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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

FAITH N. WOODALL,

Plaintiff and Appellant,

v.

COUNTY OF LASSEN et al.,

Defendants and Respondents.

C065550

(Super. Ct. No. 50065)

Faith N. Woodall appeals from the judgment entered in favor of defendants the County of Lassen (county) and its community development department (department) after the trial court sustained defendants' demurrer without leave to amend.

Woodall does not dispute that her original complaint was flawed or that the demurrer was properly sustained. She contends only that the trial court erred in failing to give her even a single opportunity to amend the complaint.

We agree Woodall should have been allowed to amend her complaint. We shall reverse and remand.

BACKGROUND

Reviewing the judgment entered after a demurrer has been sustained, we assume the truth of all material facts properly pled by the complaint, but not its contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The original (and operative) complaint is a partially completed judicial council form complaint filed pro se by Woodall. In it, Woodall seeks damages under causes of action for breach of contract, a common count for money had and received, and claims for fraud and general negligence. The breach of contract cause of action neither incorporates the alleged written agreement nor recites its terms. It states only that Woodall agreed with the department that Woodall would borrow \$100,000 for home repairs and remodeling to make her home safe, but "[n]o cooking stove or refrigerator was provided as agreed," the wiring remains unsafe, and the repairs made by the contractor violate building code provisions.

Woodall also sought relief under theories of negligence, alleging that defendants failed to ensure that the loan proceeds were spent on necessary repairs; fraud, alleging that she has been unable to live in her home for over a year, her health has deteriorated drastically, and the "emotional stress has been overwhelming"; and common counts. She sought general damages of \$300,000, and exemplary damages of \$3 million, based on allegations the department failed to "look after [her] best interests in the completion of the remodeling of her home by the

contractor" and did nothing to address her concerns about the inadequacy of the work done to her home.

Defendants demurred to the complaint, arguing that each of the four causes of action Woodall attempts to assert is fatally defective. They asserted the contract claim fails to allege the terms of the loan or how defendants breached the agreement and, as a matter of law, defendants had no duty to inspect the contractor's work; the common counts claim makes no sense, because it purports to allege that defendants received money for Woodall's use and benefit, when the contract claim asserts that defendants loaned money to Woodall; the fraud claim "is devoid of the allegations required by the form" and, in any event, is barred by defendants' immunity for injury arising from misrepresentation (Gov. Code, § 818.8); and the negligence claim fails to allege why defendants are responsible for the contractor's inadequate work and cannot survive because a lender owes no duties to the borrower beyond those expressed in the loan document.

Defendants also moved to strike the punitive damages claim, asserting they are immune from claims for exemplary damages. (Gov. Code, § 818.)

In her opposition to the demurrer, Woodall explained that a written summary of the facts underlying the dispute was inadvertently omitted from the complaint.¹ That summary would

¹ Woodall included the full text of the eight-page factual summary in her brief on appeal.

have alleged that the department loaned her \$100,000 for the rehabilitation of her home through the county's housing rehabilitation program, secured by a mortgage against her home; the department received the funds from the federal Housing and Urban Development Department (HUD). The department created the repair list, put the work out to bid, selected the contractor, supervised his work, made changes along the way (without Woodall's approval) to the repair list, signed off on the contractor's work, and made all payments to the contractor.

Woodall attached to her written opposition to the demurrer a "Housing Rehabilitation Construction Contract," dated September 2008, between herself and the contractor, which states that the county shall inspect and approve the work before any payments to the contractor are released by the county, and Woodall may terminate the contract only with the county's approval. Woodall also argued that, because the department acted as the intermediary between her and HUD, and represented her in all dealings with the contractor, the department owed her a duty to ensure that the work was up to code and that the house was "in livable condition" when the contractor was finished. Instead, an inspector retained by Woodall identified 87 deficiencies. In Woodall's view, the county breached its contract with her to ensure that the house was habitable when the work was completed and was negligent in representing her interests in connection with the repairs. She sought leave to amend her complaint.

Following an unreported hearing, the trial court struck the request for exemplary damages and sustained the demurrer without leave to amend.

DISCUSSION

I

Standard Of Review And Issues Presented

We apply well established rules of review. We review de novo a trial court's sustaining of a demurrer without leave to amend, exercising our independent judgment as to whether the complaint alleges sufficient facts to state a cause of action. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

We apply the abuse of discretion standard in reviewing a trial court's denial of leave to amend. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497-1498.) The plaintiff bears the burden of proving there is a reasonable possibility that the defect can be cured by amendment. (*Blank, at p. 318; Zelig v. County of Los Angeles, supra*, 27 Cal.4th at p. 1126.) A request for leave to amend, and the showing necessary to cure the defects, may be made for the first time on appeal. (Code Civ. Proc., § 472c, subd. (a); *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412.) If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, "leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment." (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747.)

