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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 et al.,
Defendants and Respondents.

A143596

(Alameda County
Super. Ct. No. RG13706930)

Milton Lathan appeals from a judgment after the court sustained a demurrer to his third amended complaint without leave to amend. There was no error, so we affirm.

BACKGROUND

This is the second time this case has come before us. In *Lathan v. Edehomon* (October 29, 2015, A142945) [nonpub. opn.] we affirmed defendant Tonia Edehomon's dismissal from the action after the court sustained a demurrer to Lathan's second amended complaint without leave to amend. We incorporate by reference our discussion of the proceedings leading up to that ruling.

Although the court dismissed Tonia, it permitted Lathan to amend causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and promissory fraud against Odion Edehomon to show they were not barred by the statute of limitations. Lathan was specifically directed to explain the conflict between his original allegations, which established that alleged breaches occurred more than four years before he filed suit, and his amended allegations that breaches first occurred sometime in 2011 or 2013.

Lathan filed a third amended complaint, and Edehomon again demurred. The court sustained the demurrer. As before, it issued a detailed and thoughtful written order that explained why the amendments failed to cure the defects in the prior pleading. “To the contrary,” the court observed, “it is apparent that Plaintiff’s new allegations, intended to show that his claims are not time-barred, are a sham, and that he cannot allege facts that avoid the bar of the statute of limitations for breach of contract.”

The third amended complaint alleged that prior to 2011 Edehomon made sporadic payments on the promissory notes and did limited work for Lathan in an effort to meet his payment obligations. It also incorporated a one-page handwritten exhibit that purported to show that Edehomon made from one to three payments each year between 2002 and 2011. Lathan also alleged that he waived Edehomon’s obligation for many of the payments until late 2013, “when it appeared the defendant had no intentions to make any further payments with regard to the promissory notes.” The court found these new allegations inadequate. “No documents corroborating this new assertion are offered, no explanation for Plaintiff’s sudden recollection of payments made during each of these years is offered, and no facts are alleged to show that Exhibit 1 is anything other than an attempt to avoid the bar of the statute of limitations. [¶] Plaintiff’s new allegations contradict prior allegations and he has not provided an adequate explanation for his complete reversal on the issue of payments made by Defendant.”

The court also found that Lathan’s new allegation that he had waived some number of unidentified monthly payments between May 2001 and November 2013—apparently whichever payments Edehomon had failed to make—did not cure the statute of limitations problem. “A party to an agreement always has the ability to waive breaches. But that waiver does not toll the limitation period unless it is in writing and signed by the person obligated. . . . Para. 13 of the promissory notes does not constitute a written waiver signed by Defendant with regard to any particular breach, but merely states the fact that Plaintiff has the right to waive breaches of the contract. Plaintiff has not provided any written waivers, and it is apparent that he believes he can pick and choose which breaches were waived, so as to avoid the commencement and running of

the limitation period. That contention has no support in the law and para. 13 does not allow Plaintiff to avoid the running of the statute of limitations.”¹

The court found that Lathan had not shown the defects in his pleadings resulted from mistake, inadvertence, surprise or excusable neglect, or that they could be cured by further amendment. “To the contrary,” it observed, “his explanations for his earlier contradictory allegations and admissions are not satisfactory, and his argument based on his right to [waive] provisions in his favor pursuant to para. 13 is not a viable basis for avoiding the statute of limitations.” In addition, “all of Plaintiff’s claims remain uncertain, despite multiple court orders sustaining demurrers on that ground. In each of his pleadings and in his opposition papers, Plaintiff has asserted his right to make unilateral changes in the terms of the promissory notes under paras. 12 and 13, and has inconsistently pled that Defendant breached or did not breach, that Plaintiff waived or did not waive various provisions, and that payments were credited to one loan or all 25 alleged loans equally, so that it is virtually impossible to determine what breaches are claimed or to calculate the amount allegedly owed. Plaintiff’s arguments in his most recent opposition concerning his right to waive some aspects of particular breaches by Defendant, in order to avoid triggering the statute of limitations, without waiving other aspects, such as the right to recover late fees resulting from those breaches, is just one example of the uncertain nature of Plaintiff’s claims. [¶] It is clear that Plaintiff cannot provide a satisfactory explanation for his earlier allegations that no payments were made from 2001 to 2008 and after 2008, and that Defendant breached his obligations under the promissory notes during this period of time or thereafter. . . . It is apparent that Plaintiff’s allegations with regard to prior payments made by Defendant under the notes, in an attempt to show that his claims are not time-barred, are a sham. Plaintiff’s new allegations are stated in a vague and conclusory manner, without any reasonable

