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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GLENN M. ROSEN et al.,	
Plaintiffs and Appellants,	G046336
v.	(Super. Ct. No. 30-2010-00364357)
BANK OF AMERICA, N.A.,	O P I N I O N
Defendant and Respondent.	

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

Law Offices of Glenn M. Rosen and Glenn M. Rosen for Plaintiffs and Appellants.

Bryan Cave, Stuart W. Price, Sean D. Muntz and John T. Madden for Defendant and Appellant.

INTRODUCTION

Glenn and Peggy Rosen appeal from an order dismissing their third amended complaint against Bank of America (BofA), based on the foreclosure of their Laguna Niguel Home.[1] The court sustained without leave to amend BofA's demurrer to the Rosens' fourth attempt to state a cause of action, having despaired of obtaining a comprehensible pleading. Glenn Rosen, it should be mentioned, is a member of the California State Bar and is representing himself and his wife in this appeal.

We allude to Glenn Rosen's status as an attorney because of the state of the appellants' opening brief. The statement of facts section in the opening brief is devoid of a single citation to the record. (See Cal. Rules of Court, rule 8.204(a)(1)(C).) Numerous references to facts in the argument portion also lack citations to the record. The brief contains no headings summarizing each separate point. (See Cal. Rules of Court, rule 8.204(a)(1)(B).)[2] The statement of relief sought (see Cal. Rules of Court, rule 8.204(a)(2)(A)) is the *dismissal* of the order sustaining the demurrer to the third amended complaint without leave to amend. There is no discussion of, or even reference to, the standard of review of an appeal following the sustaining of a demurrer.[3]

In addition, appellants did not include the judgment of dismissal when they designated the clerk's transcript. (See Cal. Rules of Court, rule 8.122(b)(1)(B).) We had to issue our own order to appellants to get a copy of the judgment.

Disregarding the rules of appellate procedure even by an unrepresented layperson is always problematic; when an attorney representing himself flouts them so

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[1] The third amended complaint also named the Federal Deposit Insurance Corporation (FDIC) and Loanrider.com as defendants. Appellants dismissed the FDIC shortly after BofA demurred to the third amended complaint. No proof of service for Loanrider.com appears in the record, and no allegations regarding this defendant appear in the third amended complaint.

[2] The headings are merely the numbers and the names of the causes of action.

[3] This omission is inexplicable given that Glenn Rosen represented the plaintiff and appellant in a case we decided last year, *Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453 (*Rosen*), in which we affirmed the trial court's sustaining of a demurrer without leave to amend. In that opinion, we discussed at some length the standard of review after both the sustaining of a demurrer and the denial of leave to amend. (*Id.* at p. 458.)

pervasively, it is simply incomprehensible. Were we to take one of the steps permitted in response to such conduct – disregarding the noncomplying portions – we would, in effect, toss out the entire opening brief.[4] (See, e.g., *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4.)

Considering all the circumstances, however, we conclude we should go ahead with the review on the merits, at least in part. We do so reluctantly, because we do not wish to encourage the view that attorneys can get away with disregarding the rules at the price of a severe talking-to and nothing more. But because the record in this case is so abbreviated – too abbreviated, in fact – and the standard of review is de novo, the rule violations do not burden our court as they would if the proceedings below had been lengthier. For example, we do not have to hunt through exhibits or jury instructions or pages and pages of testimony.[5] Moreover, the third amended complaint is so obviously defective that we need not spend a great deal of time on the issues remaining in this appeal. As appellants have conceded they cannot amend, we can put this entire case to rest expeditiously.

FACTS

Like the trial court, we have found appellants' pleading difficult to sort out. Their two main complaints appear to be, first, BofA foreclosed on appellants' home after it said it would not do so and, second, BofA did not give proper notice of the foreclosure. There are also subsidiary allegations of a conspiracy between BofA and the FDIC whereby BofA transferred the property to the FDIC so BofA could plausibly deny any possibility of negotiating a loan modification with appellants.

