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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

KENNETH J. CATANZARITE et al.,

Plaintiffs and Appellants,

v.

WELLS FARGO BANK, N.A. et al.,

Defendants and Respondents.

E053136

(Super.Ct.No. CIVDS909322)

OPINION

APPEAL from the Superior Court of San Bernardino County. W. Robert Fawke,  
Judge. Affirmed.

Catanzarite Law Corporation, Kenneth J. Catanzarite, Nicole M. Catanzarite-  
Woodward and Eric V. Anderton for Plaintiffs and Appellants.

Barry, Gardner & Kincannon, Jeffrey B. Gardner, Laura J. Petrie and Cathy A.  
Knecht for Defendants and Respondents.

I

INTRODUCTION

This action arises out of plaintiffs Kenneth J. Catanzarite, Kim E. Catanzarite,

Darryl E. Moore, and Christine G. Moore (plaintiffs) agreeing to purchase the north portion of real property owned by Michele M. Gingras. Plaintiffs were unable to consummate the purchase because Wells Fargo Bank, N.A. (Wells Fargo) refused to reconvey its security lien on the portion of the property plaintiffs agreed to purchase. Plaintiffs sued Wells Fargo and Mortgage Electronic Registration Systems, Inc. (MERS)<sup>1</sup> (collectively referred to as Wells Fargo) for interference with contract and prospective economic advantage.

Plaintiffs appeal judgment entered in favor of Wells Fargo, after the trial court sustained Wells Fargo's demurrer to plaintiffs' second amended complaint (SAC) without leave to amend. Plaintiffs contend they alleged sufficient facts to support causes of action for interference with contract and prospective economic advantage. Plaintiffs further argue the trial court abused its discretion in denying leave to amend the SAC.

We conclude plaintiffs failed to allege viable causes of action for interference with contract and prospective economic advantage, primarily because under the due-on-sale clause in the first deed of trust (DOT), Wells Fargo had the option to require full payment of the outstanding loan balance upon plaintiffs purchasing a portion of Gingras's property. Wells Fargo therefore did not owe plaintiffs a duty to agree to a partial reconveyance or to act reasonably or in good faith when deciding to exercise the due on

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<sup>1</sup> MERS is named as a respondent on appeal but there are no allegations in the second amended complaint referring to MERS. The original complaint, however, names MERS as a defendant, and both MERS and Wells Fargo demurred to the second amended complaint. Their demurrer was sustained, as to both of them, without leave to amend.

sale option. Because plaintiffs also have not demonstrated they can successfully amend their complaint, we affirm the judgment.

## II

### FACTS AND PROCEDURAL BACKGROUND

The following facts are alleged in plaintiffs' SAC and exhibits attached to the SAC, which include the first DOT (exh. A), the second DOT (exh. B), and the grant deed to Gingras's property (exh. C).

Gingras owned 28,352.75 square feet of land, measuring 95 by 298.45 lineal feet, located in the City of Grand Terrace. In 1993, Gingras obtained a loan on the property from Colonial Bank, N.A. (Colonial), in the amount of \$97,000 (the first note), secured by the first DOT. Colonial's interest was acquired by Homeside Lending, Inc., then by Washington Mutual, and thereafter by JP Morgan Chase Bank (Chase) and Wells Fargo. The first DOT contains a due-on-sale clause which states that "If all or any part of the Property or any interest in it is sold or transferred . . . without Lender's prior written consent, Lender may at its option, require immediate payment in full of all sums secured by this Security Instrument . . . ."

In 2000, Gingras obtained from Millennia Mortgage Corp. (Millennia) another loan on the property, in the amount of \$20,000 (the second note), secured by a second DOT. Millennia's interest was acquired by Irwin Union Bank & Trust Co., First Financial Bank, N.A., and finally Credit Suisse Securities (USA) LLC (Suisse). The second DOT also contains a due-on-sale clause, but the second DOT is not at issue in this appeal.

Plaintiffs owned real property adjoining Gingras's property. Plaintiffs intended to use their property for a residential condominium development and wanted to increase the value of their property by purchasing the north portion of Gingras's adjacent property. Darryl and Christine Moore (the Moores) and Gingras entered into a purchase and sale agreement for the purchase of the north portion of Gingras's property, which consisted of 15,675.06 square feet of land, measuring 95 by 165 lineal feet (the north portion). Although only the Moores and Gingras executed the purchase agreement, Kenneth and Kim Catanzarite (the Catanzarites) joined the Moores in co-partnership, in agreeing to purchase the north portion of Gingras's property.

