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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JANELLE T. KANESHIRO,

Plaintiff and Appellant,

v.

COUNTRYWIDE HOME LOANS
SERVICING, L.P. et al.,

Defendants and Respondents.

D059384

(Super. Ct. No. 73-2010-00075115-
CU-BC-SC)

APPEAL from a judgment of the Superior Court of San Diego County, William S. Cannon, Judge. Affirmed.

This case involves a lender's payment of delinquent property taxes on a residence on which it held two deeds of trust. Contrary to the arguments of the owner of the residence, nothing in the terms of a loan modification agreement the owner and the lender entered into prevented the lender from paying the delinquent taxes and then recouping the amount paid from the owner by increasing the monthly payments owed on the deeds of

trust. Accordingly, we affirm a judgment entered in favor of the lender following an order sustaining the lender's demurrer without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

In 2007 plaintiff and appellant Janelle T. Kaneshiro purchased a home in Chula Vista. At the time of the purchase she obtained two loans from defendant and respondent Countrywide Home Loans, Inc. (Countrywide), in the total amount of \$1.4 million; the loans were secured by two deeds of trust on the home.

In 2008 Kaneshiro defaulted on the loans. Thereafter on July 14, 2008, Kaneshiro and defendant and respondent Countrywide Home Loans Servicing, L.P. (Servicing) entered into a loan modification agreement. The loan modification agreement reduced the principal due on the deeds of trust and reduced the monthly payments on the deeds of trust to \$5,164.05. The loan modification agreement required that Kaneshiro pay Servicing \$1,714.78 in foreclosure costs and delinquent loan payments of \$13,240.22.

Although Kaneshiro made the specific payments required by the loan modification agreement, at the time of the modification and thereafter the real property taxes due on the residence were unpaid. In her complaint Kaneshiro alleges that at the time she entered into the loan modification agreement she had made an agreement with the County of San Diego (the county) to pay the delinquent real property taxes in installments. She further alleged that during the negotiation over the loan modification Servicing agreed the delinquent taxes would be " 'tacked' onto the back of the princip[al]" due on the deeds of

trust and she did not need to make a 20 percent payment to the county but instead could simply make that payment to the defendants.

Notwithstanding Kaneshiro's understanding of her agreement with the county and the defendants, the defendants paid the county the entire amount due in delinquent taxes. Then the defendants added \$2,995.15 to Kaneshiro's monthly payment obligation on the loans as a means of recouping the amounts paid to the county on Kaneshiro's behalf.

Kaneshiro filed a complaint against Countrywide, Servicing, and Servicing's successor, defendant and respondent Bank of America, N.A. By way of a first amended complaint Kaneshiro alleged causes of action for breach of the modification agreement, breach of the modification agreement's covenant of good faith and fair dealing, and tortious interference with her contract with the county. The defendants filed a demurrer to the first amended complaint and the trial court sustained the demurrer without leave to amend. Thereafter, the trial court entered a judgment of dismissal in the defendants' favor.

I¹

In reviewing the order sustaining a demurrer, we assume the truth of Kaneshiro's factual allegations, but not her contentions, deductions or conclusions of fact or law.

¹ Kaneshiro has asked that we take judicial notice of a statement she received from defendants which included an amount due in an escrow account. We deny her request. The statement has no relevance to the issues litigated on the defendants' demurrer and was not a part of the record below. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

(*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6; *County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1010.) We review the court's order declining to give Kaneshiro leave to amend for abuse of discretion. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) With respect to its request for leave to amend, on appeal Kaneshiro bears the burden of showing there is a reasonable likelihood she can cure any defects in her complaint. (*Ibid.*)

II

With respect to Kaneshiro's allegation the defendants breached the modification agreement, the trial court found that nothing on the face of the modification agreement altered the defendants' right under the underlying deeds of trust to protect their security by paying delinquent property taxes and thereafter increasing Kaneshiro's monthly obligation as a means of recouping the amounts paid. The trial court rejected Kaneshiro's argument that in the alternative the first amended complaint alleged the existence of an enforceable oral agreement that any amount paid in taxes would be added to the principal on the loans and payable over the term of loans. We agree with these conclusions of the trial court and its ultimate conclusion that therefore the first amended complaint does not allege a breach of contract.

