Filed 1/12/16 Loanvest I, LLC v. Ropers Majeski Kohn Bentley, PC

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

LOANVEST I, LLC, Plaintiff and Appellant, v. ROPERS MAJESKI KOHN BENTLEY, PC, Defendant and Respondent.	A144977 (Alameda County Super. Ct. No. RG12654982)

Loanvest I, LLC (Loanvest) alleges that its former manager, George Cresson, misappropriated company proceeds from the sale of commercial real property and used the proceeds to pay legal expenses incurred by Cresson and other companies he controlled. Loanvest brought this action against Cresson, attorneys who received sale proceeds, and other individuals.

As relevant here, Loanvest pled causes of action for conversion and restitution against one law firm seeking reimbursement of sale proceeds the firm received from Cresson and later filed a Doe amendment adding another law firm, Ropers Majeski Kohn Bentley, PC (Ropers). The trial court sustained Ropers' demurrer without leave to amend finding, among other things, that the claims were barred by a two-year statute of limitations and were inadequately pled.

We conclude, in the discussion that follows, that a three-year statute of limitations applies, making the claims timely. We also find that the conversion cause of action is adequately stated and that inadequacies in the restitution cause of action may be cured by amendment. We shall reverse the judgment of dismissal and remand the case with

directions to overrule the demurrer as to the conversion cause of action and to sustain the demurrer as to the restitution cause of action with leave to amend.

Statement of Facts

A complex series of financial and real estate transactions underlie the case. The essential facts are stated in the pleadings, exhibits to the pleadings and judicially noticed documents from related litigation submitted in connection with the demurrer (*Madow v. Post Construction Services, LP* (Super. Ct. S.F. City and County, 2011, consolidated Nos. CGC-11-508188, CGC-11-508589, CGC-11-515621) (the San Francisco action).[1]

James Madow is an attorney who represented Cresson and numerous business entities affiliated with Cresson for many years. In 2009, the businesses owned and controlled by Cresson included Loanvest, South Bay Real Estate Commerce Group, LLC (South Bay), and Post Construction Services, LP (PCS).

South Bay was the manager of Loanvest. Loanvest acquired in foreclosure commercial real property located on 18th Street in Oakland. Loanvest then sold an undivided half interest in the property to PCS by seller financing: Loanvest loaned the purchase price to PCS in exchange for a promissory note secured by a deed of trust on the property. Loanvest sold the remaining half interest to a business entity owned by Jason Perkins. Perkins, or associated entities, leased PCS's half interest in the property and operated a nightclub on the premises.

Madow invested in Cresson's businesses. He loaned $325,000 to PCS and purchased an interest in Loanvest for $475,000. In 2011, Madow filed the San Francisco action against Cresson and his affiliated entities to recover on the PCS loan. With the San Francisco action pending, Loanvest foreclosed on the Oakland property securing its loan to PCS and acquired a half interest in the property. In September 2012, Loanvest sold its

[1] We treat a demurrer "as admitting all material facts properly pleaded" and also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The trial court properly took judicial notice of documents filed in the San Francisco action. We take judicial notice also of an appellate opinion filed in that action while this case was pending on appeal. (*Madow v. Post Construction Services, LP* (July 13, 2015, A139254) [nonpub. opn.].)

interest in the property to Perkins affiliated entities that held the remaining half interest. The sale allegedly "generat[ed] over $722,000 in cash."

Madow moved for a preliminary injunction in the San Francisco action to prevent Cresson and South Bay from using the Oakland sale proceeds under their control. Madow claimed Cresson and South Bay wrongfully used proceeds from the sale to pay Cresson's attorney fees and would continue to dissipate Loanvest funds unless restrained. The motion was denied.

Judgment in the San Francisco action was entered after the court ruled Madow's loan to PCS rescinded and Madow settled his remaining claims. Under the May 2013 settlement agreement, Madow became the uncontested manager of Loanvest, replacing South Bay.[2] The judgment was affirmed on appeal in July 2015. (*Madow v. Post Construction Services, LP, supra*, (A139254) [nonpub. opn.].)

