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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MICHAEL MEYERS,

Plaintiff and Appellant,

v.

EVERETT W. ROUSH et al.,

Defendants and Respondents.

A141419

(Solano County
Super. Ct. No. FCS038455)

Michael Meyers appeals from a judgment entered after the trial court sustained respondents' demurrer to his first amended complaint without leave to amend. He contends the court erred in ruling that his causes of action were time-barred and in declining to grant leave to file a second amended complaint. We conclude that the first amended complaint stated a cause of action based on his allegations of unjust enrichment, and reverse the judgment.

I. FACTS AND PROCEDURAL HISTORY

Meyers filed a complaint on August 31, 2011, against respondent Everett W. Roush, individually and doing business as Roush Enterprises (collectively, Roush). Meyers asserted causes of action for fraud, promissory estoppel, breach of contract, and unjust enrichment. Essentially, Meyers alleged that Roush fraudulently induced him to continue working as an employee by promising him a raise under an agreement by which Meyers would ultimately purchase Roush's plumbing business.

Meyers filed his first amended complaint in January 2012, asserting virtually the same facts and claims. Because the first amended complaint is the operative pleading for purposes of this appeal, we review it in greater detail.

A. First Amended Complaint

Roush owned and operated a plumbing business. Beginning in 1998, he employed Meyers as a plumber.

In January 2005, Meyers was offered employment by another plumbing contractor. Allegedly to dissuade Meyers from seizing this opportunity, Roush promised Meyers that his monthly salary would be increased by \$350 per month and he would be paid an additional \$50 per hour for work that required Meyers to perform difficult plumbing tasks such as climbing on roofs or crawling under buildings. Roush also represented that the salary increases would not be in the form of payments to Meyers, but would be retained on Roush's books and credited first toward Meyers's purchase of Roush's plumbing business for \$10,000 (\$5,000 for equipment including the company vehicle, and \$5,000 for goodwill including its telephone listing), and second toward Meyers's purchase of a residence from Roush. The first amended complaint alleged that Roush made these promises to induce Meyers to continue as Roush's employee, Roush had no intention of performing them, and Meyers justifiably relied on them.

The first amended complaint further alleged: "During or about the month of August 2010 [Meyers] learned that the aforesaid promises were false and untrue. [Roush] declared that no such promises were made to [Meyers]." In addition, Roush put the business up for sale. By July 2010, Meyers's credits on Roush's books allegedly totaled \$33,412.

Based on these allegations, Meyers asserted causes of action for fraud, promissory estoppel, breach of contract, and unjust enrichment.

B. Roush's Demurrer

Roush filed a demurrer to the first amended complaint in April 2012, contending it was ambiguous, barred by the statute of frauds, and barred by the statute of limitations.

As to the statute of limitations, Roush urged that Meyers knew or should have known by June 2007 that Roush's alleged promises were untrue because, with credits accruing at \$350 per month, Meyers would have obtained by that time the amount necessary for the purchase of the business. Under the three-year limitations period of Code of Civil Procedure section 338, subdivision (d), the deadline for filing the fraud claim was therefore in June 2010, over a year before Meyers filed the original complaint. And under Code of Civil Procedure section 339, Roush urged, the deadline for filing his other causes of action was in June 2009.

In his opposition to the demurrer, Meyers referenced the first amended complaint's allegation that he did not actually learn of the fraud until August 2010. He also contended that Roush had failed to cite authority for the proposition that the causes of action for promissory estoppel and unjust enrichment were barred by the two-year limitations period. In addition, Meyers sought leave to add causes of action for constructive trust and quantum meruit.

The court issued its tentative ruling—sustaining the demurrer without leave to amend—and the matter was heard on August 6, 2012. At the hearing, Meyers's attorney contested the denial of leave to amend. First, Meyers wanted to allege that the sale was not to occur until January 2010. His counsel stated: “And I am asking the Court for authority to file a second amended complaint which would allege, essentially, that at the time this verbal contract was entered into in January of 2005, it was contemplated that the sum of \$10,000 for the purchase price would not be enough for them to really—for my client to really begin the new business. [¶] And it was discussed at that time it might be as long as five years before there was enough built up for him not only to be able to buy it for [\$]10,000 but have enough credits there to allow him to have operating capital.” In response, the court noted that the allegation would give rise to a problem with the statute of frauds. Second, Meyers sought to add a cause of action for constructive trust, based on Roush's unjust enrichment in keeping the money he had promised to Meyers as a raise.