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4 BofA's attorneys are not without sin. Their citations to the "record" regarding appellants' prior attempts to state a cause of action turn out to be citations to statements in their own memorandum of points and authorities about the contents of these complaints. This is not a "citation to the . . . record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) The matter appears in the previous complaints; if BofA wanted to refer to them, it should have moved to augment the record under Rule 8.155.

5 The record does not include a reporter's transcript.

Appellants alleged several phone conversations with BofA representatives in which the representative stated no foreclosure sale date had been set and no foreclosure sale would take place. Specifically, appellants alleged that Glenn Rosen spoke to Joseph Hall and "Rachel" by telephone on June 23, 2010, both of whom told him there would be no foreclosure sale. Nevertheless, a foreclosure sale did take place on July 9, 2010.[6] Appellants' third amended complaint asserted causes of action for promissory estoppel, violation of Civil Code section 2924(a)(d),[7] and several kinds of fraud.

The trial court held oral argument on BofA's demurrer and motion to strike on November 16, 2011. It sustained BofA's demurrer and dismissed the motion to strike as moot. In a comprehensive minute order, the trial court ruled that appellants had failed to state a cause of action for promissory estoppel because, among other defects, appellants had not alleged any promise on which they had relied to their detriment. Their causes of action for fraud suffered from the same deficiencies. In light of the three previous failed attempts to state a cause of action, the trial court refused to allow any further amendment. Judgment of dismissal with prejudice was entered on January 26, 2012.

DISCUSSION

As we explained in *Rosen, supra*, "We review Rosen's complaint de novo to determine whether it alleged facts sufficient to state a cause of action under any legal theory. [Citation.] In doing so, we look past the form of the pleading to its substance and ignore any erroneous or confusing labels Rosen attached. [Citation.] '"'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] . . .' . . . Further, we give the complaint a

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6 Appellants alleged that Glenn Rosen spoke to other BofA representatives in July 2010, but by that time the foreclosure sale had already taken place. He also spoke to a representative named Kimberly, but appellants did not allege that Kimberly made any promises regarding the sale.

7 In the complaint, the Civil Code section is pleaded as "2429(a)(d)." The court and BofA assumed appellants meant section 2924.

reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]"' [Citation.]" (*Rosen, supra*, 193 Cal.App.4th at p. 458.)

Throughout their briefs, appellants refer to the trial court's abuse of its discretion in sustaining BofA's demurrer. They never identify the correct standard of review – de novo – thereby derailing any legal analysis of the trial court's rulings they could offer. They have not supported their arguments for reversal with applicable legal authority. (See *Estate of Cairns* (2010) 188 Cal.App.4th 937, 949.)

I. The Demurrer Was Properly Sustained

A. Promissory Estoppel

"'Promissory estoppel applies whenever a "promise which the promissor 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" would result in an "injustice" if the promise were not enforced. [Citations.]' 'The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." [Citation.]'" (*Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1671-1672 (*Advanced Choices*).) Promissory estoppel permits the substitution of the promisee's action or forbearance for consideration to create an enforceable contract. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) An action for promissory estoppel is, in effect, an action on a contract. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 902.)

Appellants alleged that BofA promised not to foreclose on their home, a promise they relied upon by not conducting a short sale and not filing for bankruptcy protection to stave off foreclosure.

The promise appellants allege is not sufficiently "clear and unambiguous in its terms." (*Advanced Choices*, *supra*, 182 Cal.App.4th at pp. 1671-1672.) Did appellants mean BofA promised *never* to foreclose on their home? Did it promise not to foreclose on the noticed date? Did BofA promise to postpone foreclosure temporarily? If so, for how long? Appellants alluded vaguely to wanting to talk to Joseph Hall about a loan modification, but they alleged nothing to indicate BofA had agreed to enter into loan modification negotiations, let alone that BofA had promised to postpone foreclosure until negotiations were complete.

"To be enforceable, a promise must 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." (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 770.) Appellants did not allege a sufficiently clear and unambiguous promise.

