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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MILTON LATHAN, Plaintiff and Appellant, v. ODION EDEHOMON, Defendant and Respondent.	A142945 (Alameda County Super. Ct. No. RG13706930)

Plaintiff Milton Lathan appeals from an order sustaining a demurrer to his second amended complaint without leave to amend. The trial court found the complaint failed to state a valid cause of action against defendants Tonia and Odion Edehomon,[1] allowed Lathan to amend certain causes of action against Odion, and dismissed the action as to Tonia. Lathan asserts the court should have allowed him to amend his allegations against Tonia. We disagree, and affirm.

BACKGROUND

This is essentially a breach of contract case, although the second amended complaint[2] also includes purported causes of action ranging from fraud and embezzlement to breach of a confidential relationship. Lathan alleged he loaned the Edehomons money and provided them with food, shelter and other necessities of life on

[1] Because defendants share a common last name, we will refer to them by their given names. We intend no disrespect by this practice.

[2] For brevity, we will at times simply call it the complaint.

various occasions in the 1990's, and that the parties reduced those loans to writing, in the form of 25 distinct promissory notes, on May 2, 2001. In 2014 Lathan sued the Edehomons for $4,600,000 to $9,200,000 in compensatory damages and a $1,000,000 punitive award. The trial court sustained successive demurrers to Lathan's original and first amended complaints, each time with leave to amend.

Lathan then filed the pleading at issue, with the same result. At the outset of its thorough and carefully reasoned four-page ruling, the trial court sustained the demurrer as to Tonia without leave to amend as to all causes of action. It explained: "The claims against defendant Tonia Edehomon are based exclusively on the alleged written loan agreements between Plaintiff and Defendant Odion Edehomon, in which Defendant Odion Edehomon allegedly agreed to bind himself and his marital community. Those alleged promises . . . do not support causes of action against Defendant Tonia Edehomon for breach of contract because she is not a party to the contract. The liability of the marital community for the debts of Defendant Tonia Edehomon's husband is distinct from the issue of her personal liability. Plaintiff's claims also fail to state a cause of action against Defendant Tonia Edehomon for the reasons stated in the court's ruling on the demurrer by Defendant Odion Edehomon."

The court sustained Odion's demurrer without leave to amend previously stricken causes of action for "indemnification-breach of written contract," fraud, embezzlement, and breaches of a confidential relationship, a relationship of trust, and fiduciary duty. The court sustained Odion's demurrer with leave to amend for one cause of action for fraud and one for breach of the covenant of good faith and fair dealing. As to the breach of contract claims, which comprised 13 separate causes of action, the court sustained Odion's demurrer with leave to amend for failure to state a cause of action and uncertainty. We quote its order at length. "Plaintiff alleges that Defendant agreed in May 2001 to substitute thirteen written agreements for thirteen earlier loan agreements executed in 1994, 1995 or 1996. All of the alleged agreements in May 2001 provided in para. 1 that Defendant agreed to make minimum monthly payments. Those monthly payments would have resulted in complete repayment of all the loans by 2002. However,

under para. 6 of those agreements, if Defendant was unable to make the minimum payments, he was allowed to make payments of as little as $1 per month, as long as he notified Plaintiff at a personal meeting why the minimum payment could not be made. Plaintiff admitted in his First Amended Complaint . . . that the purpose of the term requiring payment of $1 per month was so that Plaintiff could determine whether Defendant was acknowledging his obligation to repay and was taking steps to do so.

"Plaintiff did not allege in the original Complaint or First Amended Complaint that Defendant made the minimum payments required under para. 1 or the payments of $1 per month under para. 6 on any of the loans in any month. Plaintiff did not allege that he and Defendant ever had a personal meeting with regard to any of the loans in any month. Instead, Plaintiff alleged that Defendant paid $200 on the loans from the time they were executed, and that those payments consisted of a 'payment' on August 9, 2008 in the form of 3 ½ hours of roof repairs to Plaintiff's house, and a payment of $100 in March 2011. Plaintiff conceded that there were no more payments in 2008. The court previously found that it was clear from the allegations that the limitation period had run prior to 2008 and after 2008, because the limitation period for breach of written contract is four years under C.C.P. sec. 339 and Plaintiff did not file this action within four years after 2002 or 2008."

