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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

PAUL KOWALSKI,

Plaintiff and Appellant,

v.

MIDCOUNTRY FINANCIAL CORPORATION  
et al.,

Defendants and Respondents.

F063192

(Super. Ct. No. CV-271125)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Joseph D. Allen for Plaintiff and Appellant.

McCarthy & Holthus, Matthew Podmenik and Melissa Robbins Coutts for Defendants and Respondents.

-ooOoo-

Plaintiff appeals from the judgment of dismissal entered against him after the trial court sustained defendants' demurrer to his first amended complaint without leave to amend. Plaintiff has not demonstrated that his pleading was sufficient to state any cause of action or that it could be amended to do so. Accordingly, we affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff obtained a construction loan from defendants, a bank and associated entities and individuals. The loan was secured by a deed of trust on plaintiff's real property and had a one-year term. Construction was delayed and the one-year due date on the loan was extended to April 19, 2009. Beginning in August 2009, plaintiff received notices from the bank advising that his loan was in default and that the property would be sold at a trustee's sale. Defendant, MidCountry Bank, subsequently purchased the property at the trustee's sale.

Plaintiff filed a complaint alleging eight causes of action against defendants: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) fraud, (4) slander of title, (5) cancellation of deed of trust, (6) deceptive business practices, (7) failure to notify reporting agency of dispute, and (8) injunction. He alleged that, although the construction loan had a one-year term, defendants agreed the loan would "automatically convert to a conventional, 30-year residential mortgage-backed loan." Plaintiff alleged defendants breached the contract by refusing to honor the agreement to convert the construction loan to a 30-year loan. The same promise to convert the loan formed the basis of the other causes of action. Defendants demurred to the complaint, asserting plaintiff had not alleged an enforceable contract, because the alleged contract was not in writing and was barred by the statute of frauds. The demurrer challenged the sufficiency of the other causes of action as well. The trial court sustained the demurrer to the sixth, seventh, and eighth causes of action without leave to amend, and the demurrer to the first through fifth causes of action with leave to amend.

Plaintiff filed a first amended complaint that omitted the sixth through eighth causes of action; he added to the causes of action for breach of contract and breach of the covenant of good faith and fair dealing allegations that the agreement was enforceable in spite of the statute of frauds, because it was partly oral and partly in letters and emails, and because plaintiff reasonably and justifiably relied on the agreement to his detriment by failing to obtain financing from other sources. Defendants demurred to the first amended complaint, arguing that the causes of action for fraud, slander of title, and cancellation were identical to those in the original complaint, and plaintiff's attempt to allege promissory estoppel to avoid the effect of the statute of frauds on the contract causes of action was ineffective. Plaintiff's opposition argued, without citation of authority, that the fraud, slander of title, and cancellation causes of action were adequately alleged; it asserted that plaintiff's proposed second amended complaint, which was submitted with the opposition, cured any defect in the causes of action for breach of contract and breach of the covenant of good faith and fair dealing by adequately alleging promissory estoppel. The proposed second amended complaint would have added an allegation that plaintiff justifiably relied on defendants' promise to convert the construction loan to a 30-year conventional loan both by failing to obtain financing elsewhere and by foregoing the opportunity to file a bankruptcy petition before he lost the property through the trustee's sale.

The trial court sustained the demurrer to the first amended complaint without leave to amend, "[a]fter consideration of the proposed second amended complaint as a proffer of ability to amend to state a cause of action," and dismissed the action. (Full capitalization omitted.) Plaintiff appeals from the judgment of dismissal.