II

*Woodall Has Shown A Reasonable Possibility She
Can Amend The Complaint To State A Cause Of Action*

Woodall's sole contention on appeal is that the trial court abused its discretion in denying her leave to amend her original complaint. She contends she can plead facts sufficient to constitute causes of action for breach of contract and negligence against defendants, if allowed to amend.

Based on the facts set forth in her opposition to the demurrer and in the text of her brief on appeal, we agree. (*Rakestraw v. California Physicians' Service, supra*, 81 Cal.App.4th at pp. 43-44.)

Woodall has shown a reasonable possibility she can amend the complaint to state a cause of action for breach of contract. A cause of action for breach of contract requires four elements: (1) a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damages. (See 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 515, p. 648.)

Woodall asserts on appeal she can amend the complaint to allege that she and the county are parties to a Lassen County housing rehabilitation program loan agreement, dated April 2008. She asserts that the terms of the contract provide that the county agreed to act as Woodall's representative over the life of the contract by (among other things) assisting her in obtaining repair bids; recommending and approving the winning bid; approving all change orders; resolving any disputes between Woodall and the contractor by making "the final determination of

Contract requirements"; and authorizing payment to the contractor. The county breached this contract, Woodall asserts, by approving work that was not done properly, does not meet building code standards, and does not satisfy the bid requirements that the contractor provide safe wiring, a fireplace, a stove, and refrigerator. As a result, Woodall's home is not habitable, and she has been forced to live with friends and relatives. Woodall also alleges the department violated the dispute resolution procedures required by the contract and the grievance procedures that govern the county's housing rehabilitation program and failed to respond to Woodall's complaints. These facts show a reasonable possibility Woodall can amend the complaint to state a cause of action for breach of contract.

Woodall contends these facts will also support a cause of action against the county for negligent disbursement of loan proceeds. (*Commercial Standard Ins. Co. v. Bank of America* (1976) 57 Cal.App.3d 241, 247-248 [having agreed to and undertaken to disburse the loan proceeds in accordance with the value of the construction as it progressed, bank owed to owner the duty to exercise reasonable care in so doing].)

Defendants respond, much as they argued in the trial court, that Woodall cannot amend her complaint to state a claim against them because they are protected from liability as a matter of law by Civil Code section 3434, which states that one who lends for the repair or improvement of real property "shall not be held liable to third persons for any loss or damages" from a

defect in the repair or improvement “unless such loss or damage is a result of an act of the lender outside the scope of the activities of a lender of money” (See also *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096, fn. 6.) This statute does not provide an absolute shield from liability as defendants contend. Not only is Woodall a party, not a “third person,” but Woodall asserts that defendants acted as her agent in hiring, supervising, and approving payments from Woodall’s loan proceeds to the contractor. Such actions as she asserts she can allege in an amended complaint are *not* characteristic of a “financial institution engaged in its conventional role as a lender of money” (*ibid.*) and may give rise to liability.

Given the judicial policy of liberality in allowing amendments to pleadings, Woodall must be afforded an opportunity to amend her complaint to allege the elements of her breach of contract action and to allege facts showing that defendants were negligent in the disbursement of her loan proceeds or otherwise.²

² It is true that public entities such as the county are not liable in tort, except as provided by statute. (Gov. Code, § 810 et seq.; *Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983, 990-991.) But one such statute is Government Code section 815.6, which provides: “Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.” We express no opinion here as to whether applicable state and/or federal regulations governing the disbursement of such housing rehabilitation funds give rise

The trial court clearly abused its discretion by refusing Woodall's request to amend her pleading. If Woodall chooses to amend, after remand, defendants will have a new opportunity to demur to the amended pleading.

Because, in Woodall's view, "[i]t seems doubtful that someone filing a claim against the county itself will receive a fair hearing" in the Lassen County Superior Courts, she also asks that her complaint, once reinstated, be transferred to another county. A request to change venue,³ however, must be made in the trial court in the first instance. (See Code Civ. Proc., § 397, subd. (b).) Woodall can request this on remand.

DISPOSITION

The judgment of dismissal is reversed. The case is remanded to the trial court with directions to allow Woodall to amend her complaint. Woodall shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1)-(2).)

We concur: ROBIE, Acting P. J.

BUTZ, J.

MAURO, J.

to such a duty under the facts here, as Woodall asserts she could allege in an amended complaint.

³ The rules designating a particular county or counties within California as the proper geographic place for trial of the action are called "venue" rules.