Appellants also did not adequately allege reliance on the promise. They allege only that, relying on BofA's promise, they did not sell their home through a short sale or file for bankruptcy protection.

A short sale would have required BofA's approval and its willingness to accept less than the amount of the debt as payment for the house. (See *Espinoza v. Bank of America, N.A.* (S.D.Cal. 2011) 823 F.Supp.2d 1053, 1059.) Appellants did not even hint that BofA ever represented it was willing to do this. As appellants have pleaded this cause of action, a short sale was never an option or an alternative to foreclosure. As for not filing a bankruptcy petition, this allegation is far too vague and conclusory to support the reliance element of promissory estoppel. Appellants did not allege that they took any steps toward filing, which they then called off because of BofA's promise or representations. More importantly, a bankruptcy does not obliterate the debt. It provides a means for paying off arrearages over time (see *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 228-230 (*Aceves*)), but it does not excuse them. Appellants did not allege that they would have been able to find the funds to cure their default and save their home.

A comparison with some cases in which the debtors asserted promissory estoppel in the context of foreclosure sales illustrates the insufficiency of appellants' reliance allegations. In *Aceves*, *supra*, the plaintiff was already in a Chapter 7 bankruptcy. She alleged she refrained from converting her Chapter 7 to a Chapter 13 bankruptcy, which would have allowed her time to cure her default, because U.S. Bank told her it would enter into negotiations for a loan modification if she did not convert. She also alleged she could have used her husband's financial assistance to cure the loan default through a Chapter 13 bankruptcy. (*Aceves*, *supra*, 192 Cal.App.4th at pp. 223, 227.) In *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, the plaintiffs supported the detrimental reliance element by alleging (and proving) that they had obtained a loan secured by another piece of property to pay off the debt to World Savings. (*Id.* at p. 1041; see also *Raedeke v. Gibraltar Sav. & Loan Assn*. (1974) 10 Cal.3d 665, 673 [borrowers found purchaser for property].)

By contrast, a number of recent foreclosure cases applying California law have held that mere conclusory allegations about bankruptcy are not sufficient to establish detrimental reliance for promissory estoppel purposes. (See, e.g., *Anderson v. PHH Mortgage* (C.D.Cal., Sept. 28, 2012, No. SACV 12-01192 CJC) 2012 U.S.Dist. Lexis 141780 *8-9; *Morrison v. Wachovia Mortgage Corp.* (C.D.Cal., March 12, 2012, No. CV 11-7948 CAS) 2012 U.S.Dist. Lexis 39273 *18, fn.8; *Clark v. Wachovia Mortgage* (C.D.Cal., June 9, 2011, No. SACV 11-00226-CJC) 2011 U.S.Dist. Lexis 63398 *14; *Mehta v. Wells Fargo Bank, N.A.* (S.D.Cal., Mar. 29, 2011, No. 10CV944JLS) 2011 U.S.Dist. Lexis 33407 *8.) Having alleged no more than this, appellants have not alleged facts necessary to establish detrimental reliance.

B. Violation of Civil Code 2924

Appellants allege a failure by BofA to give proper notice of the foreclosure sale, thereby violating "Civil Code 2429(a)(d) [*sic*: section 2924]." Presumably appellants mean sections 2924a through 2924d, although only Civil Code section 2924b deals with the notice required for a foreclosure sale. In any event, the trial court observed that in order to state a cause of action to set aside a foreclosure sale – which appellants acknowledged had already occurred – a plaintiff had to allege "an unconditional ability and present readiness to tender the indebtedness. . . ." Appellants had not made the requisite allegations.

Appellants argued this issue in their opening brief. In their reply brief, however, they throw in the towel. They assert they are not challenging a foreclosure and concede they did not state facts sufficient to constitute a cause of action for violation of Civil Code section 2924. We do not need to occupy ourselves further with this issue.

