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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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BERNARDINA T. OLIVA et al.,

Plaintiffs and Appellants,

v.

DELTA BANK, N.A.,

Defendant and Respondent.

C074962

(Super. Ct. No.  
39201200280855CUORSTK)

Plaintiffs Bernardina T. Oliva (Bernie Oliva), Mary Oliva, and Joseph Oliva (collectively the Olivas) appeal from a judgment of dismissal in favor of Delta Bank, N.A. (Delta Bank) after the trial court sustained Delta Bank's demurrer to the first amended complaint without leave to amend. This ended the Olivas' lawsuit against Delta Bank for tortious interference with a contract.

The Olivas contend the trial court erred because they had standing to bring the lawsuit, and regardless, they could have amended their complaint to allege that Bernie

Oliva was to be the beneficiary of a certain note and deed of trust (later referred to as to the Oliva note and Oliva deed of trust). In sustaining Delta Bank’s demurrer, the trial court reasoned that the Olivas could not establish the first element of tortious interference with a contract, which is that “they are a party to the contract in which they allege interference,” as Bernie Oliva “assigned the Purchase Agreement to [LandAmerica 1031 Exchange Services], and the note was executed in favor of and delivered to [LandAmerica 1031 Exchange Services].” Because this “defect could not be cured through amendment,” the court sustained the demurrer without leave to amend. We affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

In December 2006, Bernie Oliva and Hand Properties LLC (Hand Properties) entered into a purchase and sale agreement for real property on Eighth Street in Stockton (the Oliva property). The Oliva property had been owned by Tom Oliva and Bernardina M. Oliva before they died, and as of November 2006, title to the Oliva property had been vested in their heirs (plaintiffs). Harold Hand and Sharless Hand control Hand Properties and Hand Management LLC, and Hand Management LLC is the managing member of Hand Properties. Hand Properties agreed to buy the Oliva property for \$2.16 million, and Bernie Oliva agreed to provide Hand Properties financing of \$1.1 million. Addendum No. 2 to the purchase and sale agreement stated that “both parties agree to cooperate with each other for the purpose of affecting a tax deferred exchange(s) pursuant to IRS 1031.[<sup>1</sup>] (a) c[lose] o[f] e[scrow] hereunder is not delayed, (b) the cooperating party shall incur no additional expense by reason of such cooperation, and (c) the exchange party

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<sup>1</sup> A 1031 exchange is “an exchange of investment property to defer capital gains taxes.” (*McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512, 516, fn. 2.)

shall hold the cooperating party harmless from any and all liability by reason of the cooperating party's participation in such exchange.”

After the purchase and sale agreement with Hand Properties was executed, Bernie Oliva entered into an agreement with LandAmerica 1031 Exchange Services to relinquish the Oliva property and acquire a replacement property as part of the 1031 exchange. On April 26, 2007, Bernie Oliva executed a grant deed of the Oliva property to Hand Properties and assigned her interest in the purchase and sale agreement to LandAmerica 1031 Exchange Services. On the same day, Hand Properties executed and delivered a promissory note for \$1.1 million and a deed of trust to the Oliva property (Oliva note and Oliva deed of trust) to LandAmerica 1031 Exchange Services. The Oliva deed of trust provided that it was subordinate to a deed of trust in favor of Delta Bank (Delta deed of trust). The Oliva note's subordination clause provided as follows: “Subordination: Lender agrees to subordinate its note and deed of trust to second position financing for Maker to obtain financing for the specific and restricted purpose of property improvements. Such improvements shall be but not limited to, architectural and engineering work, on-site and off-site improvements, grading, and general construction, parking and building construction.”

Also on April 26, 2007, Hand Properties executed and delivered a note (Delta note) in the amount of \$1,688,510 to Delta Bank and executed and recorded the Delta deed of trust.

Escrow closed on the Oliva property on April 30, 2007. Escrow closed on the replacement properties in August 2007. Thereafter, Bernie Oliva communicated with LandAmerica 1031 Exchange Services regarding the assignment of the Oliva note and Oliva deed of trust back to her. The last Bernie Oliva heard from LandAmerica 1031 Exchange Services was that it was working with Old Republic Title Company to record the assignments. But the Oliva note and the Oliva deed of trust were not conveyed back

to Bernie Oliva because in 2008 LandAmerica 1031 Exchange Services filed for bankruptcy protection. Hand Properties is the record owner of the Oliva property.