By written order filed on September 26, 2012, the court sustained Roush's demurrer without leave to amend. The court explained: “Plaintiff's claims are barred by

the applicable statutes of limitations. Plaintiff claims fraud, breach of an oral agreement, promissory estoppel, and unjust enrichment based on alleged promises made by Defendant for a raise and the sale of Defendant's business to Plaintiff for \$10,000 in January 2005, well over five years prior to the filing of this action. Any cause of action based on a contractual obligation or liability not founded upon a written instrument carries a two[-]year limitations period. (Code Civ. Proc. § 339.) Any cause of action rooted in fraud must be brought within three years. (Code Civ. Proc. § 338(d).) Though Plaintiff alleges that he did not discover the fraud until August of 2010, Plaintiff had reason to suspect and discover the alleged fraud by May of 2007, when the purported \$350 monthly credit exceeded the \$10,000 purchase price, even without the additional \$50 an hour for 'difficult' plumbing assignments."

A judgment of dismissal was entered, and this appeal followed.

II. DISCUSSION

In our de novo review of an order sustaining a demurrer, we assume the truth of all facts properly pleaded in the complaint or reasonably inferred from the pleading, but not mere contentions, deductions, or conclusions of law. (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 985-986.) We then determine if those facts are sufficient, as a matter of law, to state a cause of action under *any* legal theory. (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) We review the denial of leave to amend for an abuse of discretion. (*Debro v. Los Angeles Raiders* (2001) 92 Cal.App.4th 940, 946 (*Debro*).

A. Fraud Cause of Action

Meyers alleged that Roush committed fraud by inducing Meyers to work for him, based on his false promise that he would credit Meyers's raises toward the purchase of the business. We consider first whether the allegations of the first amended complaint show that the claim is time-barred, and then whether leave to amend should have been granted.

1. Limitations Period

Code of Civil Procedure section 338, subdivision (d) provides a three-year limitations period for “[a]n action for relief on the ground of fraud or mistake.”¹ The statute further provides, “The cause of action in that case is not deemed to have accrue[d] until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.” Discovery, in this context, means the discovery of facts that would lead a reasonably prudent person to *suspect* fraud. (*Debro, supra*, 92 Cal.App.4th at p. 950; *Doe v. Roman Catholic Bishop of Sacramento* (2010) 189 Cal.App.4th 1423, 1430 (*Doe*); see *Creditors Collection Service v. Castaldi* (1995) 38 Cal.App.4th 1039, 1044 [cause of action accrues, and the limitations period begins to run, when aggrieved party could have discovered the mistake through the exercise of reasonable diligence].)

Because the fraud allegedly occurred in January 2005 and the complaint was not filed until August 2011, Meyers had to allege facts showing that a reasonably prudent person would not have suspected Roush’s alleged fraud before August 31, 2008—three years prior to the filing of the complaint. (*Doe, supra*, 189 Cal.App.4th at p. 1430; *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319 (*E-Fab*).)

Meyers does not point to any allegation in the first amended complaint showing he reasonably did not suspect the fraud before August 31, 2008. Instead, he contends the trial court erred in finding that he knew or should have known of the fraud by May 2007 because “the court made an impermissible assumption that on or before May of 2007 [Roush] had decided to deny entering into the agreement.” But this argument does not help Meyers. The first amended complaint alleges that Roush knew the promises were false when he made them in January 2005. If, instead, Roush had *not* “decided” to deny entering into the agreement until after May 2007, his promises in January 2005 could not have been fraudulent, and Meyers would have no fraud claim. And to the extent Meyers simply means that Roush remained silent about his intention not to fulfill his promises,

¹ Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

the first amended complaint still shows that Meyers had a basis for suspecting the promises were false.

In this regard, Meyers argues there was no alleged “event that would give him a reason to believe [Roush] was not going to sell the business to him.” But there was. By the end of June 2007, Meyers had necessarily accrued credits of over \$10,000 toward the purchase of a business for \$10,000, and yet the business was not his.² Meyers may not have subjectively discerned that Roush had never intended to sell him the business, but there were at least facts that put him on notice of a potential fraud and, through the exercise of reasonable diligence (such as simply asking Roush), he could have discovered the truth.

In any case, the question is not whether the first amended complaint contains facts showing Meyers had reason to discover the alleged fraud; rather, the question is whether the first amended complaint contains facts showing he had *no* reason to suspect the fraud. (*Doe, supra*, 189 Cal.App.4th at p. 1430; *E-Fab, supra*, 153 Cal.App.4th at p. 1319.) Meyers’s fraud claim, as alleged, is time-barred.