Meanwhile, Loanvest with Madow as manager filed this action in November 2012. Initially, the action stated claims against PCS and Perkins's business entities and sought to recover Loanvest's interest in the Oakland property sold to the Perkins entities. In May 2013, following the settlement agreement in the San Francisco action, Loanvest filed a second amended complaint adding a legal malpractice claim against the attorneys who represented Loanvest in that action when it was managed by South Bay, Paul Utrecht and Utrecht and Lenvin, LLP (collectively, Utrecht). The pleading also added a separate claim against Wendel Rosen Black & Dean, LLP (Wendel), which represented South Bay in the San Francisco action. Loanvest sought "reimbursement" of payments Cresson made to Wendel from the Oakland property sale proceeds. By this time, Madow was the attorney of record for Loanvest and remains so today.

In proceedings that were the subject of an earlier appeal to this court, the trial court granted Utrecht's special motion to strike the malpractice cause of action under the

[2] Madow claimed the right to manage Loanvest since at least August 2012 when he filed notice with the California Secretary of State.

anti-SLAPP statute.[3] (Code Civ. Proc., § 425.16.)[4] We found that Loanvest's malpractice claim was not a challenge to the exercise of protected activity within the scope of the anti-SLAPP statute and, without considering the merits of the claim, reversed the judgment of dismissal. (*Loanvest I, LLC v. Utrecht* (Mar. 26, 2015, A141564) [nonpub. opn.].)

While that appeal was pending, proceedings continued in the trial court. Loanvest filed additional amendments to its complaint and, in June 2014, filed its fourth amended complaint that is at issue on this appeal (hereafter, the complaint). The complaint avers seven causes of action against numerous named defendants and "DOES 1-10," whose "true names and capacities . . . are unknown" to Loanvest. Two of the causes of action are conversion and restitution against the Wendel law firm. Loanvest, now under Madow's control, alleges that Cresson "loot[ed]" Loanvest when Cresson and his company South Bay managed Loanvest by using Loanvest's proceeds from the sale of the Oakland property to pay legal expenses incurred by Cresson and his other companies, including South Bay and PCS. Loanvest avers that it "bore no legal responsibility for payment" of legal expenses incurred by South Bay, yet Wendel "received hundreds of thousands of dollars out of the cash proceeds of Loanvest I's sale of its Oakland property interest in payment for [Wendel's] representation of South Bay in the San Francisco action." In its conversion claim, Loanvest alleges that Wendel "exercised unlawful dominion over Loanvest I's proceeds of sale and converted said proceeds for its own use and benefit." Loanvest further alleges that Wendel "knew that it had no right to take possession of Loanvest I assets to discharge South Bay's obligations," entitling Loanvest to restitution of the amounts Wendel received.

In September 2014, Loanvest attempted to add another defendant to the conversion and restitution causes of action: the Ropers law firm. Ropers represented Cresson and PCS in the San Francisco action. Loanvest filed a motion for leave to file a

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[3] SLAPP is an acronym for a strategic lawsuit against public participation.

[4] All further section references are to the Code of Civil Procedure.

fifth amended complaint to add Ropers as a defendant, asserting that Loanvest had only recently learned that Ropers, like Wendel, received payment for its services from Loanvest's sale of the Oakland property in 2012. Loanvest soon abandoned its efforts to file a fifth amended complaint and, in November 2014, filed an amendment to its fourth amended complaint substituting Ropers as Doe 1[5] to the pending sixth (conversion) and seventh (restitution) causes of action. The Doe amendment, and a later amended Doe amendment of December 2014, were filed without leave of court.

In January 2015, Ropers demurred to the amended Doe amendment to the fourth amended complaint. The court sustained the demurrer without leave to amend on the following grounds: "First, the doe amendment at issue was filed without leave of court as admitted by plaintiff. . . . Second, even if the doe amendment was in good procedural posture, the two claims at issue, conversion and unjust enrichment [or restitution], are subject to a 2-year statute of limitations period, and based on the record both claims are time-barred. Third, the relation back doctrine doesn't apply to save the two claims because the record doesn't support plaintiff's argument that plaintiff was ignorant of [Roper's] involvement and alleged culpability" as Cresson's lawyer in the San Francisco action. "Lastly, as pled the allegations are insufficient to support a claim for conversion and the claim for unjust enrichment is not a cause of action at all but a remedy."