Pursuant to the purchase agreement as amended, the purchase price was \$65,000, with an escrow deposit of \$15,000; \$14,000 of the escrow funds released to Gingras; Gingras carrying back a \$30,000 note secured by a trust deed; plaintiffs receiving a right of first refusal over the remainder of Gingras's property; and payment of \$20,000 in cash to close escrow, when a lot line adjustment to split Gingras's property was approved by the City of Grand Terrace. Escrow opened and in May 2008, Gingras executed the grant deed, transferring title to the north portion of Gingras's property to the Moores, who held title for themselves and the Catanzarites. The City of Grand Terrace approved the lot-line adjustment, and plaintiffs and Gingras were ready to close the sale.

Gingras told Wells Fargo that plaintiffs had entered into an agreement to purchase the north portion of Gingras's property, with the intent to build a condominium project on plaintiffs' adjacent property and the north portion of Gingras's property. Gingras further told Wells Fargo that in order to complete the sale, a partial reconveyance of the security

lien on the north portion of her property was required. This reconveyance allegedly would not materially diminish the value of Gingras's property as a whole and Wells Fargo's security interest would not be adversely affected by the partial reconveyance, given the relative loan to value of the remainder of Gingras's property.

Wells Fargo refused to consent to a partial reconveyance. Without the partial reconveyance, Gingras was unable to comply with her obligation under the purchase agreement to transfer clear title to the north portion of her property. As a consequence, Gingras was unable to close escrow on the sale. Thereafter, property values declined and plaintiffs were prevented from developing the property before the decline.

Plaintiffs filed a complaint against Gingras,<sup>2</sup> Homeside Lending, Inc., MERS, and Irwin Home Equity Corporation for quiet title, interference with contract, and interference with prospective economic advantage. Wells Fargo Bank was added as a Doe defendant. After Wells Fargo demurred to the complaint, plaintiffs filed an amended complaint as a matter of right and the demurrer was taken off calendar. Wells Fargo demurred to the first amended complaint. The trial court sustained the demurrer, without leave to amend to the quiet title cause of action, and with leave to amend as to the causes of action for interference with contract and prospective economic advantage. Plaintiffs filed a second amended complaint (SAC), alleging two causes of action for interference with contract and prospective economic advantage. Wells Fargo demurred to the SAC, and the trial court sustained the demurrer without leave to amend.

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<sup>2</sup> Gingras died in May 2009.

In sustaining Wells Fargo’s demurrer to the SAC, the trial court stated that plaintiffs failed to allege interference with contract and prospective economic advantage because plaintiffs had not alleged any facts that Wells Fargo acted unlawfully or without justification in refusing to consent to a partial reconveyance. The trial court noted that the implied good faith covenant cannot “prohibit a party from doing what it expressly is permitted to do under the contract, . . . [¶] . . . [¶] The respective trust deeds herein impose no duty on the defendants to grant a partial reconveyance. Rather, the trust deeds allow the defendant to request, at their option, that their respective loans be paid in full before any sale of the subject property.”

### III

#### STANDARD OF REVIEW

We apply the following standard of review to the trial court’s ruling sustaining Wells Fargo’s demurrer without leave to amend: “We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citations.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions, or conclusions of law. [Citations.] 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.” (*Flores v. Kmart Corp.* (2012) 202 Cal.App.4th 1316, 1324, quoting *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

## IV

### INTERFERENCE WITH CONTRACT AND PROSPECTIVE ECONOMIC ADVANTAGE

Plaintiffs contend they alleged sufficient facts to support causes of action for interference with contract (first cause of action) and interference with prospective economic advantage (second cause of action) by alleging that Wells Fargo interfered with plaintiffs' agreement to purchase the north portion of Gingras's property. Wells Fargo allegedly interfered with the purchase agreement by refusing to partially reconvey its first DOT on Gingras's property. As a consequence, Gingras was unable to transfer free and clear title to the north portion of her property to plaintiffs. In turn, plaintiffs were unable to profit from building a condominium project on their adjacent property and the north portion of Gingras's property.

#### *A. Law Applicable to Interference with Contract and Prospective Economic Advantage Claims*

“‘[A] stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract.’ [Citations.] To prevail on a cause of action for intentional interference with contractual relations, a plaintiff must plead and prove (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. [Citation.]” (*Reeves v. Hanlon* (2004))

33 Cal.4th 1140, 1148; see also *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 344 (*LiMandri*.)

The elements of a cause of action for intentional interference with prospective economic advantage are similar: ““(1) [A]n economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.” [Citations.]’ [Citation.]” (*LiMandri, supra*, 52 Cal.App.4th at p. 339.) “[A] plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff’s expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself.” (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 (*Della Penna*).)

While the *Della Penna* court declined to define “wrongful,” in a concurring opinion, Justice Mosk stated that the tort of interference “requires objective, and unlawful, conduct or consequences.[.]” (*Della Penna, supra*, 11 Cal.4th 376 at p. 408, conc. opn. of Mosk, J.) The court in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134 (*Korea*) subsequently explained that “an 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.[.]” (*Id.* at p. 1159.)

