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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LIANA GOFFMAN,

Plaintiff and Appellant,

v.

BANK OF AMERICA, N.A., et al.,

Defendants and Respondents.

G045942

(Super. Ct. No. 30-2010-00360016)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
William M. Monroe, Judge. Affirmed in part, reversed in part and remanded.

Traut Law Group, John T. Dzialo; Law Offices of John Thomas Dzialo and
Scott B. Hayward for Plaintiff and Appellant.

Bryan Cave, Aaron M. McKown, Paula L. Zecchini and Aileen M. Hunter
for Defendants and Respondents.

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INTRODUCTION

Plaintiff Liana Goffman, a home loan borrower, appeals from the judgment entered after the trial court sustained, without leave to amend, the demurrer to her second amended complaint brought by defendants Bank of America, N.A. (B of A), Countrywide Financial Corporation, BAC Home Loans Servicing, LP (BAC), ReconTrust Company, and Mortgage Electronic Registration Systems, Inc. (collectively, Defendants). In her second amended complaint, Goffman asserted a single cause of action for breach of oral contract based on an oral reinstatement agreement. We conclude the trial court did not err by sustaining the demurrer to that cause of action. However, based on facts she alleges on appeal, we conclude Goffman is able to set forth a cause of action for promissory estoppel on the grounds we describe, and, therefore, we reverse and remand with leave to amend.

ALLEGATIONS OF THE SECOND AMENDED COMPLAINT

The second amended complaint alleged the following facts:

In May 2008, Goffman obtained a loan from Countrywide Bank in the amount of \$255,500. The loan was evidenced by a promissory note secured by a deed of trust against Goffman's home in Mission Viejo. In July 2008, Countrywide Financial Corporation was purchased by B of A, which owns and controls BAC.

By July 2009, Goffman had fallen behind in her loan payments, and she applied for a loan modification. She continued to pursue an alternative repayment agreement with BAC until December 19, 2009, when her loan modification application was denied. A notice of trustee's sale was recorded against her home. The notice set a sale date of November 19, 2009, but the sale was postponed to January 4, 2010 because Goffman's modification application was under review.

On December 30, 2009, Goffman received by facsimile a written offer to reinstate her loan. A copy of the written offer was attached to the complaint. Goffman

telephoned BAC on the same day to negotiate a different reinstatement option. “[I]n a series of telephone calls from 10:01 am to 2:48 pm,” Goffman and the BAC agent reached an oral reinstatement agreement based on these terms: (1) “make one payment in the amount of \$8[,]674.88 by certified funds to be received by BOFA/BAC no later than January 13, 2010”; (2) “make monthly mortgage payments in the amount of \$1,805.17” by personal check, to be made no later than the 15th day of the month starting February 2010 and continuing through May 2010; (3) “make a mortgage payment of \$1,864.56” by personal check on or before June 15, 2010; and (4) “resume her regular monthly loan payments of \$1,000.00” for 36 months beginning in July 2010.

Goffman was “repeatedly told by BAC that her loan would be fully reinstated upon receipt of the \$8,674.56 in certified funds.” She timely made that payment and the February and March payments of \$1,805.17, all of which were accepted by BAC.

Despite receiving the payments, BAC foreclosed the deed of trust on Goffman’s home and sold it to a third party on March 16, 2010.

Defendants allegedly breached the oral reinstatement agreement by foreclosing on Goffman’s home. Goffman suffered damages because foreclosure “permanently deprived [her] of the use and enjoyment of her property, in addition to suffering the loss of all monies invested in the home,” and because she “incurred the expenses of securing new housing along with the attendant costs of moving.” She alleged BAC should be estopped from asserting the statute of frauds as a defense because it accepted Goffman’s payments under the oral reinstatement agreement.