Two weeks after the ruling, Loanvest filed an application to supplement the record with additional evidence, which the trial court denied. Judgment in favor of Ropers was entered in April 2015 and a corrected judgment, attaching the previously omitted demurrer order, was filed in May 2015. Loanvest timely filed notice of appeal.

Discussion

1. *Standards governing review of demurrers.*

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled." (*Aubry v. Tri-City*

[5] Ropers notes that its denomination as Doe 1 is incorrect because Does 1 through 5 are named in connection with a different cause of action. The defect in naming Ropers Doe 1 instead of Doe 6 is immaterial.

Hospital Dist. (1992) 2 Cal.4th 962, 966.) " '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." (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

2. *The Doe amendment was improperly filed without leave of court but the procedural irregularity was later cured.*

The trial court found, as the first ground for sustaining the demurrer, that "the doe amendment at issue was filed without leave of court." It is well-established that "[w]here the plaintiff is ignorant of the true names of certain defendants, he may designate them by a fictitious name in the complaint and later request leave to amend to insert their true names when ascertained." (*Johnson v. Goodyear Tire & Rubber Co.* (1963) 216 Cal.App.2d 133, 13, italics omitted.) Loanvest admits it failed to obtain the required approval but argues that Ropers waived its objection to the unpermitted filing by demurring rather than moving to quash service of summons.

It is far from clear that a motion to quash was the proper, much less exclusive, means of raising the issue. A motion to quash challenges personal jurisdiction; it is not the proper procedure to dispute whether a plaintiff has properly filed a Doe amendment. (*A.N. v. County of Los Angeles* (2009) 171 Cal.App.4th 1058, 1063-1064.) In any event, it is the substance, not the label, of a motion that matters (*id.* at p. 1064) and Ropers' motion promptly and plainly disputed the filing of the Doe amendment. The trial court properly reached the issue and correctly concluded that the Doe amendment was improperly filed without leave of court.

This finding, however, was not dispositive of the demurrer. The failure to obtain leave of court was a procedural irregularity that was cured when Loanvest sought leave in conjunction with its opposition to the demurrer. The trial court apparently would have granted Loanvest's belated request had there been no other ground to sustain the demurrer. But the trial court found that "even if the doe amendment was in good procedural posture," Loanvest's claims are time-barred and insufficiently alleged. We turn to those findings.

3. *The conversion cause of action is not time-barred.*

The causes of action pled in the complaint against Ropers are conversion and restitution, which the parties agree are both governed by the statute of limitations for conversion, at least to the extent restitution is sought for conversion. At Ropers' urging, the trial court held Loanvest's conversion cause of action to be "subject to a two-year statute of limitations period." In applying the two-year statute, the trial court erred.

A three-year statute of limitations applies to "[a]n action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property." (§ 338, subd. (c)(1).) A cause of action for conversion is governed by this three-year statute of limitations. (*Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 561; *Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 915; *Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077, 1087; see generally Rylaarsdam et al., Cal. Practice Guide: Civil Procedure Before Trial Statutes of Limitations (The Rutter Group 2015) ¶ 4:1101.) The two-year statute Ropers relies upon applies to a distinct class of torts. The two-year statute applies to "[a]n action upon a contract, obligation or liability not founded upon an instrument of writing" (§ 339, subd. (1)), in other words, oral contracts and tort claims "not specifically mentioned in other portions" of the statutes of limitations. (*Piller v. Southern Pacific Railroad Co.* (1877) 52 Cal. 42, 44.) Conversion *is* specifically mentioned in other portions of the statutes of limitations; it is expressly governed by a three-year statute. (§ 338, subd. (c)(1).)

