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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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RICK SILLMAN et al.,

Plaintiffs and Appellants,

v.

JOHN WALKER et al.,

Defendants and Respondents.

C069237

(Super. Ct. No. 150224)

After plaintiffs Rick Sillman and Kim Laird filed their fourth amended complaint for breach of contract and fraud, defendants John Walker and Lisa Talcott moved for judgment on the pleadings. Plaintiffs did not oppose the motion, and the trial court granted it.

In this pro se judgment roll appeal from the ensuing judgment, plaintiffs contend the appeal should be stayed until the trial court can determine whether defendants violated the automatic stay triggered by Sillman's bankruptcy petition, assert that the trial court should have granted a continuance of the hearing on defendants' motion, and argue the merits of their claims against defendants. Because plaintiffs have failed to provide an

adequate record to assess their first two contentions, and their complaint fails to state a cause of action against defendants, we affirm the judgment.

## BACKGROUND

In accordance with the legal principles governing our review of the trial court's grant of a motion for judgment on the pleadings, the following factual recitation is based on the allegations of the plaintiffs' fourth amended complaint and such matters as may be subject to judicial notice. (See *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515-516; *Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 116.)

### *The Transaction*

In February 2005, Sillman purchased from Walker a mobile home and approximately 2.1 acres of land on Powtan Trail in Oroville (the Powtan Trail property).<sup>1</sup> In connection with that transaction, Sillman and Walker signed a written "Manufactured Home Purchase Agreement" and a "Buyer's Inspection Advisory," in which Sillman acknowledged Walker had a duty to make the property available for inspection and to disclose known material facts affecting the value, but no duty to inspect and no "obligation to repair, correct or otherwise cure known defects" or defects discovered by Sillman.<sup>2</sup> The purchase was financed in part by Walker: Sillman and Walker signed a "Seller Financing Addendum and Disclosure" in or about May 2005, pursuant to which Walker agreed to extend credit to Sillman for part of the purchase price, in exchange for

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<sup>1</sup> The purchase contract states that the property is located in Oroville. Other documents state that the property is located in Yankee Hill.

<sup>2</sup> The documents executed at or about the time of the transaction are described in detail in the operative complaint, but appear to have been submitted to the trial court as part of plaintiffs' "objection" to defendants' demurrer to the second amended complaint.

monthly payments and a balloon payment due in five years. Sillman executed a promissory note and deed of trust in Walker's favor.<sup>3</sup>

After the purchase, Sillman and his daughter, plaintiff Kim Laird, resided on the Powtan Trail property. As of the filing of the operative complaint, Sillman still lived there. Defendant Talcott owned the adjacent parcels, where she and Walker lived; they subsequently moved to Montana.

Sometime in late 2008 or early 2009, Sillman sought bankruptcy protection. During the pendency of the Sillman's bankruptcy, defendants -- who plaintiffs contend had not kept accurate records of plaintiffs' payments on the property -- sought relief from the automatic stay, and Sillman's bankruptcy petition was inadvertently dismissed. Sillman's bankruptcy petition was reinstated, but not before foreclosure proceedings were initiated and Walker acquired the property at the resulting trustee's sale in April 2009.

#### *The Pleadings*

Plaintiffs' original complaint (filed in May 2010) alleged causes of action for breach of contract and fraud arising out of the 2005 real estate transaction. The original complaint is not in the record on appeal; nor are the first, second or third amended complaints. Neither are defendants' demurrers to these complaints, which were all sustained with leave to amend.

The fourth amended (operative) complaint against defendants, filed June 13, 2011, purports to allege causes of action for breach of contract, fraud and deceit, and "intentional tort." It seeks to recover money spent by plaintiffs to repair "undisclosed defects" and "structural damages," as well as punitive damages.

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<sup>3</sup> Because we granted plaintiffs' motion to augment the appellate record to include these documents (and others) shortly before plaintiffs filed their appellate brief, we do not address plaintiffs' discussion of their prior efforts to include various exhibits in the clerk's transcript.

The breach of contract claim states it is based on the 2005 written real estate purchase agreement executed by Walker and Sillman and “oral agreements” by Walker to, within 30 days of the close of escrow, remove all trash on the property, and show Sillman the location of county survey markers. Plaintiffs also allege Walker breached his oral promises to Sillman to reduce the monthly payments or purchase price “when the condition of the home or property was not as presented”; to “[w]ork with plaintiffs if there were any problems about the condition of the subject property, above what was disclosed”; to “[w]ork with plaintiffs if they ran into any financial difficulties” and to “[r]estore the section of land removed from” the property purchased and added to the neighboring parcel owned by Talcott. According to plaintiffs, “the contract was breached by Walker from the beginning.”