PROCEDURAL HISTORY

Goffman’s initial complaint asserted eight causes of action, including breach of contract and fraud. The trial court sustained a demurrer to that complaint with leave to amend. Goffman’s first amended complaint reduced the number of causes of

action to six: She kept the breach of contract and fraud causes of action and added a cause of action for violation of Business and Professions Code section 17200. The trial court sustained a demurrer to the first amended complaint, with leave to amend, and noted, “[t]o the extent that Plaintiff is alleging promissory estoppel, the alleged agreement is not definite enough to support such claim.”

The second amended complaint pared the causes of action down to one, for breach of oral contract. The trial court sustained Defendants’ demurrer to the second amended complaint without leave to amend. Judgment was entered against Goffman, and she appealed.

DISCUSSION

I.

The Trial Court Did Not Err by Sustaining the Demurrer to the Breach of Contract Cause of Action.

A. Standard of Review

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, . . . [w]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] 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.” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) We independently review a ruling on a demurrer to determine whether the pleading alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.)

B. The Second Amended Complaint Did Not Allege a Cause of Action for Breach of Contract.

1. Statute of Frauds

Goffman contends (1) the second amended complaint stated a cause of action for breach of an oral contract based on the oral reinstatement agreement and

(2) she alleged estoppel to assert the statute of frauds as a defense to enforcing an oral reinstatement agreement. Settled law leads us to disagree.

A contract falling within the statute of frauds is unenforceable unless the contract is memorialized in writing and signed by the party against whom enforcement is being sought. (Civ. Code, § 1624, subd. (a).) Under Civil Code section 1624, “[a]n agreement for the sale of real property or an interest in real property comes within the statute of frauds.” (*Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 552 (*Secrest*).) Civil Code section 2922 clarifies that the creation, extension, or renewal of a mortgage and/or a deed of trust must be in writing and in full compliance with the statute of frauds. (*Secrest, supra*, at p. 552.)

Here, the oral reinstatement agreement was subject to the statute of frauds because it was an agreement to extend a mortgage, which ““represented an interest in land.”” (*Secrest, supra*, 167 Cal.App.4th at pp. 553-554 [forbearance agreements are subject to the statute of frauds].) This court in *Secrest* confirmed, “[a]n agreement to modify a contract that is subject to the statute of frauds is also subject to the statute of frauds.” (*Id.* at p. 553, citing Civ. Code, § 1698, subd. (a).) A contract is modified by a subsequent agreement between the parties, which changes a party’s obligations. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 964, p. 1055.)

Section 131 of the Restatement Second of Contracts provides: “[A] contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which [¶] (a) reasonably identifies the subject matter of the contract, [¶] (b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and [¶] (c) states with reasonable certainty the essential terms of the unperformed promises in the contract.”

The oral reinstatement agreement was neither memorialized by a writing nor signed by BAC. Goffman argues the use of B of A letterhead on the written offer to reinstate her loan was sufficient authentication to satisfy the statute of frauds. The B of A letterhead would suffice as a signature because it was written for the purpose of giving authenticity to the instrument (Rest.2d Contracts, § 134); however, the written reinstatement offer did not memorialize the later oral reinstatement agreement. The reinstatement offer sent to Goffman by facsimile was an offer to contract. The oral reinstatement agreement reached by the parties had significantly different terms from the proposed one.

2. *Estoppel to Assert the Statute of Frauds*

Goffman argues she alleged Defendants are estopped from asserting the statute of frauds because her reliance on the oral reinstatement agreement led her to change her position to her detriment.

A contract that is subject to the statute of frauds and lacks the requisite writing can be enforced when a party has partially performed. (*In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1108.) Part performance means the party seeking enforcement of the contract changed position to “such an extent that the application of the statute of frauds would result in an unjust or unconscionable loss, amounting in effect to a fraud.” (*Secrest, supra*, 167 Cal.App.4th at p. 555; see also *Anderson v. Stansbury* (1952) 38 Cal.2d. 707, 715; *Contreras v. Loya* (1961) 192 Cal.App.2d 176; *Gaglione v. Coolidge* (1955) 134 Cal.App.2d 518; *Estes v. Hardesty* (1944) 66 Cal.App.2d 747.) Payment of money is not sufficient part performance for estoppel to assert the statute of frauds because the party paying money has an adequate legal remedy. (*Anderson v. Stansbury, supra*, at p. 716; *Secrest, supra*, at p. 555.)