Ropers acknowledges that a three-year statute of limitations applies to traditional conversion actions to recover tangible personal property but argues that Loanvest's action

is for the recovery of intangible property rights and that such claims are governed by the two-year statute of limitations. Initially, we note that conversion claims for intangible property interests are controversial and seldom permitted. "Courts have traditionally refused to recognize as conversion the unauthorized taking of intangible interests that are not merged with, or reflected in, something tangible." (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1565.) Some courts have expanded the traditional scope of conversion to include intangible property interests, at least where "both the property and the owner's rights of possession and exclusive use are sufficiently definite and certain." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 125.) To the extent actions for the conversion of intangible property interests are recognized, we see no reason why the three-year statute of limitations for conversion would not apply. Ropers has not cited any case in which a *conversion* action involving intangible property interests—as opposed to other tort actions—was subjected to a two-year statute of limitations. (See Rylaarsdam et al., Cal. Practice Guide: Civil Procedure Before Trial Statutes of Limitations, *supra*, ¶¶ 4:1101, 4:1150 [tort actions for injury to intangible interests *not* amounting to conversion are governed by the two-year statute of limitations]). Courts routinely apply the three-year statute to conversion claims, even to the conversion of "quasi-tangible" property interests (*Fabricon Products v. United California Bank* (1968) 264 Cal.App.2d 113, 117) and, thus, are likely to apply the same statute to the conversion of intangible property interests.

The dispositive point here, however, is that Loanvest's cause of action fits within the scope of a traditional conversion action to recover tangible personal property: a definite sum of money. "Conversion is generally described as the wrongful exercise of dominion over the personal property of another. [Citation.] The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages." (*Fremont Indemnity Co. v. Fremont General Corp, supra*, 148 Cal.App.4th at p. 119.) "The tort of conversion is derived from the common law action of trover. The gravamen of the tort is the defendant's hostile act of

dominion or control over a specific chattel to which the plaintiff has the right of immediate possession." (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395.)

A " 'generalized claim for money' " does not seek return of specific property and thus is " 'not actionable as conversion.' " (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, supra,* 150 Cal.App.4th at p. 395.) But money can be the subject of conversion where "a specific sum capable of identification is involved." (*Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681.) "California cases permitting an action for conversion of money typically involve those who have misappropriated, commingled, or misapplied specific funds held for the benefit of others." (*PCO, Inc. supra,* at p. 396.) A conversion action for a specific sum of money is subject to a three-year statute of limitations. (*Baxter v. King* (1927) 81 Cal.App. 192, 192-194.)

Ropers claims conversion of money is conversion of an intangible property interest, citing *Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 214. *Welco* does not support that contention. *Welco* did not concern the conversion of a definite sum of money but the "appropriation and unauthorized use of a credit card," which the court found to be intangible property sufficiently akin to money to permit a conversion action to proceed: "By, in effect, taking from plaintiff, or without authorization transferring plaintiff's rights in, a certain identifiable sum *equivalent* to money, defendant has converted an intangible property right." (*Ibid.*, italics added.)

Here, Loanvest alleges conversion of *tangible* property: a specific sum of money capable of identification. Loanvest alleges that Ropers received "between $83,813.90 and $165,000 in Loanvest I sales proceeds" from Loanvest's Oakland property. While a range of amounts is stated in the pleading, Loanvest alleges the loss of a specific sum: "the amount of the converted sales proceeds." The exact amount of those proceeds is capable of identification and, in fact, was identified. Madow filed a declaration stating that recently subpoenaed bank records reveal that Ropers received $165,000 from Loanvest sale proceeds. Ropers requested judicial notice of this declaration on demurrer and the court granted the request.

The three-year statute of limitations applies. (§ 338, subd. (c)(1).) The parties are agreed that any conversion occurred in September 2012 when Ropers allegedly received money from the sale of Loanvest's Oakland property. The pleading amendment is timely as it was filed in December 2014, within three years of the alleged conversion.

