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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SHARON HENDERSON,

Plaintiff and Appellant,

v.

SAXON MORTGAGE SERVICES, INC.,

Defendant and Respondent.

G046614

(Super. Ct. No. 30-2009-00121191)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed.

Robinson Calcagnie Robinson Shapiro Davis, and William D. Shapiro, for Plaintiff and Appellant.

Pite Duncan, Peter J. Salmon, Christopher L. Peterson and William L. Partridge, for Defendant and Respondent.

## INTRODUCTION

Sharon Henderson appeals a judgment dismissing her third amended complaint after the trial court granted the motion for judgment on the pleadings of defendant Saxon Mortgage Services, Inc., without leave to amend.<sup>1</sup> By this point in the litigation, two demurrers had already been sustained with leave to amend. The court granted the last leave to amend on condition that Henderson produce a writing memorializing Saxon's alleged agreement to allow a "short sale" of her residence to her son in exchange for the proceeds from a fire insurance policy.

Henderson was unable to provide the documentation necessary to satisfy the statute of frauds (Civ. Code, § 1624). Although Henderson sued Saxon for wrongful foreclosure, negligence, and several kinds of fraud, in her opening brief she argued error only as to her fraud causes of action – misrepresentation, concealment, and promissory fraud. Under well accepted principles of appellate review, any other disagreements she had with the trial court's rulings are waived.

We affirm the trial court's judgment. Henderson did not state a cause of action for fraud because she failed to allege facts showing any reliance on a promise made without any intent to perform it or facts showing monetary loss for any of the varieties of fraud she alleged. It does not appear that she could amend the complaint to supply the necessary facts. The court properly granted Saxon's motion for judgment on the pleadings without leave to amend and dismissed the action.

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<sup>1</sup> Henderson actually named "Saxon Mortgage" and "Saxon Mortgage Services, Inc.," as defendants. She did not, however, distinguish between the two defendants in her pleading or papers, and, in fact, the allegations referred only to Saxon Mortgage Services, Inc. We refer to defendants collectively as Saxon.

## FACTS

In July 2006, Henderson borrowed \$1.2 million secured by two deeds of trust on a house in Yorba Linda. The first deed of trust, for just under \$1 million, is the one at issue in this lawsuit.<sup>2</sup>

Henderson's loan went into default for the first time in early 2007, and a notice of default was recorded on April 14, 2007. Although a trustee's sale was noticed in early August 2007, the notice of default was rescinded at the end of the month, presumably because some payment arrangement had been made. In 2008, however, the loan was again in arrears, and another notice of default was recorded on June 23, 2008. Apparently nothing happened to cure this default, because a trustee's sale was noticed for April 8, 2009. Saxon bought the property at the trustee's sale.

In November 2008, after the second notice of default but before the trustee's sale, a fire swept through the city of Yorba Linda, destroying many homes, including Henderson's. Henderson alleged that after the fire Saxon agreed to "short sale" the burned-out property to Henderson's son, Kenny Williams, in return for the proceeds of the fire insurance policy. Saxon would not foreclose on the property, but would allow Henderson to convey title to Williams, with Saxon regarding the insurance proceeds as payment of the loan in full. Henderson alleged that Williams had many conversations with a Saxon employee, Joe Lopez, regarding the short-sale deal. Henderson failed, however, to secure any writing signed by Saxon confirming the agreement.

Saxon went ahead with the foreclosure and, as mentioned above, bought the property at the trustee's sale. Saxon also recovered the proceeds from the fire insurance policy. Henderson learned of the trustee's sale only about two weeks before it was due to

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<sup>2</sup> The first deed of trust identifies the lender as "SBMC Mortgage," a general partnership. Henderson does not explain how Saxon came to be the lender. She alleges, however, that she obtained a real estate loan from Saxon Mortgage Services, Inc., and we accept that allegation as true.

take place.<sup>3</sup> Had she known about the pending sale before then, Henderson alleged she could have obtained funds from her retirement account to bring the loan current.

Henderson sued Saxon on April 8, 2009, the date of the trustee's sale. She also filed a lis pendens. After Saxon answered, she filed a first amended complaint in December 2009. Saxon demurred to the first amended complaint and also moved to expunge the lis pendens.<sup>4</sup> Henderson's second amended complaint was filed in May 2010, and Saxon demurred to that pleading as well. The court sustained the demurrer, ruling that Henderson could amend the complaint again only if she could attach documents supporting her allegations of an agreement to cancel the loan and of fraud. If she could not provide these documents, the demurrer was sustained without leave to amend.