In her appellate brief, Goffman argues she pleaded estoppel to assert the statute of frauds because she “performed her obligations in full compliance with the

agreement and in addition she changed her position by foregoing her options to refinance, borrow money to pay the full reinstatement or file bankruptcy.” In the second amended complaint, Goffman alleged the only change in position was that she made timely payments on the oral reinstatement agreement. She did not allege she changed her position by foregoing her options to refinance, to file bankruptcy, or to borrow money to pay the amount required to reinstate the loan. In a proposed third amended complaint submitted with a motion to vacate the trial court’s order sustaining the demurrer to the second amended complaint, Goffman alleged she changed her position by making the reinstatement payment, making the February and March 2010 payments, and “[p]ass[ing]-up the other options available to her.”

Goffman’s payments to BAC did not constitute part performance sufficient to raise an estoppel to assert the statute of frauds. In that regard, this case is indistinguishable from *Secrest, supra*, 167 Cal.App.4th at page 557. The appellants in *Secrest* argued their downpayment on a forbearance agreement constituted part performance and a change in position sufficient to estop the respondents from asserting the statute of frauds. (*Id.* at p. 555.) This court disagreed because “[t]he principle that full performance takes a contract out of the statute of frauds has been limited to the situation where performance consisted of conveying property, rendering personal services, or doing something other than payment of money.” (*Id.* at p. 556.)

In *Secrest*, this court also recognized that actions other than payment of money might be sufficient to raise an estoppel to assert the statute of frauds. (*Secrest, supra*, 167 Cal.App.4th at p. 557 [“We do not address what other actions in reliance on the January 2002 Forbearance Agreement might have been sufficient to raise an estoppel to assert the statute of frauds”].) The court in *Seymour v. Oelrichs* (1909) 156 Cal. 782, 793-794, disapproved on another ground in *Sterling v. Taylor* (2007) 40 Cal.4th 757, 769-770, for example, found the plaintiff substantially changed his position in reliance on

an oral agreement by resigning from his lifetime position at the police department to enter into the defendants' employ.

Goffman's second amended complaint did not allege a substantial change in position, other than the payment of money, and did not allege "other actions" that might have been sufficient for estoppel. (*Secrest, supra*, 167 Cal.App.4th at p. 557.) The trial court therefore did not err by sustaining the demurrer to Goffman's breach of contract cause of action.

II.

Goffman Should Be Granted Leave to Amend to Plead Promissory Estoppel.

Goffman argues we should grant her leave to amend to allege a cause of action for promissory estoppel. In her written opposition to the demurrer and at the hearing, Goffman argued the second amended complaint sufficiently alleged promissory estoppel and, therefore, she "should be able to get around a statute-of-frauds' problem." Although Goffman did not request leave to amend in her written opposition to the demurrer, at the hearing, her counsel stated, "if nothing else, we would like one more chance to amend."

After oral argument in this matter, we vacated submission and invited Goffman to submit a proposed *third* amended complaint for promissory estoppel, which she would be prepared to file in the superior court if we were to grant her request for leave to amend. We also invited her to submit a letter brief explaining why her proposed amended complaint states a cause of action for promissory estoppel, and we invited Defendants to submit a letter brief in response to the proposed amended complaint and Goffman's letter brief. We have considered Goffman's proposed amended complaint and the parties' letter briefs, and, as we shall explain, we conclude Goffman should be granted leave to file an amended complaint for promissory estoppel.

A. *Standard of Review*

We review the parties' pleadings to resolve whether a third amended complaint could reasonably support a valid cause of action. (*Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1347.) "Where a complaint could reasonably be amended to allege a valid cause of action, we must reverse the judgment. [Citations.] Leave to amend is liberally allowed; a specific request to amend is not required as a prerequisite to review on appeal the trial court's decision not to grant leave to amend." (*Id.* at p. 1348.) A plaintiff may seek leave to amend for the first time on appeal. (*Thornton v. California Unemployment Ins. Appeals Bd.* (2012) 204 Cal.App.4th 1403, 1423.)

