* (1996)

45 Cal.App.4th 133, 156 (*Conrad*), rejected on another point in *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 92–94.) “[M]isrepresentation . . . includes a concealment or nondisclosure.” (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal. App. 4th 513, 519 (*Cadlo*)). “Fraud is a charge that is easily made but less often substantiated. In order to establish a cause of action for fraud a plaintiff must plead and prove in full, factually and specifically, all of the elements of the cause of action.” (*Conrad, supra*, 45 Cal.App.4th at p. 156.) “General and conclusory claims of fraud will not suffice.” (*Ibid.*)

To establish negligent misrepresentation, the same elements must be shown, “except there is no requirement of intent to induce reliance.” (*Cadlo, supra*, 125 Cal.App.4th at p. 519.) As with fraud, a cause of action for negligent misrepresentation must be “factually and specifically alleged.” (*Ibid.*)

Despite being given specific directions by the trial court as to the allegations she needed to make to state viable causes of action for fraud and misrepresentation, Dobard failed to meet her pleading burden. She made no allegations of misrepresentation, a requirement for both causes of action. (*Conrad, supra*, 45 Cal. App. 4th at p. 156.) Nor did she allege Allstate’s knowledge of falsity, intent to induce reliance, or her own justifiable reliance. (*Ibid.*) Rather, Dobard alleged that Allstate employee Sharon Torres threatened to “damage [her] life and cause great bodily harm”, and that Torres’s threats over the phone led her to suffer a stroke. Even assuming the truth of these factual allegations, as we must, they do not state a cause of action for fraud or misrepresentation. Accordingly, the court did not err in sustaining the demurrer as to these causes of action.

Leave to Amend to Allege Breach of Oral and Written Contract

Dobard did not include in the record on appeal any reporter’s transcript of the hearing on the demurrer and motion to strike her second amended complaint. Nor are we able to discern from any of the moving and opposing papers filed in conjunction therewith any request by Dobard that she be given leave to further amend, let alone a showing as to what allegations she could make to justify granting her a third opportunity to amend. The trial court, however, expressly denied leave to amend. And, in any case, “ ‘the showing as to how the complaint may be amended need not be made to the trial

court and can be made for the first time to the reviewing court. . . .’ ” (*Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472, 1482.)

In her opening brief on appeal, Dobard seems to suggest she can state a claim for breach of an “oral and written contract guarantying the accident [*sic*] of its preferred services” and that she made a motion for leave to file a third amended complaint to state such a claim. The record does not reflect such a motion was ever filed. She has not, in any event, in her opening brief, adequately explained how and on what basis she could state a breach of contract claim against Allstate, with which she did *not* have a policy of insurance.

“To state a cause of action for breach of contract, a party must plead the existence of a contract, his or her performance of the contract or excuse for non performance, the defendant’s breach and resulting damage.” (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.) “If the action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference.” (*Ibid.*) The elements of a breach of oral contract claim are the same as those for a breach of written contract. An oral contract is formed when (1) the parties have the capacity to enter into a contract; (2) the parties consent to the contract; (3) the contract has a lawful object; and (4) there is sufficient consideration or cause for the parties to enter into the contract. (See Civ. Code, § 1550.)

While Dobard asserts Allstate breached “its separate oral and written contract guarantying the accident [*sic*] of its preferred services,” she ties this to Allstate’s written contract of insurance with its policyholder, Jose Martinez. Dobard, however, is not a party to that contract, and thus cannot state a cause of action against Allstate for breach of that contract. Similarly, Dobard’s references to the implied covenant of good faith and fair dealing do not, and cannot, support a breach of contract claim. That is an implied term of the contract of insurance, and is a duty Allstate owes its insured, not Dobard. (See *Moradi-Shalal v. Fireman’s Fund Ins. Companies* (1988) 46 Cal. 3d 287, 304–305.)

Dobard also asserts “Allstate orally represented to Dobard that it would assume the position of guarantor of the repairs work need to undertake by the body shop, including the assumption of responsibilities for medical damage to the physical body parts caused by the accident in carrying out the repair work.” To the extent Dobard is attempting to assert a separate oral promise by Allstate to her, she has not met her burden of showing a reasonable possibility she could allege the other required elements of contract. For example, she has alleged no consideration for the alleged oral contract, nor is there a reasonable possibility she could do so.

In sum, the trial court did not abuse its discretion in dismissing her second amended complaint without leave to further amend.

DISPOSITION

The judgment of dismissal is affirmed. Respondent to recover costs on appeal.

Banke, J.

We concur:

Dondero, Acting P. J.

Sepulveda, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.