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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANIEL MARSHALL,

Plaintiff and Appellant,

v.

COUNTRYWIDE HOME LOANS, INC.,  
et al.,

Defendants and Respondents.

G045458

(Super. Ct. No. 30-2009-00120660)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

Peter C. Holzer for Plaintiff and Appellant.

Severson & Werson and Ryan K. Woodson for Defendants and Respondents.

In this wrongful foreclosure case, Daniel Marshall sued Countrywide Bank, Mortgage Electronic Registration Systems, Inc., and CTC Real Estate Services (collectively referred to as Defendants unless individual names are required for clarity). The case was dismissed after the court sustained the Defendants' demurrer to the second amended complaint (SAC) without leave to amend. On appeal, Marshall asserts the court abused its discretion. We affirm the judgment.

## I

### *A. Factual Background*

The following facts are undisputed and contained in the operative complaint (in this case it was the SAC): Marshall borrowed money from Countrywide Bank and purchased a house in Costa Mesa. On August 9, 2006, Marshall granted Countrywide Bank a first deed of trust for \$712,500, and a second deed of trust for \$95,000. A couple years later, on March 10, 2008, Countrywide Bank recorded a notice of default. In June 2008, Countrywide Bank recorded a notice of trustee's sale against the property, indicating it would be foreclosed due to Marshall's failure to cure his default. On August 21, 2008, the house was sold in foreclosure.

### *B. Procedural Background*

In March 2009, Marshall filed his original complaint against the Defendants<sup>1</sup> alleging breach of contract, quiet title, slander of title, fraud, and unfair credit reporting. He also sought \$1 million in damages and declaratory relief. He alleged, "Because of the precipitous decline in the fair market value of the subject property, [Marshall] entered into an agreement with Defendants for a 'short sale' of the subject property." Marshall admitted he did not have a copy of the agreement, but he summarized the terms of the agreement in the complaint. Marshall alleged he "provided

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<sup>1</sup> We note the original complaint named Countrywide Home Loans, Inc., as a defendant. Marshall did not include this entity as a named defendant in the first amended complaint (FAC) or in the operative SAC.

Defendants with a verified statement” of the property’s value, and “Defendants” agreed to accept payment of that amount “as a full and complete payment of all principal, interest and any other charges or costs under both . . . deeds of trust.” He stated, “Defendants agreed that they would not complete their threatened foreclosure sale of the property.”

In this version of the complaint, Marshall alleged each defendant was liable for each cause of action. Marshall concluded, “Defendants breached the terms of the short sale agreement by refusing to accept the reduced amount” and choosing to complete their foreclosure sale. Defendants demurred to the complaint, alleging Marshall failed to attach a copy of the purported short sale agreement or state any of its applicable terms. Defendants noted the complaint was not verified and Marshall failed to name or serve the current owner of the property. Marshall filed an opposition.

On September 23, 2009, the court sustained the demurrer with 15 days leave to amend (due October 8, 2009). In its minute order, the court stated the breach of contract action was sustained with leave to amend, explaining, “The agreement must be attached to the complaint or its relevant portions must be quoted verbatim (or at least laid out with specificity). In addition, if plaintiff wishes to prevail on this [cause of action], he needs to allege (if he can) that he fully performed under the agreement or that his performance was excused.”

The court sustained the demurrer to Marshall’s second cause of action for quiet title and third cause of action for slander of title without leave to amend because “[Marshall] did not oppose the demurrer” to these causes of action, “which this court takes as a concession.” The court sustained the demurrer to the fourth cause of action for fraud with leave to amend but notified Marshall he must “allege which individual(s) made the representations, how they were made (orally, in writing, etc.), when they were made and what the representations were. Also, as a matter of law, there was no fiduciary

relationship between the parties.” Finally, the court overruled the demurrer to the fifth cause of action for declaratory relief.

On November 17, 2009, Defendants filed a motion to dismiss the complaint on the grounds Marshall had failed to file an amended complaint. Marshall opposed the motion, seeking relief from default under Code of Civil Procedure section 473, claiming the delay was due to attorney mistake. Marshall submitted the FAC, alleging the same causes of action. Defendants replied to the dismissal motion, stating, Code of Civil Procedure section 473 did not apply because the court had not entered any default or any order against Marshall. Defendants also filed a demurrer to the FAC. Defendants again noted Marshall failed to attach a copy of the short sale agreement or quote the relevant language verbatim. Defendants faulted Marshall for failing to allege any details about the purported contracts such as “who was involved, how the agreement was reached, . . . or to whom he spoke.” Defendants asserted Marshall was continuing to waste the court’s time by failing to cure any of the defects found in the original complaint regarding the causes of action. Marshall filed an opposition.