B. *Promissory Estoppel*

Estoppel to assert the statute of frauds and promissory estoppel have different requirements and different remedies. Goffman's inability to plead a cause of action based on breach of contract would not prevent her from pleading a cause of action for promissory estoppel. The issue of promissory estoppel was not raised in *Secrest*. (*Secrest, supra*, 167 Cal.App.4th at pp. 547-548.) The court in *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1040, footnote 10 (*Garcia*), did address the issue and concluded the statute of frauds would not defeat a claim based on promissory estoppel. Civil Code section 1698, subdivision (d) expressly permits a claim of promissory estoppel: "Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel"

Promissory estoppel makes a promise binding, under certain circumstances, "without consideration in the usual sense of something bargained for and given in exchange." (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 249.) The elements of promissory estoppel are (1) a promise, (2) the promisor should reasonably

expect the promise to induce action or forbearance on the part of the promisee or a third person, (3) the promise induces action or forbearance by the promisee or a third person (sometimes called “detrimental reliance”), and (4) injustice can be avoided only by enforcement of the promise. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310 (*Kajima*); see Rest.2d Contracts, § 90, subd. (1).)

C. Goffman Can Allege Promissory Estoppel Based on Availability of Reinstatement and Financing.

1. *Clear and Unambiguous Promise*

“‘[A] promise is an indispensable element of the doctrine of promissory estoppel. The cases are uniform in holding that this doctrine cannot be invoked and must be held inapplicable in the absence of a showing that a promise had been made upon which the complaining party relied to his prejudice’ [Citation.] The promise must, in addition, be ‘clear and unambiguous in its terms.’ [Citation.]” (*Garcia, supra*, 183 Cal.App.4th at p. 1044.) To be enforceable, a promise need only be “‘definite enough that a court can determine the scope of the duty[,] and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages.’ [Citations.]” (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 209.)

Goffman’s proposed third amended complaint alleges, under a subheading entitled “Clear and Unambiguous Promises” (boldface omitted), the following: “On December 30, 2009 in a series of telephone calls from 10:01am to 2:48pm, Ms. Goffman and [B of A] reached an oral reinstatement agreement based on the following terms: [¶] • Ms. Goffman would make one lump sum payment in the amount of \$8[,]674.88 by certified funds to be received by [B of A] no later than January 13, 2010; [¶] • Starting in February 2010 and continuing through May 2010, Ms. Goffman would make monthly mortgage payments in the amount of \$1,805.17 said payments to be made by personal check and were to be made no later than the 15th day of the month; [¶] • On or before

June 15, 2010 Ms. Goffman would make a mortgage payment of \$1,864.56 also payable by personal check; and [¶] • Thereafter, in July 2010 she would resume her regular monthly loan payments of \$1,000.00 and continue those payments for 36 months.” (Some capitalization omitted.)

The proposed amended complaint alleges Goffman memorialized her conversation with B of A in a handwritten note, which she attached to the proposed amended complaint, and alleges that in the telephone conversations, she was “repeatedly told by [B of A] that her loan would be reinstated upon receipt of the \$8,674,56 in certified funds and that as long as she continued to make the prescribed monthly payments her home would be ‘out of foreclosure.’” (Capitalization omitted.)

These allegations satisfy the requirement of a promise “‘clear and unambiguous in its terms’” (*Garcia, supra*, 183 Cal.App.4th at p. 1044).