¹ Paragraph 13 of the promissory notes provides that “Lender may waive any provision in Lender’s favor in whole or in part, temporarily or permanently without additional consideration by Lendee. Lender hereby waives any provision to the extent that it is unconscionable, illegal, against public policy or otherwise unlawful or unenforceable.”

explanation for the fact that they contradict his prior allegations establishing that his claims are time-barred.”

The court sustained the demurrer without leave to amend and dismissed the action. Lathan filed a timely appeal from the judgment of dismissal.

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 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 Properly Sustained the Demurrer Without Leave To Amend

Lathan asserts the court erred when it rejected his new allegations that Edehomon made payments on the notes during each of the years between 2001 and 2012, even though they contradicted his prior allegations that demonstrated continuous breaches from 2002. In a rambling declaration in opposition to the demurrer, Lathan recounts a tale of a false arrest, a break-in, and a leaking roof that culminated ultimately in a loss of banking records and, hence, the “imprec[ision]” in his original allegations about the missing payments. But a court is “ ‘not bound to accept as true allegations contrary to factual allegations in [a] former pleading in the same case.’ ” (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946 (*Vallejo Development*); 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 1190-1191, pp. 621-624.) The trial

court reasonably found Lathan's alleged belated discovery of the handwritten roster of payments, and his explanation as to why it differed from his earlier allegations of non-payment, were sham. We do not fault that assessment.

The principle articulated in *Vallejo Development* also defeats Lathan's claim that the court erred when it rejected his new position that no breach occurred until 2011 or 2013 because, in essence, he had waived Edehomon's performance until then. In Lathan's view, "[b]y the terms of the contract, there is no breach unless and until Appellant says that there is a breach. By the terms of the contract, the powers granted to Plaintiff therein go past the authority to waive breaches! They allow him to avoid breaches so that breaches do not occur [T]he contract by its express terms is that Plaintiff has the right to determine whether an action or non-action by Defendant with respect to the contract is or is not a breach and thereby avoid a breach if Plaintiff so desired. To be clear: A waiver of a payment according to the terms of the contracts is not a waiver of a breach of contract as represented by non-payment of the scheduled payment; it is a re-calibration—a re-writing of the contract terms such that no such breach occurred." Again, Lathan offered no plausible explanations for the discrepancy between his prior allegations of nonpayment and his new allegations that no payments were due because he excused them. The court reasonably rejected his new allegations as a sham attempt to plead around the statute of limitations, and because it is virtually impossible to determine what non-payments he actually claims are breaches or to calculate the amount allegedly owed, as fatally uncertain. To the extent Lathan asserts that Edehomon waived the statute of limitations, the law is against him. As the court observed, a waiver of the statute of limitations is ineffective unless it is in writing and signed by the person obligated. (Code Civ. Proc., §360.5.) No such writing has been alleged.

Lathan also argues he successfully pleaded estoppel to assert the statute of limitations. His argument, to the extent intelligible, is premised on the same allegations of waived payments that the court rejected as sham, and so fails for the same reasons.

The remainder of his arguments simply rehash arguments from his prior unsuccessful appeal concerning Tonia Edehomon, and as such are both irrelevant and moot.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.

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