2. Leave to Amend

Meyers seeks leave to amend his fraud claim in two respects. First, as he proposed at the demurrer hearing, he would amend the claim to allege that “additional funds would be needed to accrue in order for [Meyers] to have working capital when he acquired the business and that any amount over the purchase price and needed working capital would be applied to a 2002 sales contract by which [Meyers] and his spouse were purchasing a residence from [Roush] and his wife.” Second, he would amend the claim

² The court found that the monthly \$350 payments exceeded \$10,000 in May 2007. Roush had argued this occurred by June 2007, which accords with our calculation: it would take 29 months of \$350 per month to total \$10,000; it is alleged the parties entered into their agreement on some date in January 2005; assuming it was the last day in January (January 31), 29 months later would be June 30, 2007; so the accumulated amount would have eclipsed the \$10,000 mark no later than the end of June 2007. The precise month is immaterial to our analysis and the disposition of the appeal.

to allege “that the date of sale was to coincide with [Roush’s] retirement which was anticipated to occur in approximately five years,” in January 2010.

As to the first proposed amendment, an allegation that funds over \$10,000 would need to accrue before the sale is inconsistent with the allegations of the complaint and amended complaint. Meyers alleged in his original complaint that “[t]he sum of \$350 per month would be credited to plaintiff against plaintiff’s purchase of the defendant’s plumbing business at a price of \$10,000.00.” He alleged in his first amended complaint that “[t]he parties agreed to a *purchase price* of \$10,000.00.” (Italics added.) There was no allegation that any amount *above* the “purchase price” would need to accrue before the business would be transferred to Meyers. To the contrary, it was alleged that any amount over the \$10,000 would be credited toward the purchase of a house: paragraph 3(b) of the first amended complaint states, “*All sums so earned over and above the amount required to purchase the plumbing business would [be] credited on the books of defendant as payment on account of the purchase of a residence by plaintiff and plaintiff’s spouse, from the defendant.*” (Italics added.) Moreover, Meyers’s proposed amendment is inconsistent with his own characterization of his pleadings: in opposition to the demurrer, Meyers argued that the statute of frauds did not apply to bar his contract claims because the contract by its terms could have been performed within *one year*. Given these circumstances, the court did not abuse its discretion in denying leave to amend. (See *Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151 [court may disregard allegations of amended complaint inconsistent with allegations of prior pleading].)

The second proposed amendment—that the sale would await Roush’s retirement around January 2010—was not offered to the trial court. On that basis, Meyers fails to establish that the court erred in denying leave to amend. And although Meyers argues we have discretion to allow the amendment nevertheless, he fails to persuade us we should. He provides no justification for his failure to make the allegation in his original complaint, his amended complaint, his written opposition to the demurrer, or the demurrer hearing. Moreover, an allegation that the sale would not occur until January

2010 is inconsistent with his argument that the contract could be performed within one year of January 2005. Accordingly, Meyers fails to demonstrate a reasonable possibility that the defects in the complaint can be cured by amendment. (E.g., *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

B. Promissory Estoppel Cause of Action

As to his promissory estoppel claim, Meyers merely quotes *Cal Jur 3d* in regard to a defendant being estopped from invoking a statute of limitations defense where the defendant had induced the plaintiff to file the complaint after the deadline. He concludes, “Thus, the demurrer to the second cause of action should have been overruled.” He does not, however, provide any argument explaining why that would be so in this particular case, or point to any allegation that Roush induced him to file in an untimely manner. (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 279 [where appellant offers no argument concerning a cause of action on appeal from an order sustaining a demurrer, the cause of action is deemed abandoned].) Moreover, Meyers did not raise this issue in the trial court; he cannot establish the court erred based on an issue he never raised.

C. Breach of Contract Cause of Action

Meyers’s first amended complaint alleged that Roush breached their oral agreement by failing to perform his promise to sell the plumbing business to Meyers for \$10,000.

1. Limitations Period

A two-year limitations period applies to claims for breach of an oral contract. (§ 339.) Meyers argues that the breach of the agreement occurred when Roush refused to perform it in August 2010, within two years of the filing of the complaint in August 2011, and his complaint is thus timely. We disagree.