2. *Reasonably Foreseeable Reliance*

In the proposed third amended complaint, Goffman alleges: “The representations made to Ms. Goffman in the above-described telephone calls were clear and unambiguous and were made by the representative of [B of A] who reasonably should have expected or did, in fact, expect that Goffman would be induced into believing that her loan was reinstated and that her home was ‘out of foreclosure.’” (Some capitalization omitted.) This allegation of reasonably foreseeable reliance is sufficient. B of A had reason to know Goffman would rely on its promise because she had spoken with the B of A agent about a reinstatement agreement, had expressed her desire to save her home, and previously applied for a loan modification. Under those circumstances, a lender could reasonably foresee a borrower would rely on the lender’s promise to reinstate a loan for payment of a specified amount.

3. *Detrimental Reliance*

“As a general rule, a gratuitous oral promise to postpone a foreclosure sale or to allow a borrower to delay monthly mortgage payments is unenforceable.” (*Garcia, supra*, 183 Cal.App.4th at p. 1039; see also *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 673 (*Raedeke*); *Secrest, supra*, 167 Cal.App.4th at pp. 553-554.) In *Raedeke*, the California Supreme Court recognized it would be unjust for a defendant lender to avoid its promise to postpone a foreclosure sale when the “plaintiffs relied thereon to their detriment, being misled and lulled into a course of inaction.” (*Raedeke, supra*, at p. 672.)

Under the subheading “Ms. Goffman’s Reliance Was Reasonable” (boldface and some capitalization omitted), the proposed third amended complaint alleges Goffman reasonably relied to her detriment on B of A’s representations, “as evidenced by the fact that she” did the following:

“A. Passed-up the other options available to her such as full reinstatement, refinance to access equity, and/or bankruptcy; and

“B. Made the \$8,674.56 reinstatement payment in timely fashion and in properly certified funds. That payment was accepted by [B of A].

“C. Additionally, she made the February and March payments of \$1,805.17 in timely fashion by personal check as she had been instructed. Those payments were accepted by [B of A].

“D. [B of A] foreclosed before the next payment (April) was due.”

The proposed third amended complaint then alleges: “[B of A]’s reinstatement letter . . . specifically raised the possibility of an alternate reinstatement plan requiring an initial payment less than \$14,961.30, and in contacting [B of A] to discuss such alternatives Ms. Goffman was relying on the actual language of the reinstatement letter. Additionally, in hammering out the specifics of just such an alternate plan Ms. Goffman was foreseeably and reasonably relying on [B of A]’s

agreement to accept those payments in lieu of the payment outlined in that reinstatement letter. Therefore, the new reinstatement plan was done at the invitation of [B of A], and [B of A] was an active participant with Ms. Goffman in working out those terms.” (Some capitalization omitted.)

Accepting the allegations as true, and giving them a liberal construction (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1469), we believe the proposed third amended complaint satisfactorily alleges that Goffman detrimentally relied on B of A’s alleged promises by foregoing the option to reinstate her loan or option to refinance. To be sure, the proposed third amended complaint does not specifically identify the source of refinancing and does not forthrightly allege she would have obtained refinancing or reinstatement had B of A not foreclosed. But, “[t]he rules of pleading require, with limited exceptions not applicable here, only general allegations of ultimate fact. [Citations.] The plaintiff need not plead evidentiary facts supporting the allegation of ultimate fact. [Citation.] A pleading is adequate so long as it apprises the defendant of the factual basis for the plaintiff’s claim. [Citations.]” (*McKell v. Washington Mutual, Inc., supra*, at pp. 1469-1470.)

In light of these pleading rules, we construe the allegation that Goffman “[p]assed-up the other options available to her such as full reinstatement, refinance to access equity” as pleading the ultimate fact that she would have obtained full reinstatement or refinancing had she not relied on B of A’s alleged promises. In other words, we construe the phrase “available to her” as implying a degree of reasonable certainty rather than mere potentiality. Whether Goffman can prove this ultimate fact is another matter; for purposes of alleging promissory estoppel, it is sufficient.