The new complaint alleged that Lathan's prior allegations were mistaken, that Odion made payments on the promissory notes in every year from 2002 through 2011, and that Lathan let Odion defer payments during each of those years because Odion said he could not pay. But, the court explained, "Plaintiff asserted in an email sent to Defendant on June 20, 2013 that Defendant had only paid $200 on the 26 promissory notes from May 2001. In an email sent on November 10, 2013, Plaintiff attempted to provide an itemization of the amounts owed by Defendant on each loan, and started by deducting $200 off the top from Note A before calculating interest at 21% on the remaining sum, and using the full amount of principal and interest for each of the other notes. Plaintiff now alleges that 'it seems like some ideas were conflated and/or confused by me in the emails,' because he was not referring to notes. Plaintiff asserts that he did

not ‘want to compute interest and charges and payments for every month,’ and so he was giving Defendant a credit for $200 on the principal, which was about 10% of what Defendant had paid, because of all the interest that had accrued. Plaintiff asserts that he was just being friendly by choosing $200 as the amount paid, and because the emails were not bills. Plaintiff alleges that Defendant was actually in compliance with the terms of the notes and the permissions granted him until at least 2011 or 2012 or 2013 when he refused to pay. Plaintiff also argues that he had the right under paras. 12 and 13 of the note to change the terms and to waive any provision in his favor without additional consideration by Defendant, and that he exercised the power to allow Defendant to skip payments.”

But the new allegations about payments between 2002 and 2008 contradicted the prior complaints. Moreover, the court found that Lathan had not explained the contradictions sufficiently to avoid his earlier admissions. “Plaintiff’s explanation for his errors in his two emails is not at all persuasive. Although Plaintiff adds allegations with regard to specific payments made in 2008, 2010, and 2011, there are no allegations concerning payments made by Defendant in 2001-2007. The allegation that Defendant made payments in 2001-2007 is alleged as a conclusion, and includes no information about whether minimum payments under para. 1 or lesser payments under para. 6 were made, the identity of the loans on which payment was made, or the amounts paid. *The policy against sham pleadings is fully applicable under the circumstances. It is clear from the pleadings, including attachments and prior pleadings in this case, that the limitation period on the loan agreements started to run prior to 2008, when payments were not made under any of the notes.* Despite the court’s prior ruling explaining that all of the notes showed on their face that breach would have occurred in 2001 if payments were not made as required by paras. 1 or 6 of the notes, Plaintiff has not alleged that any particular payments were made prior to 2008 or that Defendant complied with the requirement under para. 6 to have a personal meeting to explain why the minimum payment under para. 1 could not be made. *Thus, the pleadings still show on their face*

that Plaintiff's claims accrued more than four years before 2008, when he alleges that a payment was made." (Italics added.)

The court ruled "[i]n light of the policy against sham pleadings" that Lathan's "conclusory allegations of payments made by Defendant from 2001 to 2007 must be disregarded, and the specific admissions by Plaintiff in the emails attached to his pleadings prevail over his conclusory allegations to the contrary. Plaintiff has attempted to provide an explanation for his admission in two separate emails that Defendant had only paid $200 since 2001, but his explanation for arriving at the sum of $200 is implausible, his new allegations are conclusory, and he provides new factual allegations that show only that Defendant made small payments in 2008 or later." The court also found the allegations were uncertain: "There are thirteen different loans at issue, but Plaintiff offers no allegations showing that payments were made by Defendant on any particular loan during the period from 2001 to 2007 or that payments made in 2008, 2010, or 2011 should be applied to any particular loan." The court also found the new allegations were insufficient to support estoppel to plead the statute of limitations, tolling or revival of the limitations period, modification of the written loan agreements, or an acknowledgement of debt sufficient to revive the obligation to pay.