The fraud claim is based on allegations Walker intentionally concealed with paint and new flooring several major defects of the home, including water damage to walls, flooring, broken ceiling beams, and mold damage, all caused by a leaky roof, and that both defendants knew and concealed that a section of Sillman’s property had been removed for the benefit of Talbott’s neighboring parcels. Notwithstanding that they lived on the property after its purchase in early 2005, plaintiffs allege they failed “to closely look at the basic components of the house and property” until 2007, when they discovered the damage.

Plaintiffs’ “intentional tort” cause of action alleges plaintiffs lost hundreds of trees on the property to undisclosed infestation and had to spend time and money making repairs to “undisclosed defects” on the property. Plaintiffs allege they are entitled to recover punitive damages because defendants intended plaintiffs to rely upon defendants’ knowingly false representations.

Simultaneously with the fourth amended complaint, plaintiffs filed a separate “complaint” seeking damages and preliminary and permanent orders restraining defendants from evicting plaintiffs from their property on Powtan Trail, or selling or

giving away plaintiffs' property or the neighboring parcels; making topographical changes to the landscape; building any new buildings on the parcels adjacent to plaintiffs' or blocking Powtan Trail with an "undersized gate."

Plaintiffs also filed a "complaint to set aside trustee sale," that they describe as an "ancillary attachment for declaratory relief," in which they asserted that the trustee's deed by which Walker re-acquired the Powtan property in April 2009 was obtained by fraud.

*Defendants' Motion for Judgment On the Pleadings*

Defendants answered the complaint and moved for judgment on the pleadings. Neither defendants' answer nor their motion appear in the record on appeal.

At the unreported hearing on defendants' motion, plaintiffs appeared and moved for a continuance; the minutes of that hearing indicate plaintiffs' motion for a continuance was denied, and defendants' motion for judgment on the pleadings was granted. The order granting defendants' motion states that "no opposition to the motion having been filed by plaintiffs, defendants are entitled to judgment in this action against plaintiffs."

DISCUSSION

I

*Standards Of Review*

On appeal, we must presume the trial court's judgment is correct. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Thus, we adopt all intendments and inferences to affirm the judgment or order unless the record expressly contradicts them. (See *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583.)

It is the burden of the party challenging a judgment on appeal to provide an adequate record to assess error. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) Thus, an appellant must not present just an analysis of the facts and legal authority on each point made; he or she must support arguments with appropriate citations to the material facts in the record. If an appellant fails to do so, the argument is forfeited.

(*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239-1240.)

Plaintiffs are not exempt from the rules governing appeals because they are appearing in propria persona. A party representing himself or herself is to be treated like any other party and is entitled to the same, but no greater, consideration than other litigants and attorneys. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247; see *Leslie v. Board of Medical Quality Assurance* (1991) 234 Cal.App.3d 117, 121 [self-represented parties are held to “the same ‘restrictive procedural rules as an attorney’ ”].)

Because plaintiffs have elected to proceed on a clerk’s transcript -- and no transcript or settled statement of the hearing on defendants’ motion for judgment on the pleadings -- we must treat this as an appeal “on the judgment roll,” to which the following rules apply: “ ‘Error must be affirmatively shown by the record and will not be presumed on appeal [citation]; the validity of the judgment on its face may be determined by looking only to the matters constituting part of the judgment roll [citation]; where no error appears on the face of a judgment roll record, all intendments and presumptions must be in support of the judgment [citation] [citation]; the sufficiency of the evidence to support the findings is not open to consideration by a reviewing court [citation]; and any condition of facts consistent with the validity of the judgment will be presumed to have existed rather than one which would defeat it [citation].’ ” (*Ford v. State of California* (1981) 116 Cal.App.3d 507, 514, overruled on other grounds in *Duran v. Duran* (1983) 150 Cal.App.3d 176, 177-179; *Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082-1083; Cal. Rules of Court, rule 8.163.)

In sum, our review of a judgment roll appeal is limited to determining whether any error “appears on the face of the record.” (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521.)

## II

### *Plaintiffs Have Shown No Basis for Staying the Appeal*

Plaintiffs begin their appellate brief by asserting that their appeal should be stayed because the case poses the “federal issue” of whether defendants violated the automatic stay associated with Sillman’s bankruptcy petition in order to “affect an illegal foreclosure and related issues requiring determination by a federal magistrate” and “it is extremely likely the federal court will have to make such a determination.”