On June 9, 2010, the court sustained the demurrer to the FAC without leave to amend the second, third, fourth, and sixth causes of action. The court sustained with leave to amend the first cause of action for the breach of contract claim and the fifth cause of action for declaratory relief. The notice of ruling stated the court advised Marshall that he “must specifically allege the one defendant with whom he allegedly had a written contract for a short sale of his former property, the defendant that allegedly breached the alleged written contract, and also the ‘prospective buyer’ with whom [Marshall] allegedly had a purchaser agreement to consummate the alleged short sale. [¶] Finally, the [c]ourt stated that, if [Marshall] obtains evidence through discovery that [d]efendants committed fraud, then the [c]ourt would permit [him] to file a [m]otion for [l]eave to [a]mend his operative complaint to allege a fraud cause of action.”

On June 22, 2010, Marshall filed his SAC alleging breach of contract (first cause of action) and declaratory relief (second cause of action). He also filed a motion to compel responses to his request for production of documents. Defendants filed a demurrer to the SAC. Defendants argued Marshall “again failed to comply with the court’s orders and sufficiently state facts . . . to constitute his breach of contract cause of action since his [SAC] is essentially unchanged. [Marshall] merely alleged that Countrywide Bank is the contractual party, but continues to switch between ‘Defendant’ and ‘Defendants’ when discussing the breach of contract allegations.” In addition, Defendants argued Marshall failed to identify the prospective buyer. Marshall filed an opposition.

On September 15, 2010, the court denied Marshall’s motion to compel and sanctioned him \$1,187.75 for having no basis for filing the motion. Defendants submitted a copy of the court’s tentative ruling (attached as an exhibit to the respondent’s brief). On our own motion we have taken judicial notice of the court’s minute order from the superior court file that incorporates the same tentative ruling. (Evid. Code, § 452.) The court’s ruling first addressed Marshall’s argument he served Defendants with a request for production of documents but that he never received a response. The court determined the proof of service was defective because the person who served the document did not indicate the manner of service. In addition, the court decided Marshall’s claim he served the requests was not credible. The court noted that three months after the responses were due, Marshall’s counsel sent Defendants “lengthy meet and confer letters . . . regarding its responses to interrogatories but failed to mention the [unanswered request for production of documents].” The court stated Defendants responded to Marshall’s other discovery requests, and there was no reason why they would not respond to the request for production of documents “if they were, in fact, served.” Defendants’ counsel was ordered to give Marshall notice of the ruling. The

minute order reflects neither Marshall nor his counsel attended this hearing. Defendant filed a notice of ruling on September 21, 2010.<sup>2</sup>

On September 29, 2010, the court held a hearing on the demurrer to the SAC. The court sustained the demurrer and issued a lengthy minute order. The court noted that one year earlier, “On September 23, 2009, the court sustained the demurrer to the breach of contract [cause of action] in the original complaint with leave to amend, and the court noted the inconsistent use of ‘defendant’ and ‘defendants’ in the pleading, which caused this [cause of action] to be ambiguous. [¶] On June 9, 2010, the court conducted a hearing on the demurrer to the FAC. The court pointed out to [Marshall’s counsel, Peter Holzer], that confusion still reigned.”

To support its conclusion, the court included in the minute order a portion of the June 2010 reporter’s transcript as follows: “[The court]: And then we come to [p]aragraph 20 and that starts the discussion about the short sale. And you say [Marshall] hopes to obtain a copy of the actual written agreement from defendant, in the singular. Now we are in [p]aragraph 21. Who is the defendant? We’ve got [one], [two], [three], [four] different entities that are being sued that are named defendant, Mr. Holzer. So I don’t know when you say defendant in the singular who you mean . . . . In [p]aragraph 20 you say, [Marshall] entered into a written agreement with defendants, in the plural. Okay? That to me . . . means all the defendants, because you’re not saying [two] of the defendants or [three] of the defendants. So all the defendants, okay? So now there’s some written agreement called short sale agreement, apparently, or that was the essence of it, with [four] defendants. And you say that you hope to get a copy of the actual

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<sup>2</sup> In his opening brief, Marshall asserts the court did not rule on the motion to compel because it was rendered moot when the court sustained the demurrer to the SAC. This is simply untrue. As stated in more detail above, the court ruled on the motion to compel and sanctioned Marshall on September 15, and two weeks later, it held a hearing on the demurrer (September 29). We have reviewed the court docket. The court issued a minute order on September 8, 2010, scheduling the two separate hearing dates.

written agreement from defendant, in the singular. Who the heck—who is this defendant? We don't know . . . .”

## II

“In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] 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; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

### A. Breach of Contract

“To state a cause of action for breach of contract, a party must plead the existence of a contract, his or her performance of the contract or excuse for nonperformance, the defendant’s breach and resulting damage. [Citation.]” (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307 (*Harris*)). “A written contract is usually pleaded by alleging its making and then setting it out verbatim (*‘in haec verba’*) in the body of the complaint or as a copy attached and incorporated by reference.” (4 Witkin, *Cal. Procedure* (5th ed. 2008) Pleading § 518, at p. 650; see also *Harris, supra*, 74 Cal.App.4th at p. 307 [“If the action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference”].)