We therefore need not address the trial court's conclusion—hotly debated by the parties—that Loanvest was not truly ignorant of the identity of Ropers and thus improperly substituted Ropers into the action as a Doe defendant. "[S]ection 474 permits a plaintiff to amend complaints by adding parties as Doe defendants '[w]hen the plaintiff is ignorant of the name of a defendant' at the time the complaint is filed. 'The purpose of section 474 is to enable a plaintiff to avoid the bar of the statute of limitations when he [or she] is ignorant of the identity of the defendant.' " (*Davis v. Marin* (2000) 80 Cal.App.4th 380, 386.) " 'If the requirements of section 474 are satisfied, the amended complaint substituting a new defendant for a fictitious Doe defendant filed after the statute of limitations has expired is deemed filed as of the date the original complaint was filed.' " (*Id.* at p. 387, fn. omitted.) There is no need to consider if the amendment should relate back to an earlier date because the statute of limitations had not expired when the amendment was filed. Loanvest could have filed an amended complaint, as it initially sought to do, rather than a Doe amendment to the existing complaint. Had it filed an amended complaint, the question of whether Ropers' identity was known to Loanvest would have been irrelevant. The question is likewise irrelevant when a Doe amendment is filed *before* the statute of limitations expires. (*Ibid.*) "There is no reason to treat [Loanvest's] amendment to the complaint any differently than we would have treated an amended complaint naming [Ropers] as a defendant. To do so would elevate form over substance and would ignore common sense." (*Ibid.*)

4. *The complaint adequately alleges a cause of action for conversion. The cause of action for restitution is inadequately pled but Loanvest should be given an opportunity to amend its complaint.*

As against Ropers, Loanvest alleged a sixth cause of action for conversion and a seventh cause of action for restitution. The trial court found the allegations of the

complaint "insufficient to support a claim for conversion" and regarded the cause of action for restitution as one for "unjust enrichment," which the court found "is not a cause of action at all but a remedy." Loanvest contests these findings and Ropers makes no effort to defend them. We find that the allegations, while sparse, are sufficient to support a claim for conversion.

The essential elements of conversion are stated in the applicable jury instruction which, adapted to the facts here, require Loanvest to prove: (1) that Loanvest had a right to possess proceeds from the sale of the Oakland property; (2) that Ropers intentionally and substantially interfered with Loanvest's property by taking possession of the property or refusing to return the property after Loanvest demanded its return; (3) that Loanvest did not consent; (4) that Loanvest was harmed; and (5) that Roper's conduct was a substantial factor in causing Loanvest's harm. (CACI No. 2100.) Even those who commit no wrong themselves are liable for conversion if "they received possession of the items from one who had no legal title and therefore no right to transfer the items." (*Strasberg v. Odyssey Group, Inc., supra,* 51 Cal.App.4th at p. 919.)

Loanvest adequately alleges a claim for conversion. Loanvest avers that "Cresson, purportedly acting as Loanvest I's agent, sold Loanvest I's Oakland Property interest . . . with the sale generating over $722,000 in cash sales." Cresson "had no authority to act for Loanvest I, said authority being vested in Madow" and, even if Cresson had the authority to act for Loanvest, Cresson had no authority to use Loanvest assets to pay his expenses and those of other companies. Loanvest further alleges that "between $83,813.90 and $165,000 in Loanvest I sales proceeds [were] diverted by Mr. Cresson in September of 2012 to ostensibly pay Ropers legal bills." Ropers represented Cresson and PCS in the San Francisco action, not Loanvest. Ropers allegedly "knew that it had no right to take Loanvest I money to discharge the obligations of Mr. Cresson, PCS, and/or [South San Francisco I, LLC] to pay its legal bills, bills for which Loanvest I bore no responsibility, and also knew that Loanvest I sales proceeds were the only source available to Mr. Cresson to pay these bills." Ropers, it is alleged, "exercised unlawful

dominion over Loanvest I's proceeds of sale and converted said proceeds for its own use and benefit."

In its demurrer, Ropers argued: "There are no facts plead[ed] to demonstrate that [Ropers] knew that the payment of fees was improper, that the fees were paid with Loanvest I sale proceeds, or that Loanvest did not consent to payment." While there was no *demonstration* of facts, each of these facts was alleged. Whether the elements of conversion can be proven is a question for another day. We are simply assessing the adequacy of the allegations against a demurrer.