The limitations period on a claim for breach of an oral contract generally starts to run upon breach. The question, therefore, is when the breach occurred, which turns on when performance was due. Here, it is alleged that the raises of \$350 per month and \$50

per hour of difficult work were credited toward the \$10,000 purchase price for Roush's plumbing business. The reasonable inference is that, once these credits reached the \$10,000 mark, Roush was required to effect the sale of the business to Meyers. Since those credits must have totaled \$10,000 by June 2007, Roush breached his alleged promise to sell the business to Meyers no later than the end of June 2007. Therefore, the deadline for the filing of Meyers's complaint was two years later, by the end of June 2009. (§ 339.) Because the complaint was not filed until August 2011, Meyers's cause of action for breach of an oral agreement to sell the plumbing business is time-barred.

2. Leave to Amend

As mentioned, Meyers seeks leave to amend his pleading so as to allege that "the date of sale was to coincide with [Roush]'s retirement which was anticipated to occur in approximately five years," in January 2010. Under that theory, the breach would not have occurred until January 2010, within two years of the filing of the complaint. However, such an amendment would be futile, because the breach of contract claim would become barred for another reason: if the sale was not to occur for five years, then the agreement could not be performed within one year, and enforcement of the parties' purported oral contract would be barred by the statute of frauds. (See *Hollywood M. P. Equipment Co. v. Furer* (1940) 16 Cal.2d 184, 187.)

Meyers also seeks leave to allege that the parties understood additional funds would be needed to accrue for working capital, which presumably would have resulted in a later sales date and, therefore, a later date of breach. For reasons stated *ante*, however, the trial court did not abuse its discretion in declining to allow this amendment.

Meyers fails to establish error in the trial court's sustaining of the demurrer to the breach of contract claim without leave to amend.³

³ As alleged in the first amended complaint, the breach of the parties' agreement was Roush's refusal to sell Meyers the business. It was not the failure to pay Meyers his raises, since Meyers alleged that Roush was to credit Meyers on his books rather than pay Meyers directly, and Roush *did* credit Meyers with the raises. Therefore, the alleged fact that Roush has held on to the raises he promised Meyers, and Meyers has not been

D. Unjust Enrichment Claim

Meyers's purported fourth cause of action was entitled "unjust enrichment." In this part of the first amended complaint, Meyers alleges that he "has bestowed benefits upon [Roush] in the form of his labor as a plumber for which he was not compensated." A reasonable reading of these allegations is that Roush told Meyers he would be paid \$350 more per month and \$50 more per hour for difficult work, Meyers proceeded to work for Roush, but Roush has not turned over those amounts to Meyers.

Although the parties do not point this out, there is no cause of action for unjust enrichment in California. (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793 (*Melchior*); *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1490 (*McKell*)). Instead, the phrase "unjust enrichment" describes the result of a defendant's failure to make restitution under circumstances where it is equitable to do so, and is a general principle underlying various legal doctrines and remedies. (*Melchior*, at p. 793.)

Essentially, a defendant's receipt of a benefit from a plaintiff, under circumstances that make it inequitable for the defendant to retain the benefit without paying for it, provides a basis for alleging a cause of action for breach of a quasi-contract (a contract implied in law) or for seeking a remedy of constructive trust. (*McKell, supra*, 142 Cal.App.4th at p. 1490 ["unjust enrichment is a basis for obtaining restitution based on quasi-contract or imposition of a constructive trust"]; *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 346 (*Dintino*) ["unjust enrichment is a common law obligation implied by law based on the equities of a particular case," requiring the individual who is unjustly enriched to make restitution].)

Here, the first amended complaint alleges Roush's unjust enrichment, by alleging that he convinced Meyers to continue working for him after January 2005 by raising his monthly salary and hourly rate for difficult work, Meyers proceeded to work for Roush's benefit, but Roush never turned over the raises to Meyers. In light of this unjust

compensated fully for the work he performed after January 2005, must be considered in the context of Meyers's unjust enrichment claim, discussed *post*.

enrichment, Meyers has stated a cause of action for breach of an implied contract. (See § 452 [allegations of a pleading must be liberally construed to promote substantial justice between the parties]; *Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 938 [reviewing court may disregard the mislabeling of a cause of action where supported by the record].)