The California Supreme Court in *Korea, supra*, 29 Cal.4th at pages 1158-1159, further noted that the torts of interference with contractual relations and interference with prospective economic advantage differ: “[W]hile intentionally interfering with an existing contract is “a wrong in and of itself” (*Quelimane [Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26,] 56), intentionally interfering with a plaintiff’s prospective economic advantage is not. To establish a claim for interference with prospective economic advantage, therefore, a plaintiff must plead that the defendant engaged in an independently wrongful act. (See *Della Penna, supra*, 11 Cal.4th at p. 393.) An act is not independently wrongful merely because defendant acted with an improper motive.” (*Korea*, at p. 1158.)

*B. Cause of Action for Interference with Contract*

Plaintiffs argue that, when alleging interference with contract, plaintiffs need not allege Wells Fargo acted wrongfully, because intentionally interfering with an existing contract is “a wrong in and of itself” (*Quelimane Co. v. Stewart Title Guaranty Co., supra*, 19 Cal.4th at p. 56). Plaintiffs assert that they only were required to allege that Wells Fargo refused to partially reconvey the first DOT, knowing that refusing to do so would disrupt plaintiffs’ contractual relationship with Gingras to purchase the north portion of Gingras’s property. This, plaintiffs argue, satisfied the third element of the cause of action; that Wells Fargo committed an intentional act designed to induce a breach or disruption of the contractual relationship.

While plaintiffs are not required to allege independent wrongful conduct, they are required to allege facts showing that Wells Fargo intentionally interfered with plaintiffs’

agreement to purchase Gingras's property. Plaintiffs have not done so. At most, plaintiffs have alleged Wells Fargo acted as permitted under the terms of the first DOT due-on-sale clause. Plaintiffs have not alleged facts demonstrating intent to interfere with the purchase agreement or that Wells Fargo owed plaintiffs a duty to agree to a partial reconveyance of the security on Gingras's property. Rather, under the due-on-sale clause, plaintiffs were entitled to require payment of the outstanding loan balance upon the sale of any part of the property. Wells Fargo's refusal to agree to do something it was not required to do and was contractually permitted to refuse, defeats plaintiffs' claim of intentional interference with contract, as a matter of law. Merely alleging interference is not enough to support a cause of action for interference with contract.

*C. Cause of Action for Interference with Prospective Economic Advantage*

Plaintiffs acknowledge that, since they were not parties to the first DOT agreement, the implied covenant of good faith and fair dealing is inapplicable to them. Nevertheless, they contend they sufficiently alleged a cause of action for interference with prospective economic advantage by alleging that Wells Fargo failed to act reasonably and in good faith by refusing to reconvey its security interest in the north portion of Gingras's property.

Plaintiffs' reliance on *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342 (*Carma*), *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 363, and *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 801, for this proposition is misplaced. These cases all involve parties to contracts, in which one of the parties asserted that the other party to the contract breached the implied

covenant of good faith and fair dealing. As explained in *Locke*, at page 363, “[W]here a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing.” [Citations.]’ [Citation.]” As plaintiffs acknowledge, in the instant case, the implied good faith covenant is inapplicable because plaintiffs were not parties to the first DOT agreement. Therefore plaintiffs cannot allege interference with prospective economic advantage based on a breach of the implied good faith covenant. Plaintiffs also note that they are not relying on Gingras’s rights under the implied covenant.

The implied good faith covenant is inapplicable here because it only applies to the parties to a contract or, in some instances, where there is a special relationship with a third party. (*Fireman’s Fund Ins. Co. v. Maryland Casualty Co.* (1994) 21 Cal.App.4th 1586, 1599; *Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49; *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 102.) “A third party should not be permitted to enforce covenants made not for his benefit, but rather for others.” (*Murphy v. Allstate Insurance Co.* (1976) 17 Cal.3d 937, 944.) Plaintiffs were neither parties to the first DOT agreement between Gingras and the lender nor third party beneficiaries of the first DOT. At most, they were incidental beneficiaries. “[I]t is well settled that Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by it.<sup>3</sup> [Citations.] “A third party should

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<sup>3</sup> Civil Code section 1559 provides: “A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.”

not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him. . . .” [Citations.]” (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1724.) Because Wells Fargo has no contractual relationship or special relationship with plaintiffs, Wells Fargo owed no duty to plaintiffs to act reasonably or in good faith when rejecting partial reconveyance of the first DOT.

In addition, as in *Carma, supra*, 2 Cal.4th 342, even assuming Wells Fargo owed plaintiffs a duty to act reasonably and in good faith, there was no breach of that duty, since under the due-on-sale clause, Wells Fargo was expressly entitled to withhold partial reconveyance. In *Carma, supra*, 2 Cal.4th 342, a commercial lessee challenged the validity of a recapture clause in a real property lease in which the lessor had the absolute right to terminate the lease upon the lessee requesting to sublet a portion of the premises. Pursuant to the recapture clause, the lessor terminated the lease when the lessee gave notice of intent to sublease. The court in *Carma* held that the lessor's termination of the lease was not a breach of the covenant of good faith, since the recapture clause expressly permitted it and therefore termination of the lease was within the parties' reasonable expectations. (*Id.* at p. 376.)