The “automatic stay” is an injunction issuing from the authority of the bankruptcy court, whose purpose “ ‘ “is to give the debtor a breathing spell from his creditors, to stop all collection efforts, harassment and foreclosure actions” ’ ” and to prevent “ ‘ “diminution of the debtor’s estate.” ’ ” (*Cavanagh v. California Unemployment Ins. Appeals Bd.* (2004) 118 Cal.App.4th 83, 90; *Gruntz v. County of Los Angeles (In re Gruntz)* (9th Cir. 2000) 202 F.3d 1074, 1082 (*Gruntz*).) An automatic stay usually precludes “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . .” (11 U.S.C. § 362(a)(6); see *Cavanagh v. California Unemployment Ins. Appeals Bd.*, *supra*, 118 Cal.App.4th at p. 90.) Actions taken in violation of the automatic stay are void, and federal courts have the final authority to determine the scope and applicability of the automatic stay. (*Gruntz, supra*, 202 F.3d at pp. 1082-1083.)

Here, however, plaintiffs have shown no basis for us to conclude that this matter should be stayed while the federal bankruptcy court determines whether defendants’ violated the automatic stay that arose by virtue of Sillman’s bankruptcy petition. The record on appeal is bereft of any actual evidence that Sillman’s bankruptcy was reinstated after it was dismissed, that it is currently pending,<sup>4</sup> or that the federal court in which the

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<sup>4</sup> The only indication in the appellate record that Sillman’s bankruptcy was ever reinstated after its dismissal is an unsworn letter addressed “[t]o whom it may concern”

alleged bankruptcy is pending has been asked to determine whether defendants' actions violated the automatic stay. Because the record does not support plaintiffs' request, we must deny it.

### III

#### *Plaintiffs have Failed to Show Reversible Error*

##### *A. Plaintiffs Have Not Shown the Trial Court Erred in Denying Their Request for a Continuance*

Plaintiffs argue the trial court “erred by ruling on a motion that effectively would halt an entire cause of action when [Sillman] was unable to oppose [defendants’ motion] in the time allowed due to his verified mental state” and the “press of casework” associated with preparing discovery requests. We infer from this assertion that plaintiffs contend the trial court erred in denying their request for a continuance of the hearing on defendants’ motion for judgment on the pleadings.

First, plaintiffs make no citation to the record to support this contention. Accordingly, we must deem it forfeited. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Maria P. v. Riles*, *supra*, 43 Cal.3d at pp. 1295-1296; *City of Lincoln v. Barringer*, *supra*, 102 Cal.App.4th at pp. 1239-1240.)

Even were it not forfeited, this contention lacks merit. A party does not have a right to a continuance as a matter of law. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170.) Continuances are disfavored, and the trial court may grant a continuance “only on an affirmative showing of good cause requiring the continuance.” (Cal. Rules of Court, rule 3.1332(c) [governing trial continuances].) “Reviewing courts must uphold a trial court’s choice not to grant a continuance unless the court has abused its discretion in so doing.” (*In re*

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by Michael O. Hays, who states he represented Sillman in his bankruptcy proceedings, and that a “Debtor’s Exparte Application and Request to Reopen Case” filed on Sillman’s behalf was “very quickly granted.”

*Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823.) The party whose request for a continuance was denied bears the burden of showing the trial court abused its discretion. (*Mahoney v. Southland Mental Health Associates Medical Group, supra*, at p. 170; e.g., *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 713, 716 [good cause for continuance of summary judgment motion where the plaintiff's attorney averred that he had been hospitalized for emergency surgery and for that reason had not seen moving papers until 11 days after they were filed and served].)

Absent a reporter's transcript of the hearing on plaintiffs' motion for a continuance, and lacking the written motion (if there was one) indicating the basis for plaintiffs' request, we cannot entertain plaintiffs' suggestion the trial court abused its discretion in denying the request. (See *National Secretarial Service, Inc. v. Froehlich, supra*, 210 Cal.App.3d 510, 521; Cal. Rules of Court, rule 8.163.) Rather, we presume official duties have been regularly performed (Evid. Code, § 664), and this presumption applies to the actions of trial judges. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1462, fn. 5; *Olivia v. Suglio* (1956) 139 Cal.App.2d 7, 9 ["If the invalidity does not appear on the face of the record, it will be presumed that what ought to have been done was not only done but rightly done"].) Under these circumstances, we find no basis to disturb the trial court's exercise of its discretion to rule on defendants' motion rather than grant a continuance.

#### *B. Plaintiffs Do Not Show the Court Erred in Granting Judgment on the Pleadings*

Code of Civil Procedure section 438 gives the trial court authority to grant a defendant's motion for judgment on the pleadings if the court determines it has no jurisdiction over the subject matter of the complaint, or the complaint does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 438.)

A motion for judgment on the pleadings is equivalent to a general demurrer, and the trial court treats all properly pleaded material facts in the complaint as true.