C. Fraud

1. Promissory fraud

Appellants seem to have confused promissory fraud and promissory estoppel. Promissory estoppel is a component of a contract action. It substitutes a reliance induced by a promise for consideration. Promissory fraud is a tort. To state a cause of action for promissory fraud, a plaintiff must allege a promise made without any intention of performing it, intent to induce reliance, justifiable reliance, and resulting damages. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; see also Civ. Code, § 1710, subd. (4).) The presence or absence of consideration is not an element of promissory fraud. An intent to induce reliance and the absence of an intent to perform the promise are not elements of promissory estoppel.

Promissory estoppel and promissory fraud are similar in that both require reliance and resulting damages. The damages that can be recovered are, however, different. Contract damages are limited to those reasonably foreseeable at the time the contract was entered into, while tort damages encompass all the harm inflicted, regardless of whether it could have been anticipated. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515-516.)

Appellants' complaint mentioned several alleged promises. For example, appellants alleged that BofA promised not to sell their home through foreclosure. They also alleged a promise to inform appellants if there was going to be a foreclosure sale and a promise to postpone the foreclosure sale, both of which promises would be inconsistent with a promise not to foreclose. Still another allegation stated that appellants were promised they could apply for a loan modification. Appellants also alleged a promise to reinstate their loan. In their opening brief, however, they confine the promises in question to (1) a promise not to foreclose, (2) a promise to inform them before foreclosing, and (3) a promise to postpone the foreclosure sale. We may treat the other alleged promises as abandoned, as appellants did not include them in their briefs on appeal. (See *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538.)

Appellants failed to state a claim for promissory fraud based on these three alleged promises. In the first place, they did not allege that BofA made these promises without any intention of performing them.[8] It is well settled that a mere failure to perform will not support a claim for promissory fraud; the intent not to perform must be present when the promise is made. (See, e.g., *Building Permit Consultants, Inc. v. Mazur* (2004) 122 Cal.App.4th 1400, 1414.)

Although this deficiency could be easily cured by simply alleging the necessary lack of intent, other defects cannot be so easily mended. Obviously, BofA could not have promised both to refrain entirely from foreclosing and to tell appellants

[8] Here is where appellants' failure to follow the rules regarding appellate briefs comes home to roost. To support their fraud argument, appellants' brief cites to allegations made in only four pages of the third amended complaint. Nowhere in these four pages is there an allegation that BofA did not intend to perform at the time the promise was made. If that allegation appears elsewhere in the complaint, appellants have not cited to the place in the record where the allegation can be found.

when it was foreclosing. Appellants could not reasonably have relied on such contradictory promises. Likewise, appellants could not have reasonably relied on a promise not to foreclose and a promise to postpone the foreclosure sale.

Appellants' failure to allege reliance on the false promise appears in another way. They allege that because of the promise (whatever it was), they refrained from conducting a short sale or filing for bankruptcy. As stated above, these vague allegations are insufficient. A short sale requires lender approval, which appellants did not allege they had secured[9] (see *Espinoza v. Bank of America, N.A., supra*, 823 F.Supp.2d at p. 1059), and bankruptcy does not excuse performance of the loan contract; it merely postpones performance. Appellants did not allege access to sufficient financial resources to satisfy their debt through a bankruptcy workout. (Cf. *Aceves, supra*, 192 Cal.App.4th at p. 223 [plaintiff in bankruptcy alleged financial resources to pay off loan].) Something more concrete than a simple allusion to a possible bankruptcy filing is necessary to allege reliance adequately.

Finally appellants have not alleged damages from a false promise. A fraud cause of action requires "'actual monetary loss.'" (*City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 888, quoting *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240.) "Deception which does not cause loss is not a fraud in the legal sense." (*Hill v. Wrather* (1958) 158 Cal.App.2d 818, 825.)