## **DISCUSSION**

### **I. Standard of Review**

The standard of review governing an appeal from the judgment entered after the trial court has sustained a demurrer without leave to amend is well established. "First,

the complaint is reviewed de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.] In doing so, we accept as true the properly pleaded material factual allegations of the complaint, together with facts that may be properly judicially noticed. Reversible error exists only if facts were alleged showing entitlement to relief under any possible legal theory. [Citations.] [¶] Second, where the demurrer is sustained without leave to amend, reviewing courts determine whether the trial court abused its discretion in doing so. [Citations.] On review of the trial court's refusal to grant leave to amend, we will only reverse for abuse of discretion if we determine there is a reasonable possibility the pleading can be cured by amendment." (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497-1498.) The burden of proving a reasonable possibility of amending to cure the defect is on the plaintiff. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

## **II. Breach of Contract Cause of Action**

Plaintiff does not dispute that an agreement to convert a construction loan to a 30-year conventional loan on the residence constructed, secured by a deed of trust on the real property, is required by the statute of frauds to be in writing. "A contract coming within the statute of frauds is invalid unless it is memorialized by a writing subscribed by the party to be charged or by the party's agent." (*Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 552, citing Civ. Code, § 1624.) An agreement to modify a contract that is subject to the statute of frauds is also subject to the statute of frauds. (Civ. Code, § 1698.) "An agreement for the sale of real property or an interest in real property comes within the statute of frauds. [Citation.] A mortgage or deed of trust also comes within the statute of frauds. Civil Code section 2922 states: 'A mortgage can be created, renewed, or extended, only by writing, executed with the formalities required in the case of a grant of real property.'" (*Secrest, supra*, 167 Cal.App.4th at p. 552.) Thus, an agreement to modify a one-year construction loan

secured by a deed of trust on real property to change the nature, term, and other specifics of the loan must be in writing.

Plaintiff asserts that his breach of contract cause of action states a cause of action that is not barred by the statute of frauds because he alleged promissory estoppel. He does not cite a single authority in support of his argument.<sup>1</sup> He does not set out the essential elements of a claim of promissory estoppel or show how they were met in his first amended complaint. He does not address the arguments defendants made in their demurrer to the first amended complaint to show that the trial court sustained the demurrer in error. “When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.” (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

Even if the point were not waived, no error is established. “In California, under the doctrine of promissory estoppel, “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise....” [Citations.] ....’ [Citation.] ‘The purpose of this doctrine is to make a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange. If the promisee’s performance was requested at the time the promisor made his promise and that performance was bargained for, the doctrine is inapplicable.’ [Citation.]” (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 275.) Plaintiff’s first amended complaint<sup>2</sup> alleges plaintiff applied for a loan from defendant, MidCountry Bank, on specified terms; after negotiations, “it was agreed that Plaintiff would be loaned the sum

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<sup>1</sup> Other than two cases cited to show the proper standard of review, plaintiff’s brief is entirely devoid of legal authority.

<sup>2</sup> We note the original verified complaint contained the same allegation.

of \$362,000 as a ‘construction loan’ for a term of 1 year at an annual interest rate of 11.5%, and that the loan would then automatically convert to a conventional, 30-year residential mortgage-backed loan.” The pleading further alleges “Plaintiff entered into a valid and binding contract for good consideration, with Bank.” Thus, plaintiff alleges the promise to convert the loan was part of the parties’ agreement, part of a contract supported by consideration in the form of mutual promises. Accordingly, the doctrine of promissory estoppel does not apply. The first cause of action fails to state a cause of action for breach of contract or promissory estoppel.

### **III. Breach of the Covenant of Good Faith and Fair Dealing**

The second cause of action alleges defendants breached the covenant of good faith and fair dealing by refusing to convert the construction loan to a permanent loan. Plaintiff essentially argues that, if the first cause of action states a cause of action for either breach of contract or promissory estoppel, then the second cause of action is also sufficient. He cites no authority in support of his argument.

“‘The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract.’ [Citation.] The covenant does not exist independently of the underlying contract. [Citation.] ‘Generally, the implied covenant operates to protect the express covenants or promises of the contract.’ [Citation.]” (*Molecular Analytical Systems v. CIPHERGEN Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 711-712.) Because the first cause of action does not allege an enforceable contract between the parties containing the promise sought to be enforced, the second cause of action does not state a cause of action for breach of the covenant of good faith and fair dealing. The demurrer to this cause of action was properly sustained.