In reaching its holding, the court in *Carma* explained: ““Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” . . . ‘ [¶] The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith. [Citations.]’” (*Carma, supra*, 2

Cal.4th at pp. 372-373.) The implied covenant is violated by *a party to a contract* “if its conduct is objectively unreasonable. [Citations.] In the case of a discretionary power, it has been suggested the covenant requires the party holding such power to exercise it ‘for any purpose within the reasonable contemplation of the parties at the time of formation--to capture opportunities that were preserved upon entering the contract, interpreted objectively.’” (*Id.* at p. 373.)

The *Carma* court further noted that “It is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.” (*Carma, supra*, 2 Cal.4th at p. 373.) “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, supra*, 2 Cal.4th at p. 374.)

Because under the due-on-sale clause, Wells Fargo had the unfettered right to demand payment of the loan balance and there was no express duty to agree to a partial reconveyance, plaintiffs failed to allege Wells Fargo committed wrongful conduct by refusing to consent to a partial reconveyance.

Plaintiffs argue that the trial court erred in relying on *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44 for the proposition that Wells Fargo had unfettered discretion to reject Gingras's request for a partial reconveyance. Plaintiffs assert that in relying on *Storek*, the trial court failed to differentiate between the due-on-sale clauses in the first and second DOT's. Plaintiffs argue that the due-on-sale clause in the first DOT did not provide unfettered discretion to invoke the due-on-sale clause when the property owner requested written consent, as in the instant case. Plaintiffs conclude that, since Gingras requested consent to a partial reconveyance of the first DOT, Wells Fargo was required to evaluate the request in a reasonable manner consistent with the covenant of good faith and fair dealing.

We disagree. Wells Fargo did not have a duty to act consistent with the covenant of good faith and fair dealing when considering whether to agree to the partial reconveyance request simply because Gingras made a written request for consent. Plaintiffs misconstrue the due-on-sale clause. The due-on-sale clause is triggered when property title is transferred without written consent by the lender. Here, there was no written consent. Therefore Wells Fargo had an unfettered right to invoke the due-on-sale clause and reject the request for partial reconveyance of the first DOT. There is no language to the contrary in the agreement and this court will not add such a term. (*Levi*

*Strauss & Co. v. Aetna Casualty & Sur. Co.* (1986) 184 Cal.App.3d 1479, 1485-1486.)

Words used in a contract are to be interpreted according to their plain meaning. (*Id.* at p. 1485.) “‘Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.’ [Citation.] A contract extends only to those things concerning which it appears that the parties *intended* to contract. [Citations.] In construing a contract, the court’s function is to ascertain and declare what, in terms and substance, is contained in that contract, and not to insert what has been omitted. [Citation.] The court does not have the power to create for the parties a contract which they did not make, and it cannot insert in the contract language which one of the parties now wishes were there. [Citation.] Courts will not add a term about which a contract is silent. [Citation.]” (*Id.* at pp. 1485-1486.)

It would be fundamentally unfair not to respect the clearly expressed intent of the parties to the first DOT to be bound only by the terms of the written contract, by creating new obligations not included in the express language of the first DOT. This court therefore will not construe the first DOT as including the unstated term that the lender must act reasonably and in good faith if requested to partially reconvey its security interest. We conclude that under the first DOT, Wells Fargo was not required to agree to a partial reconveyance of the first DOT, regardless of whether rejecting the request would interfere with plaintiffs’ ability to purchase the property. Because Wells Fargo’s refusal to agree to a partial reconveyance was lawful, plaintiffs failed to allege Wells Fargo acted wrongfully or unlawfully in refusing to consent to a partial reconveyance. Plaintiffs thus failed to allege a cause of action for interference with prospective economic advantage.

*D. Leave to Amend*

Plaintiffs argue the trial court abused its discretion in not granting leave to amend the SAC. When a demurrer 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.” (*City of Dinuba v. County of Tulare, supra*, 41 Cal.4th at p. 865.) Since plaintiffs unsuccessfully attempted to allege claims on three occasions, in the original complaint, first amended complaint, and SAC, and failed to demonstrate a reasonable possibility that they could amend the SAC to allege viable claims, there was no abuse of discretion in denying plaintiffs leave to file a third amended complaint.

V

DISPOSITION

The judgment is affirmed. Wells Fargo Bank and MERS are awarded their costs on appeal.

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CODRINGTON

J.

We concur:

RAMIREZ

P.J.

McKINSTER

J.