We next consider the extent to which the cause of action is time-barred.⁴

1. Limitations Period

Meyers’s unjust enrichment claim, and his cause of action for breach of an implied contract, are based on a contractual obligation or liability not founded on a written instrument, and a two-year limitations period applies. (§ 339, subd. (1).) Meyers can therefore pursue a claim against Roush for the unpaid raises (\$350 per month and \$50 per hour of difficult work) only for the *months occurring within two years before the complaint was filed* on August 31, 2011—that is, for work on or after August 31, 2009.⁵

⁴ The other grounds for Roush’s demurrer—unintelligibility and the statute of frauds—are to no avail. The first amended complaint is sufficiently intelligible for us to conclude it states facts indicating unjust enrichment, and the statute of frauds does not apply to an unjust enrichment claim. (See *Dintino, supra*, 167 Cal.App.4th at p. 346 [claim for unjust enrichment is not based on, and does not arise from, a written contract].)

⁵ The court in *Dintino* ruled that the three-year limitations period of section 338, subdivision (d) applied to a “cause of action” for unjust enrichment based on mistake. (*Dintino, supra*, 167 Cal.App.4th at pp. 346, 348.) Since *Dintino* involved a summary judgment motion, it appears the court used the term “cause of action” loosely. In any event, Meyers cannot benefit from the limitations period of section 338, since the gravamen of his unjust enrichment claim is not fraud or mistake. Meyers merely alleges that he “bestowed benefits upon the defendant in the form of his labor as a plumber for which he was not compensated” and Roush “has been unjustly enriched in an amount equal to the reasonable value of work and labor performed in the amount of \$33,412.00.” Although he incorporates other allegations into his unjust enrichment claim, he does *not* incorporate the allegations that Roush knew his promises were false when made and that Roush’s failure to disclose his true intentions constituted fraudulent misrepresentations—which would be necessary for fraud. Furthermore, by June 2007 Meyers had reason to suspect that Roush was not going to sell him the business; from that point on, Meyers had reason to believe that Roush had induced him to work for Roush under false pretenses, and any work thereafter—including any work within three years prior to the filing of the complaint—could not have been in justifiable reliance upon Roush’s alleged misrepresentations in 2005.

A reasonable inference from the first amended complaint is that Meyers continued working for Roush through July 2010, but was not paid the raises he was due; instead those amounts are allegedly in Roush's possession. Accordingly, the allegations of the first amended complaint state a viable cause of action with respect to the period between August 31, 2009, and Meyers's last work for Roush.⁶

Because the first amended complaint states a cause of action for breach of an implied contract, the court erred in sustaining the demurrer without leave to amend. (*Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 195-198 [court erred in sustaining demurrer to complaint alleging breach of contract, even though there was no recovery under that theory as a matter of law, because the complaint stated facts disclosing a right to relief in the form of restitution for unjust enrichment].) We will therefore reverse the judgment.

2. Leave to Amend

Because the allegations of the first amended complaint state a cause of action, we need not decide whether the trial court should have granted Meyers's request for leave to amend the first amended complaint to cure the pleading's purported defects. Nonetheless, we briefly address two matters for the guidance of the parties and the court.

a. Constructive Trust

In his opposition to the demurrer and at the demurrer hearing, Meyers sought leave to allege a cause of action for constructive trust. A constructive trust may be imposed when a person gains something through a wrongful act or wrongfully detains the property of another. (Civ. Code, §§ 2223, 2224; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 600 (*Weiss*)). However, a constructive trust is a *remedy*, not an independent cause of action, and therefore must arise out of some underlying wrongdoing, such as fraud, breach of fiduciary duty, or other act entitling the plaintiff to relief. (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82, disapproved on other grounds in *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626; *Weiss*, at p. 600.) The constructive

⁶ At oral argument in this appeal, Roush conceded as much for purposes of the demurrer.

trust will “ ‘compel a person who has property to which he is not justly entitled to transfer it to the person entitled thereto.’ ” (*Burger v. Superior Court* (1984) 151 Cal.App.3d 1013, 1018.) We express no opinion on whether leave should be granted to add to the first amended complaint a request for a constructive trust.

b. Quantum Meruit

Meyers also sought leave to amend the first amended complaint to allege a claim for quantum meruit. “ ‘Quantum meruit refers to the well-established principle that “the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.” [Citation.] To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that “the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made” [citations].’ [Citations.]” (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1150.) “[W]here services have been rendered under a contract which is unenforceable because not in writing, an action generally will lie upon a common count for quantum meruit.” (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996.) The statute of limitations for a count based on quantum meruit is two years, under section 339. (*Ibid.*) We express no opinion on whether leave should be granted to add to the first amended complaint a claim for quantum meruit.

III. DISPOSITION

The judgment is reversed.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.