In April 2012, the Oliva estates were closed. The final distribution orders provided for the transfer of all title and rights in the Oliva note and the Oliva deed of trust to Bernie Oliva (51 percent), Mary Oliva (24.5 percent), and Joseph Oliva (24.5 percent).

In May 2012, the Olivas filed a lawsuit against Hand Properties, Hand Management LLC, Harold Hand, Sharless Hand, Delta Bank, Old Republic Title Company, and others, alleging causes of action for reformation, injunction and damages. The theory of the lawsuit was that Bernie Oliva was unaware in April 2007 that the Oliva deed of trust provided it was subordinate to another note secured by a deed of trust, namely, the Delta note and Delta deed of trust, as the subordination was not provided for in the purchase agreement. Bernie Oliva first learned of the existence of the Delta note and Delta deed of trust when an employee of Hand Properties provided her with a copy of the first notice of default by Hand Properties under the Delta note.<sup>2</sup>

In September 2012, the Olivas filed an amended complaint (the complaint) that, as relevant here, alleged tortious interference with a contract by Delta Bank. The theory of the lawsuit was that Delta Bank “willfully interfered with the security interests of [the Olivas] by . . . directing or permitting the recording of the Delta Deed of Trust with the

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<sup>2</sup> The trial court sustained the demurrers to amended complaints involving all the Hand defendants and Old Republic Title Company and then entered judgment of dismissal in favor of those defendants.

Plaintiffs’ notice of appeal initially included the Hand defendants and Old Republic Title Company. But plaintiffs abandoned the appeal as to the Hand defendants because of a confidential settlement with them and then stipulated to a partial dismissal of the appeal as to Old Republic Title Company because of a settlement with it as well.

Thus, this appeal involves only Delta Bank.

intent to induce the breaches of the Purchase Agreement and the Oliva Note, and which resulted in such breaches.”

Delta Bank filed a demurrer to the complaint, contending that because the Olivas “are not a party to either agreement [the purchase agreement that was assigned to LandAmerica 1031 Exchange Services or the note that was between Hand Properties and LandAmerica 1031 Exchange Services] and no longer have an interest in the agreements, [they] cannot state a claim for damages based on interference with these contracts.”

The trial court sustained Delta Bank’s demurrer. The trial court reasoned that the Olivas could not establish the first element of tortious interference, which is that “they are a party to the contract in which they allege interference,” as Bernie Oliva “assigned the Purchase Agreement to [LandAmerica 1031 Exchange Services], and the note was executed in favor of and delivered to [LandAmerica 1031 Exchange Services].” And because this “defect[] . . . can [not] be cured through amendment,” the court sustained the demurrer without leave to amend.

## DISCUSSION

### I

#### *The Olivas Cannot Satisfy The First Element Of Tortious Interference With A Contract Because They Are Not Parties To The Oliva Note And Oliva Deed Of Trust*

The Olivas contend the trial court erred in sustaining Delta Bank’s demurrer to the complaint with regard to their cause of action for tortious inference with a contract. The trial court ruled that because the Olivas “assigned the Purchase Agreement to [LandAmerica 1031 Exchange Services], and the note was executed in favor of and delivered to [LandAmerica 1031 Exchange Services],” the Olivas could not establish the first element of tortious interference, which is that “they are a party to the contract in which they allege interference.” The trial court was correct.