Our review of the modification agreement and the underlying deeds of trust shows that, as the trial court found, the modification agreement expressly preserves the parties' rights under the terms of the underlying deeds of trust except those rights expressly modified by the modification agreement. Nothing on the face of the modification

agreement altered the defendants' right under the deeds of trust to pay delinquent property taxes and to require repayment upon notice to Kaneshiro. Thus, the express terms of the modification agreement permitted the defendants to both pay the delinquent taxes and require prompt reimbursement from Kaneshiro.

Contrary to Kaneshiro's argument, the modification agreement and the deeds of trust were not subject to any enforceable unwritten agreement or understanding. The statute of frauds required the deeds of trust on Kaneshiro's home be in writing. (See Civ. Code, § 1624, subd. (a); *Secrest v. Security National Mortgage 2002-2* (2008) 167 Cal.App.4th 544, 552 (*Secrest*)). Consequently, any agreement modifying the deeds of trust was also subject to the statute of frauds. (*Id.* at p. 553, citing Civ. Code, § 1698, subd. (a).) The modification agreement itself, because it was in writing and signed by both Kaneshiro and the defendants, satisfied the statute of frauds. However, the alleged unwritten oral agreement to add the delinquent taxes to the principal amount due on the loan and permit Kaneshiro to pay them over the remaining term of the loans, does not satisfy the statute of frauds.

In this regard, like the trial court we reject Kaneshiro's contention that her payment of the amounts required by the terms of the loan modification agreement were sufficient to estop the defendants from relying on the statute of frauds. While it is true that where an oral agreement has been partly performed by one party courts have found an estoppel to rely on the statute of frauds, those cases have uniformly involved more than the mere payment of money. In *Secrest*, the plaintiffs asserted that a payment they made to a

lender under the terms of an oral forbearance agreement gave rise to such an estoppel. In rejecting this contention, the court stated: " 'Before a party can be estopped to assert the statute [of frauds] due to the other's part performance, it must appear that a sufficient change of position has occurred so that the application of the statutory bar would result in an unjust and unconscionable loss, amounting in effect to a fraud. [Citations.]. . . . The payment of money is not "sufficient part performance to take an oral agreement out of the statute of frauds" [citation], for the party paying money "under an invalid contract . . . has an adequate remedy at law." ' [Citations.]" Here, as in *Secrest*, Kaneshiro's payment of the delinquent amounts due on the loans and the defendants' foreclosure costs, would not have created any injustice estopping the defendants from asserting the statute of frauds. To the extent those payments represented more than the value Kaneshiro received, as in *Secrest*, she plainly had an adequate remedy at law.

In sum, like the trial court, we find that the first amended complaint does not allege a viable claim for breach of contract.

III

We also reject Kaneshiro's contention that the defendants' breached the implied covenant of good faith and fair dealing. As the defendants point out, the modification and the deeds of trust expressly permitted them to pay the delinquent taxes and, after providing notice, recover those payments from Kaneshiro. It is axiomatic that where a contract *expressly* permits conduct by one of the parties, such conduct will not give rise to a breach of the *implied* covenant of good faith and fair dealing. "We are aware of no

reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement. On the contrary, as a general matter, implied terms should never be read to vary express terms.

[Citations.] "The general rule [regarding the covenant of good faith] is plainly subject to the exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing. . . . [¶] This is in accord with the general principle that, in interpreting a contract "an implication . . . should not be made when the contrary is indicated in clear and express words." [Citation.]. . . . [¶] As to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct. And if defendants were given the right to do what they did by the express provisions of the contract there can be no breach.' [Citation.]" (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374.)

IV

The trial court also properly found that Kaneshiro failed to allege a valid claim for intentional interference with contractual relations. Having failed to allege the existence of any contract between herself and the county, Kaneshiro does not dispute this aspect of the trial court's ruling on appeal.

Rather, on appeal Kaneshiro argues her complaint established a claim for intentional interference with prospective economic advantage. The difficulty with this

contention is that the tort of interference with prospective economic advantage requires an allegation that the defendant not only interfered with an economic relationship, but that the defendant's conduct was also wrongful. "[A] plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove . . . that the [defendant's interference] was wrongful by some legal measure [beyond] the fact of interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393.) " '[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.' " (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 944.)

Here, the defendants' act of paying Kaneshiro's property taxes under the express provisions of the deeds of trust was in no sense wrongful.

V

Given the express terms of the modification agreement and the deeds of trust, which permitted the defendants' alleged acts, it was not likely Kaneshiro would be able to amend her complaint to state a valid cause of action. Hence, the trial court did not error in denying her leave to amend.

DISPOSITION

The judgment of dismissal is affirmed. Respondents to recover their costs of appeal.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.