### **IV. Fraud**

The elements of fraud 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.” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*)). “The elements of promissory fraud (i.e., of fraud or deceit based on a promise made without any intention of performing it) are (1) a promise made regarding a material fact without any intention of performing it; (2) the existence of the intent not to perform at the time the promise was made; (3) intent to deceive or induce the promisee to enter into a transaction; (4) reasonable reliance by the promisee; (5) nonperformance by the party making the promise; and (6) resulting damage to the promise[e].” (*Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 1453.) “[F]raud must be pled specifically; general and conclusory allegations do not suffice.... ‘This particularity requirement necessitates pleading *facts* which ‘show how, when, where, to whom, and by what means the representations were tendered.’” [Citation.]” (*Lazar, supra*, 12 Cal.4th at p. 645.)

Plaintiff argues the fraud allegations of the first amended complaint adequately state the elements of the cause of action. He cites no authority in support of his argument, and fails to show that the allegations are adequate. The first amended complaint alleges defendants “represented to Plaintiff that he would be loaned money on the terms and conditions set forth, in the first instance, in the ‘General Loan Acknowledgement’ (Exh. A[]), including the promise that the construction loan would be converted to a permanent loan. Later, these defendants, by [defendant Steve] Flom, continued to represent that the loan would be converted to a permanent loan.” The fraud cause of action does not specifically allege facts showing “how, when, where, to whom, and by what means” (*Lazar, supra*, 12 Cal.4th at p. 645) any promise or representation was made. It does not allege any promise was made without a contemporaneous intent to perform it. It alleges defendants promised to loan plaintiff money on the terms set forth in Exhibit A, but there is no Exhibit A attached to the first amended complaint. Exhibit A to the original complaint does not contain any reference to the asserted promise—that the construction loan would be converted to a permanent loan.

Plaintiff alleges he executed the loan documents in reliance on defendants' representation. However, he also alleges the promise to convert the construction loan to a permanent loan was a term of the parties' agreement. Plaintiff offers no facts or argument to show that it was reasonable for him to rely on such an oral promise, when the promise was purportedly part of the loan transaction, but was not included in the written loan documents.<sup>3</sup> The fraud cause of action alleges plaintiff justifiably relied on defendants' representations that it would convert the loan, because "the documents generated by Bank, in particular Exhibits 'A' and 'B,' served to confirm those representations." There are no exhibits attached to the first amended complaint. Exhibits A and B to the original complaint do not reflect any promise or representation that defendants would convert the construction loan to a permanent loan.

Plaintiff has not demonstrated that his fraud allegations adequately stated a cause of action. The demurrer to this cause of action was properly sustained.

#### **V. Slander of Title**

Plaintiff's only argument in support of the slander of title cause of action is that it depends on the first three causes of action alleged and, if they are sufficient, then the slander of title cause of action is also sufficient. Since the first three causes of action are deficient, this cause of action also fails.

#### **VI. Cancellation of Deed of Trust**

The fifth cause of action alleges the deed of trust recorded by defendants against plaintiff's property "is invalid and void by reason of fraud." It seeks cancellation of the deed of trust and an order declaring it to be void. Plaintiff cites no authority

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<sup>3</sup> Although plaintiff did not attach any of the loan documents to his first amended complaint, in connection with their demurrer, defendants requested judicial notice of the recorded loan documents. The deed of trust was signed by plaintiff on July 19, 2007, and indicates it secures repayment of the \$362,000 promissory note, which plaintiff promised to repay in periodic payments and to pay in full by July 19, 2008.

demonstrating that a cause of action for cancellation of the deed of trust has been properly alleged. As discussed previously, plaintiff has not stated a cause of action for fraud. Accordingly, he has not adequately alleged fraud as a basis for cancellation of the deed of trust. The trial court did not err in sustaining the demurrer to the fifth cause of action.

**VII. Leave to Amend**

Each point in an appellate brief must be stated under a separate heading or subheading summarizing the point. (Cal. Rules of Court, rule 8.204(a)(1)(B).) When there is no separate argument heading with analysis of the issue, the argument may be deemed waived. (*Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114; *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4.) Other than a single sentence in his conclusion asserting “the complaint could easily be amended to cure any problem,” plaintiff’s brief contains no argument that leave to amend should be granted. Accordingly, we treat any such argument as waived.

**DISPOSITION**

The judgment is affirmed. Defendants are awarded their costs on appeal.

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DETJEN, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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POOCHIGIAN, J.