(*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.) On appeal, we review the matter de novo, and render an independent judgment on whether a cause of action has been stated. (*Ibid.*; *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 198; *Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc.* (2006) 138 Cal.App.4th 1215, 1220.)

But because judgments and orders are presumed to be correct, persons challenging them must affirmatively show reversible error. Thus, for example, although we conduct a de novo review of the order that granted defendants' motion for judgment on the pleadings, plaintiffs nevertheless have the burden of demonstrating to this court that the trial court made a reversible error when it granted such motion.

Here, plaintiffs have not met that burden. They mistakenly describe defendants' motion as one for summary judgment, to which different standards and tests apply. They fail to support the argument portion of their appellate brief with any citation to facts in the record, as required. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Maria P. v. Riles*, *supra*, 43 Cal.3d at pp. 1295-1296; *City of Lincoln v. Barringer*, *supra*, 102 Cal.App.4th at pp. 1239-1240.) They make no assertion that the trial court erred in granting defendants' motion for judgment on the pleadings, a motion that they made no effort to oppose on the merits. Indeed, plaintiffs have provided neither defendants' moving papers, nor a reporter's transcript or settled statement of the hearing on defendants' motion, and the record is completely silent on the basis for the trial court's ruling. In their appellate brief, plaintiffs simply re-assert that defendants knowingly misrepresented the condition of the property, misrepresented its boundaries, and breached fiduciary obligations to plaintiffs.

Notably, plaintiffs do not explain why their breach of contract claims are not barred by the applicable statutes of limitations. Plaintiffs allege defendants breached the February 2005 written agreement "from the beginning," and that they breached Walker's oral promises to perform certain acts within 30 days of closing escrow. The statute of

limitations for claims based on the agreements made in connection with the 2005 transaction is four years for actions on the written contracts (Code Civ. Proc., § 337, requiring them to have been filed in or about Feb. 2009) and two years based on Walker's alleged oral promises made at or about the time of the purchase (Code Civ. Proc., § 339, requiring the claims to have been filed in or about Feb. 2007). The original complaint, filed in May 2010, would certainly render too late plaintiffs' breach of contract claims based on oral or written promises made about the time of the February 2005 purchase and breached soon thereafter. When a complaint shows the action would be barred by the statute of limitations, a judgment based on the pleadings is proper. (See *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403 [applying rule to demurrer]; cf. *Bettencourt v. Hennessy Industries, Inc.* (2012) 205 Cal.App.4th 1103, 1111 [like a general demurrer, motion for judgment on the pleadings tests the sufficiency of the complaint].)

Finally, plaintiffs' alleged fraud claims fail to state a cause of action. "The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." [Citations.] (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Each element must be alleged with particularity. (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 156.) It is not, for example, sufficient for a party merely to allege he did not discover the alleged fraud before a certain time: he must allege "when the fraud was discovered, the circumstances of the discovery, what the discovery was, and why it was not discovered sooner." (*Tognazzini v. Tognazzini* (1954) 125 Cal.App.2d 679, 686-687.)

Here, plaintiffs make two categories of "fraud" allegations: (1) that Walker concealed defects in the property, which plaintiffs failed to discover until sometime in 2007, and (2) that the trustee's deed by which Walker re-acquired the Powtan property in

April 2009 was obtained by fraud. Both categories of fraud allegations are articulated in the most conclusory fashion, and neither alleges that plaintiffs justifiably relied on misrepresentations by defendants. To allege actual reliance with the requisite specificity, “ ‘[t]he plaintiff must plead that he believed the representations to be true . . . and that in reliance thereon (or induced thereby) he entered into the transaction. [Citation.]’ [Citation.]” (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062-1063.) Plaintiffs’ allegations do not satisfy the minimum requirements for stating a fraud cause of action.

Recalling that, on a judgment roll appeal we indulge all intendments and presumptions in support of the judgment and presume to exist “ ‘any condition of facts consistent with the validity of the judgment’ ” (*Ford v. State of California, supra*, 116 Cal.App.3d at p. 514), we note plaintiffs were allowed multiple opportunities to state a viable cause of action against defendants. On this record, we presume in favor of the judgment that the trial court sustained defendants’ demurrers to prior complaints on the grounds plaintiffs failed to state a cause of action based on the applicable statute of limitations or otherwise, and further presume that the trial court ultimately granted judgment on the pleadings because plaintiffs were unable after several attempts to amend their complaint to state a cause of action against defendants. For the trial court to have done so would not have been error.

Accordingly, we conclude judgment was properly granted.

#### DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

NICHOLSON, Acting P. J.

We concur:

MURRAY, J.

HOCH, J.