In the order inviting Goffman to submit a proposed third amended complaint, we asked the parties to address our opinion in *Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418. In *Park*, this court held the defendant title company was not liable for causing a delay in holding a foreclosure sale because there was no evidence

of at least one ready, willing, and able buyer who would have purchased the property but for the delay in the foreclosure proceeding occasioned by the title company's negligence. (*Id.* at p. 1423.) Although *Park* was decided on a summary judgment motion, and therefore did not address the required level of specificity of pleading, the case is relevant to establishing the nature of the evidence Goffman must produce to prove her promissory estoppel cause of action.

The proposed third amended complaint does not convince us, however, that Goffman can allege foregoing bankruptcy protection as detrimental reliance. In *Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 227 (*Aceves*), a borrower alleged that in reliance on a bank's promise to work with the borrower to reinstate and modify her loan, she did not attempt to save her home by converting her existing chapter 7 bankruptcy to a chapter 13 bankruptcy. The appellate court concluded the borrower had alleged detrimental reliance and reversed the judgment dismissing the borrower's promissory estoppel cause of action without leave to amend. (*Ibid.*) In doing so, the appellate court accepted as true the borrower's allegation she could have saved her home by converting to a chapter 13 bankruptcy. (*Id.* at p. 230.)

Here, unlike *Aceves*, Goffman does not assert she would be able to allege she had filed for bankruptcy protection. Goffman does not assert that she would be able to allege she qualified for bankruptcy protection or that she did anything toward seeking bankruptcy protection, even though she could have done so up until the time of the foreclosure sale. Unlike the borrower in *Aceves*, Goffman does not assert she would be able to allege that bankruptcy protection would have saved her home from foreclosure. While bankruptcy protection, like reinstatement or refinancing, was available to Goffman, filing for bankruptcy protection, unlike reinstatement or refinancing, would not automatically or necessarily have prevented foreclosure of Goffman's home. Goffman therefore failed to allege ultimate facts establishing a reasonable certainty that bankruptcy could have prevented the foreclosure.

4. *Avoidance of Injustice/Damages*

If the other elements are met, promissory estoppel arises ““if injustice can be avoided only by enforcement of the promise.”” (*Kajima, supra*, 23 Cal.4th at p. 310.) Damages for promissory estoppel are ““measured by the extent of the obligation assumed and not performed.”” (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692.)

The proposed third amended complaint alleges, “Goffman’s reliance upon the promises and representations of [B of A] was to her severe and substantial detriment, because she lost her house and the substantial equity she owned in that house to foreclosure.” (Some capitalization omitted.) The proposed third amended complaint further alleges: “As a direct result of the breach of [B of A], Ms[.] Goffman has been permanently deprived of the use and enjoyment of her property, in addition to suffering the loss of all monies invested in the home and the equity that had been established in the home, she has further incurred the expenses of securing new housing along with the attendant costs of moving in an amount to be determined at trial” (Some capitalization omitted.) Those allegations satisfy the element of avoidance of justice/damages.

DISPOSITION

The trial court did not err by sustaining the demurrer to Goffman’s second amended complaint. We reverse the judgment and remand, however, because Goffman can amend to state a cause of action for promissory estoppel, as demonstrated by her proposed third amended complaint. We grant Goffman leave to amend to file a third amended complaint for promissory estoppel to the extent the proposed third amended complaint refers to reinstatement and refinancing. (See Code Civ. Proc., § 472b.) The proposed third amended complaint fails to adequately allege that Goffman forewent bankruptcy protection in detrimental reliance on B of A’s alleged promises; therefore,

leave to amend to make those allegations is denied. Both parties prevailed in part in this appeal, so neither party shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.

ARONSON, J., Concurring:

I agree with the majority's reasoning and conclusion. I want to make clear, however, our opinion does not prohibit plaintiff from seeking leave to amend to assert additional or new facts as a basis for promissory estoppel or any other liability theory her investigation or discovery may support. (See *Dye v. Caterpillar, Inc.* (2011) 195 Cal.App.4th 1366, 1380-1381.) This includes forgoing bankruptcy protection as a basis for promissory estoppel, assuming plaintiff alleges the ultimate facts necessary to support the requisite elements, something she failed to do in the proposed complaint she submitted on appeal.

ARONSON, J.