The court granted leave to amend the causes of action against Odion for breach of contract, promissory fraud and breach of the covenant of good faith and fair dealing to plead facts showing the claims were not barred by the statute of limitations. The action against Tonia was dismissed.[3]

DISCUSSION

I. Standard of Review

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts

[3] No judgment of dismissal appears in the record provided to this court. The order sustaining the demurrer and dismissing the action as to Tonia is not independently appealable, but to avoid delay we deem the order sustaining the demurrer to include an appealable judgment and treat the appeal as from the judgment. (See *Basinger v. Rogers & Wells* (1990) 220 Cal.App.3d 16, 21.)

properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

II. The Court Did Not Abuse Its Discretion

Lathan contends the court erred when it found Tonia could not be sued for breaching the promissory notes because she was not a party to them. Accordingly, he maintains, he should have been granted leave to amend the breach of contract claims as to Tonia "as it was granted against Odion." We disagree.

Lathan asserts the complaint properly named Tonia as a defendant because it alleged that Odion had a power of attorney authorizing him to enter transactions on her behalf, and that he exercised that power by virtue of a provision in the promissory notes that says "Lendee enters into this agreement for himself/herself and his/her marital community." We disagree. Under any reasonable interpretation, the contract language he relies on indicates only that the couple's community property is liable for Odion's contractual debt—a result in any event ordained by statute. (See Fam. Code, § 910, subd. (a) ["Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage . . ."].) So, assuming for present purposes that Odion was in fact authorized to enter contracts on his wife's behalf (see *Blank v. Kirwan, supra*, 39 Cal.3d at p. 318), he did not do so here. As the trial court correctly observed, "[t]he liability of the marital community for the debts of Defendant Tonia Edehomon's husband is distinct from the issue of her personal liability."

In apparent response, Lathan asserts that he unilaterally modified the promissory notes at some unspecified subsequent time by adding a new term that defined "marital community" to mean " 'Odin Edehomon (husband) *and his wife, Tonia Edehomon*, and their community property' " (italics added), and specified "joint and several liability (liability for each individually and together/jointly as part of the marital community) for husband Odion Edehomon and wife Tonia Edehomon and with respect to their separate and community property. Lendee includes Odion Edehomon and Tonia Edehomon jointly and separately (individually and together/jointly as part of the marital community)." That language is found in an undated and unsigned document appended to the second amended complaint ("Joint Exhibit 1"), which purports to unilaterally modify the promissory notes in numerous respects. It is undisputed that neither Odion nor Tonia agreed to those modifications, which would in any event be invalid unless in writing, fully executed, or supported by new consideration. (Civ. Code, §1698.)[4] Lathan maintains he had contractual authority to unilaterally modify the contract terms under a term in the promissory notes that allowed him to make unlimited "changes in this agreement for new, additional, alternative, different or modified terms"[5] if Odion failed to make timely minimum payments, but here, too, we are unpersuaded. Assuming

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[4] Civil Code, section 1698 provides: "(a) A contract in writing may be modified by a contract in writing. [¶] (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties. [¶] (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds . . . is required to be satisfied if the contact as modified is within its provisions. "

[5]"12. "Changes in this agreement: For every month for which the minimum payment due under this note (under item 1) is not timely received by the due date, Lender at the meet and confer meeting (and continuing thereafter) shall have the power to make changes in this agreement. Lender shall at the meet and confer meeting shall [*sic*] advise the Lendee of changes in the terms of this agreement. If the Lendee does not call for or attend the meet and confer meeting, the Lender nevertheless shall at that time (and continuing thereafter) have the power to make changes in this agreement for **new, additional, alternative, different or modified terms** at the time such meeting could have taken place without further notice to Lendee."

arguendo that this provision would survive analysis for mutuality of obligation or illusoriness (see, e.g., *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1214), it would not empower Lathan to bind *Tonia*, who was not a party to the promissory notes, to a contract she never entered.

The court properly sustained the demurrer as to Tonia without leave to amend.

DISPOSITION

The judgment is affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.