The only loss appellants alleged is the loss of their home through foreclosure. Although they claim not to have received proper notice, they did not dispute BofA's fundamental right to foreclose for nonpayment of debt. They also did not allege that the property was worth more than the debt; they did not allege that, had BofA held off foreclosing or told them foreclosure was imminent, they could have sold the property for more than the debt, paid off the debt, and had money left over. Their damages would

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9 After January 1, 2011, a short sale of a dwelling operates like a nonjudicial foreclosure, in that the lender cannot collect any deficiency from the debtor. (See Code Civ. Proc., § 580e.)

be the difference between the amount of the debt and the amount in excess of the debt they realized from the sale of the property. They did not allege any such excess amount. Consequently, they did not sustain "an actual monetary loss."

2. Misrepresentation or Concealment

Appellants also alleged that BofA told them no foreclosure sale had taken place or that the sale had been postponed when in fact it had already happened. This allegation can be viewed either as a misrepresentation of fact (no sale had taken place) or concealment of the fact of the sale.

To state a cause of action for a fraudulent misrepresentation, the plaintiff must allege a false statement of fact, intent to induce reliance, justifiable reliance, and resulting damage. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974; *Wishnick v. Frye* (1952) 111 Cal.App.2d 926, 930.) A cause of action for concealment requires allegations of facts establishing: (1) concealment of a material fact; (2) the duty to disclose the concealed fact; (3) the intent to defraud through concealment; (4) the plaintiff's justifiable lack of awareness of the fact; and (5) damage resulting from the concealment. (*Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1199; see also Civ. Code, § 1710.)

Once again, appellants have failed to allege reliance. If the sale had already taken place, appellants could not have conducted a short sale – the property no longer belonged to them. Likewise, filing for bankruptcy protection in order to save the property would have been futile if they no longer owned it. Appellants do not suggest any other kind of reliance on an after-the-fact misrepresentation that no sale had taken place.

As for damages, appellants have again failed to allege monetary loss stemming from the alleged fraud. True, they lost their house, but they also lost a debt they evidently could not repay. If BofA acquired the property through nonjudicial foreclosure, BofA cannot require appellants to make up any deficiency between the amount of the debt and what BofA paid to acquire it.[10] (See *Alliance Mortgage Co. v. Rothwell, supra,* 10 Cal.4th at p. 1236.) They did not allege that the property's value exceeded the amount of the debt.

3. Negligent Misrepresentation

Negligent misrepresentation is a form of deceit that does not require intent to deceive, an indispensible element of other kinds of fraud. (*Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1184.) Negligent misrepresentation is "[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." (Civ. Code, § 1710, subd. (2).) To state a cause of action for negligent misrepresentation, a plaintiff must still allege facts establishing the other elements of fraud: a false statement of fact, justifiable reliance, and resulting damages. (*Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 181.)

Appellants based their cause of action for negligent misrepresentation on the same facts they used for their other fraud claims. Appellants' failure to allege facts establishing reliance and damages doomed this cause of action as it doomed their claims for misrepresentation, concealment, and promissory fraud. The trial court correctly sustained BofA's demurrer to appellants' fraud claims.

II. Denial of Leave to Amend Was Correct

In their reply brief, appellants specifically disclaim any desire to amend their complaint. In fact, they concede, "Allowing for further amendment would be futile." We agree. As appellants have abandoned their claim that the trial court abused

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[10] It is not entirely clear whether BofA acquired the property. Appellants made extremely confusing allegations regarding BofA's transfer of something to the FDIC, which transfer appellants regarded as fraudulent and conspiratorial. Appellants alleged that BofA transferred both their loan and title to their property to the FDIC. Obviously both cannot be true; if BofA had foreclosed, it would have had to acquire title somehow after the sale in order to transfer it to the FDIC. There would have been no loan to transfer. If BofA transferred the *loan* to the FDIC, then it would not have foreclosed. A foreclosure would have wiped out the loan. In any event, as the trial court observed, what happened to the property after foreclosure could hardly affect appellants.

its discretion in refusing to allow further amendment, we need discuss this point no further.

DISPOSITION

The judgment of dismissal is affirmed. Respondent is to recover its costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.