In their complaint, it is clear that the Olivas relinquished their interest in the Oliva property. In their complaint, they admit they assigned all of their rights and interests in

the Oliva property to Hand Properties via a grant deed of the Oliva property on April 26, 2007, that was executed by Bernie Oliva to Hand Properties. And they admit they assigned their interest in the purchase and sale agreement to LandAmerica 1031 Exchange Services. The “assignment and acceptance purchase agreement” between the Olivas and LandAmerica 1031 Exchange Services plainly states, “Assignor assigns, transfers and conveys to Assignee all of Assignor’s right, title and interest in and to . . . the Purchase Agreement . . . .” The Olivas admit that all of this was done as part of a 1031 exchange for favorable tax treatment. In a section 1031 exchange, where one piece of real property is exchanged for property of a like kind, the realization of gain is deferred. (26 U.S.C. § 1031; Greenwald & Bank, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2014) § 13:304, p. 13-58.) In such case, the adjusted basis of the property sold is transferred to the property purchased and any gain due to depreciation is deferred until the new property is sold. (Greenwald & Bank, *supra*, § 13.322, pp. 13-67-13-68.) A 1031 exchange makes no provision for retaining any interest in the title to the property being exchanged for another. Once Bernie Oliva assigned the Olivas’ interest in the Oliva property to LandAmerica 1031 Exchange Services, any right or interest they may have had in the property was transferred to LandAmerica 1031 Exchange Services. “Cases have held that a general demurrer for failure to state a cause of action should be sustained where the complaint may state a cause of action in someone, but not in the plaintiff.” (*Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 19.) That is the case here.

## II

*The Trial Court Properly Denied The Olivas Leave To Amend Their  
Complaint Because They Cannot State A Cause Of Action  
For Tortious Interference Against Delta Bank*

The Olivas contend the trial court also erred in failing to allow them to amend their complaint to state a cause of action for tortious interference with a contract against

Delta Bank because they are real parties in interest or, at a minimum, third party beneficiaries under the purchase agreement, the Oliva note, and the Oliva deed of trust. They add that “additional facts could be pleaded to further illustrate the parties’ understanding and intent that Bernie Oliva was to be the beneficiary of the Oliva Note and Oliva Deed of Trust, including the fact that Hand Properties actually made payments to Bernie under the Oliva Note totaling approximately \$137,000 without objection from [LandAmerica 1031 Exchange Services].”

The Olivas claim that their damages stem from the fact that the Oliva note and the Oliva deed of trust were not assigned to them by LandAmerica 1031 Exchange Services, and that LandAmerica 1031 Exchange Services “was in the process of conveying those instruments to Bernie [Oliva] when its bankruptcy intervened.” Thus, by the Olivas’ own admissions, their damages were not caused by the actions of Delta Bank.

Nor would the Olivas be made whole if the Delta deed of trust had been subordinated to the Oliva note and Oliva deed of trust, as the Olivas understood they would be. Their damages stem from the fact that LandAmerica 1031 Exchange Services failed to assign the Oliva note and the Oliva deed of trust back to them. But, if the Delta note and Delta deed of trust had been subordinated to the Oliva note and the Oliva deed of trust, the Olivas would be in the exact same position. The alleged failure of LandAmerica 1031 Exchange Services to assign the Oliva note and Oliva deed of trust back to the Olivas is the basis of the Olivas’ damages, which has nothing to do with the Delta note or the Delta deed of trust.<sup>3</sup> The Olivas would be in the same position even if

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<sup>3</sup> Indeed, in a declaration Bernie Oliva signed in support of a failed request for a preliminary injunction prohibiting Delta Bank from selling the Oliva property, Bernie Oliva declared that “it was her understanding that LandAmerica 1031 Exchange Services was obligated to assign the Oliva note and Oliva deed of trust to me as executor of the Oliva estates” and that she had not received interest payments since January 2011 on the Oliva note “from or on behalf of Hand Properties.”

the Delta note and Delta deed of trust had been subordinated to the Oliva note and the Oliva deed of trust.

Thus, the alleged failure of LandAmerica 1031 Exchange Services to assign the Oliva note and the Oliva deed of trust back to the Olivas, as the basis for damages, has nothing to do with the Delta note and Delta deed of trust. To prove causation in an intentional tort case (such as the one here), the plaintiff must prove that the defendant's conduct was a substantial factor in causing the alleged harm. (*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 391.) Here, the Olivas cannot do that, as their alleged harm stems from actions taken by LandAmerica 1031 Exchange Services.

#### DISPOSITION

The judgment is affirmed. Delta Bank shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

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ROBIE, J.

We concur:

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BLEASE, Acting P. J.

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MURRAY, J.