“The other method of pleading a written contract is according to its legal effect, by alleging the making, and then proceeding to allege the substance of its relevant terms. This is more difficult, for it requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions, and it involves the danger of variance where the instrument proved differs from that alleged. Nevertheless, it is an established method, although infrequently employed. [Citations.]” (4 Witkin, Cal. Procedure, *supra*, Pleading § 519, pp. 650-651, citing *Construction Protective Services v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 199 (*Construction Protective Services*); *Pneucrete Corp. v. United States Fidelity & Guaranty Co.* (1935) 7 Cal.App.2d 733, 741; *Snyder v. United Properties Co.* (1921) 53 Cal.App. 428, 431.)

In *Construction Protective Services*, the Supreme Court expressed its agreement with the proposition that “[i]n an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language.” (*Construction Protective Services, supra*, 29 Cal.4th at pp. 198-199.) The court further stated that “though the complaint could have been clearer, it satisfactorily alleged (1) that the insurance policy obligated [the insurer] to defend and indemnify [the plaintiff] against suits seeking damages, and (2) that under the terms of the policy, [a third party’s] setoff claim fell within the scope of that contractual obligation. Whether [the plaintiff] can prove these allegations . . . remains to be seen, but the allegations are sufficient to establish a prima facie right to relief.” (*Id.* at p. 199.)

The same is true here. While the SAC could have been more succinct, the allegations were sufficient to support Marshall’s claim a contract existed. The SAC stated Marshall entered into a written agreement with Countrywide Bank for a short sale of the property. Marshall alleged, “[a]t this time” he did not have a copy of the agreement, however, he provided “a description of what [he] recollects to be the substantive provisions of the written ‘short sale’ agreement. . . . In the ‘short sale’ transaction, [Marshall] provided [d]efendants with a verified statement by a licensed real

estate broker attesting to the value of the . . . property on the date of that report. . . . In light of the precipitous decline in the fair market value of the subject property, [d]efendants agreed that they would accept payment of that amount as a full and complete payment of all principal, interest and any other charges or costs under [the relevant deeds of trust]. In that agreement, [d]efendants agreed that they would not complete their threatened foreclosure sale of the subject property.”

Marshall alleged he arranged for a prospective buyer to acquire the property paying the fair market value and he submitted that purchase agreement to “Defendant.” Marshall concluded the “Defendants” breached the agreement by failing and refusing to accept Marshall’s short sale of the property and instead choosing to complete their foreclosure sale.

Although attaching the written contract or setting forth the terms verbatim is the usual method of pleading, we recognize Marshall had the option of pleading the legal effect of the contract rather than its precise language. Taking this riskier option did not by itself render the complaint uncertain or speculative. However, in the absence of the written document the trial court reasonably required Marshall to allege more details about the parties’ agreement and the purported breach. The court warned Marshall several times the breach of contract claim was uncertain because there were several different named defendants and Marshall continually switched between using the term “Defendant” and “Defendants” when discussing the alleged breach.

For example, in sustaining the FAC, the court specifically ordered Marshall to identify the defendant with whom he allegedly had a written contract for a short sale. The record reflects Marshall complied with this portion of the order. The SAC alleges Marshall entered into the short sale agreement with “Countrywide Bank.”

However, the court also ordered Marshall to specifically allege which defendant(s) allegedly breached the written contract and to identify the prospective buyer. Marshall failed to do so. The complaint simply alleged “Defendants” breached the terms

of the contract and he did not identify the name of the prospective buyer purportedly willing to purchase Marshall's property for an undisclosed sum.

The SAC names three defendants, Countrywide Bank, CTC Real Estate Services, and Mortgage Electronic Registration Systems, Inc. The SAC does not delineate the nature of each of these businesses or their relationship to each other. The SAC does not allege the three entities are connected in any way. Not having a copy of the purported short sale agreement to refer back to, the trial court reasonably sustained the demurrer on the grounds Marshall's pleading relating to the breach by "Defendants" was too uncertain.