In assessing the adequacy of the complaint, we do find the cause of action for restitution to be defectively stated but there is a reasonable possibility the defect can be cured by amendment. At Roper's urging, the trial court dismissed the restitution cause of action as the equivalent of a claim for unjust enrichment that is a remedy and not a free-standing cause of action. It is clear that unjust enrichment is not a cause of action but a principle underlying various remedies. (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387.) Restitution, too, is best understood as a remedy rather than a cause of action. (*Ibid.*)

However, " '[t]here are several potential bases for a cause of action seeking restitution' " and a cause of action may be maintained where any of these bases are stated. (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370.) Assertions of unjust enrichment or a claim for restitution should be assessed to determine if allegations of fraud, quasi-contract or some other theory is stated entitling the plaintiff to the requested relief. (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 231; *Munoz v. MacMillan* (2011) 195 Cal.App.4th 648, 661; *McBride v. Boughton, supra,* 123 Cal.App.4th at p. 387; accord *Astiana v. Hain Celestial Group, Inc.* (9th Cir. 2015) 783 F.3d 753, 762 [applying California law].) "In reviewing a judgment of dismissal following the sustaining of a general demurrer, we ignore '[e]rroneous or confusing labels . . . if the complaint pleads facts which would entitle the plaintiff to relief. [Citation].' [Citations.] Thus, we must look to the actual gravamen of [plaintiff's]

complaint to determine what cause of action, if any, he stated, or could have stated if given leave to amend." (*McBride, supra*, at p. 387.)

Here, Loanvest's claim for restitution alleges: "When a party obtains a benefit that it should not rightly retain, equity and good conscience dictate that restitution be made and the benefit be restored to the aggrieved party." Cresson, in breach of his fiduciary duty, transferred proceeds from the sale of Loanvest's Oakland property to attorneys who did not provide legal services to Loanvest but to Cresson and other companies. Ropers received sale proceeds knowing that it "had no right" to receive Loanvest assets "to discharge . . . obligations for which Loanvest I bore no legal responsibility." "The foregoing benefit was conferred . . . by mistake, fraud, coercion, and/or request."

As pled, the underlying basis for Loanvest's restitution claim is unclear. If Loanvest seeks restitution for alleged conversion, the claim is not a separate cause of action but a requested remedy included within the conversion cause of action. In its briefing on appeal, Loanvest sometimes says its restitution claim is founded on conversion and other times says it is a separate cause of action founded on "a quasi-contractual theory of recovery." One may state a quasi-contract action, in the form of a common count for money had and received, to recover money obtained by fraud or mistake. (*Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1454; CACI Nos. 370, 374.) Such actions are governed by a three-year statute of limitations. (§ 338, subd. (d); *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 348.) The elements of a cause of action for money had and received, as applied here, are: (1) that Ropers received money that was intended to be used for the benefit of Loanvest; (2) that the money was not used for the benefit of Loanvest; and (3) that Ropers has not given the money to Loanvest. (CACI No. 370.) A claim of mistaken receipt is similar, with the principal difference being proof that plaintiff paid money to defendant by mistake. (CACI No. 374.)

The complaint here fails to adequately allege a cause of action for money had and received or any other discernible cause of action. However, there is a reasonable

possibility that the defect can be cured by pleading with greater specificity and thus Loanvest should be given an opportunity to amend.

Disposition

The judgment is reversed with directions to the superior court to (1) vacate its order sustaining the demurrer without leave to amend as to counts six and seven alleged in the fourth amended complaint and amended Doe amendment, and (2) enter a new order overruling the demurrer as to count six and sustaining the demurrer with leave to amend as to count seven. Appellant Loanvest shall recover costs incurred on appeal upon timely application in the trial court. (Cal. Rules of Court, rule 8.278(c).)

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Pollak, Acting P.J.

We concur:

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Siggins, J.

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Jenkins, J.