Marshall argues the failure to specify who was responsible for breaching the contract did not render the complaint ambiguous. He asserts it is "illogic[al]" to require him "to identify the responsible party when all of the relevant evidence is in the hands of the adverse party." Marshall argued the Defendants utilized different names for themselves at different times, and only they knew "what hat it was wearing when it did different things." To support this argument, Marshall pointed to his counsel's declaration (submitted to the trial court) stating that various names were used on Defendants' documents: (1) "Federal Statements" used the name Countrywide Mortgage; (2) "[m]onthly [h]ome [l]oan [s]tatements" used the name Countrywide Home Loans; (3) the "[p]lanned [u]nit [d]evelopment [r]ider" used the name Countrywide Home Loans, Inc; and (4) the "[l]egal [d]escription" used the name Countrywide Bank. Marshall alleged Defendants created the ambiguity and they should not be permitted to "rely on [the] sloppy document preparation as a means of avoiding liability." Marshall concluded that while ordinarily a party has the burden of proof as to each fact that is essential to the claim for relief, courts may alter the normal allocation of the burden of proof based on considerations of fairness and policy, such as when it is impossible for plaintiff to prove his or her case.

We begin with the premise of Marshall's argument Defendants' names were used interchangeably. Marshall presented evidence he had difficulty distinguishing between Countrywide Bank and Countrywide Home Loans. However, there are no facts in the record to support his argument the named defendant, Countrywide Bank, could be confused with the other two named defendants, CTC Real Estate Services or Mortgage Electronic Registration Systems, Inc. The names of these three entities are not similar. No version of the various complaints ever explained the services provided by CTC Real Estate Services or Mortgage Electronic Registration Systems, Inc. The SAC does not allege these entities were alter egos, agents, employees, or otherwise connected with each other or their relationship with Countrywide Bank. Moreover, Marshall does not explain why Countrywide Home Loans (not to be confused with Countrywide Bank) was dropped as a defendant from the FAC and the SAC. Fairness to the remaining named defendants justifies the court's determination Marshall should not be excused from satisfying his burden of alleging each fact essential to a breach of contract claim, specifically *who in fact* was responsible for breaching the purported contract.

The court granted Marshall leave to amend the FAC on the condition he attach a copy of the agreement or plead the nature of the breach of contract claim with more specificity. A trial court is entitled to grant leave to amend "upon any terms as may be just" (Code Civ. Proc., § 472a, subd. (c)). We conclude the court properly recognized that without a copy of the purported agreement, fairness required greater specificity in pleading the claim. Conditioning leave to amend on naming the specific breaching parties and the prospective buyer (which would tend to prove Marshall actually performed his end of the bargain) was not an abuse of discretion. (See *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 275.)

We also agree with Defendants' contention the court properly denied Marshall a fourth opportunity to amend his complaint. The court twice articulated what must be alleged to state a breach of contract claim. The court reasonably treated

Marshall's SAC as a concession he could not state sufficient facts to constitute a cause of action.

*B. Declaratory Relief*

Marshall's declaratory relief action sought a court determination regarding the "parties' respective rights and duties under the" short sale agreement. On appeal, Marshall argues the demurrer should have been overruled because he pled "all of the elements that are required for this cause of action." He asserts the complaint contains facts showing the existence of an actual controversy under a written agreement and requests these rights be adjudged by the court.

Marshall misunderstands the nature and purpose of declaratory relief. A threshold requirement for a declaratory relief action is the existence of a justiciable dispute. The declaratory judgment statute expressly provides that declaratory relief is available to parties to contracts or written instruments "in cases of actual controversy relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060.)

"The purpose of a judicial declaration of rights in advance of an actual tortious incident is to enable the parties to shape their conduct so as to avoid a breach. '[D]eclaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.' [Citations.] No such preventive benefit is possible here." (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848.) Because Marshall alleged the short sale contract had already been breached, and his home was already sold in foreclosure, there was no need to employ the declaratory judgment procedure in this case.

Marshall correctly asserts equitable remedies such as declaratory relief can be pursued in the absence of another cause of action or other requested relief. (Code Civ.

Proc., § 1060 [permits an original action].) However, a demurrer is properly sustained as to a claim for declaratory relief that is “wholly derivative of” other non-viable causes of action. (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 794 [because facts do not support a claim that PacifiCare violated statutes, “there are no grounds for granting an injunction or declaratory relief based on purported violations of those statutes”].) In this case, Marshall’s declaratory relief cause of action is wholly derivative of the proposed breach of contract claim. The only judicial declaration sought in the complaint related to whether Defendants were obliged to perform duties under the terms of the short sale agreement and failed to do so. The breach of contract cause of action sought damages for this same event. In summary, Marshall did not demonstrate a pending controversy or need for declaratory relief unrelated to the breach of contract allegation.

### *C. Discovery*

In his reply brief, Marshall raises a new argument. He contends the court should have permitted him to conduct discovery before requiring him to state the roles of the different Defendants in the complaint. We need not address the argument. (See *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 [“[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument”]; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 [“‘[T]he rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before’ . . . .”].) Moreover, we note that in the year between filing the original complaint and SAC, Marshall did conduct discovery and was sanctioned \$1,187 for filing a baseless motion to compel production of documents. Marshall’s assertion Defendants failed to respond to his recovery is belied by the record.

III

The judgment is affirmed. Respondents shall recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.