Henderson filed the third amended complaint in March 2011. She asserted three causes of action: wrongful foreclosure, negligence, and fraud. She attached two e-mails, one from Lopez and one from herself, which she claimed documented the short-sale agreement.

Saxon moved for judgment on the pleadings on the third amended complaint. The motion focused on the lack of a signed writing modifying the loan agreement that would satisfy the statute of frauds. Along with its motion, Saxon asked the court to take judicial notice of several documents, including the first deed of trust, the two notices of default, the two notices of trustee's sale, the rescission notice, and the trustee's deed upon sale.<sup>5</sup>

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<sup>3</sup> Henderson alleged that Saxon posted the notice of the trustee's sale on the property itself, which, because it had been totally destroyed, she never visited. Henderson does not dispute that Saxon followed the notice procedure mandated by the Civil Code. The code does not require actual receipt of the notice by the trustor. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 88-89.)

<sup>4</sup> The outcome of the expungement motion is not reflected in the record before us.

<sup>5</sup> Saxon has requested judicial notice of these documents in this court under Evidence Code section 459, a request we grant. We caution, however, that we may take judicial notice only of the existence and effect of recorded documents, not of facts recited in them or of hearsay statements subject to dispute. (See *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-1118.)

The court granted Saxon’s motion without leave to amend, concentrating mainly on the failure to provide a writing complying with the statute of frauds. The court did not rule on Saxon’s request for judicial notice. Judgment was entered on October 17, 2011.

In her opening brief, Henderson did not provide us with any argument for overturning the trial court’s ruling on the causes of action for negligence and wrongful foreclosure. The sole issue identified on appeal was whether the third amended complaint stated a cause of action for fraud.<sup>6</sup>

### DISCUSSION

“A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed. [Citations.]’ . . . “[W]e are not bound by the determination of the trial court, but are required to render our independent judgment on whether a cause of action has been stated.” [Citations.]’ We accept as true the complaint’s factual allegations and give them a liberal construction. [Citation.]” (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1064-1065.)

“[A] pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless.” (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judicially noticed fact may controvert an express allegation of the pleading. (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC, supra*, 152 Cal.App.4th at p. 1117.) “[J]udicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be

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<sup>6</sup> We disregard Henderson’s argument, raised for the first time in her reply brief, regarding Civil Code section 2923.5. We do not consider issues or arguments on appeal raised for the first time in a reply brief. (*Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1387.)

judicially noticed.” (*Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134; accord, *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375.)

We review the refusal of the trial court to permit amendment for abuse of discretion. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 110.) The appellant must explain what the proposed amendments are and how they would cure the initial pleading deficiencies. (*Ibid.*)

As stated above, the only issue Henderson raised on appeal is the dismissal of the fraud causes of action. She has alleged two different fraudulent fact patterns: promissory fraud and either misrepresentation or concealment.

#### **I. Promissory Fraud**

Henderson alleged that Saxon promised to convey the property to her son by means of a short sale, accepting the proceeds of the fire insurance policy as the full purchase price.<sup>7</sup> When it made this promise, Saxon had no intention of performing it; instead, it intended to foreclose on the property. Relying on this promise, Henderson did not make the monthly payments on her mortgage. Saxon did not go through with the short sale, but instead foreclosed on the property and bought it at a subsequent trustee’s sale, while keeping the insurance proceeds. Henderson thereby lost the property and the insurance proceeds.

It is well settled that a plaintiff may state a cause of action for promissory fraud, even if the underlying promise is unenforceable because of the statute of frauds. (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 28-31.) The plaintiff must, however, allege facts establishing all the elements of promissory fraud: a promise made without any intention of performing it; intent to induce reliance; justifiable reliance; and resulting

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<sup>7</sup> At one point in the complaint, Henderson alleged that Saxon agreed to a short sale of the property to *her*. This would not, however, be a short sale. Elsewhere in the complaint, Henderson repeatedly alleged that the purchaser in the short sale would be Williams, and this is the position she adopted on appeal.

damages. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; see also Civ. Code, § 1710, subd. (4).)

Henderson failed to establish facts to support at least two elements of promissory fraud: reliance and damages. She alleged she relied on the promise by ceasing to make her monthly payments on the property. A document of which the court could take judicial notice showed she had ceased making payments on the mortgage at least as of June 2008, months before the fire that precipitated the conversations with Lopez regarding the short sale. Henderson did not allege that she resumed payments after the second notice of default and then once again stopped after the fire, because of Lopez's representations. (Cf. *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196-197 [triable issue of fact as to whether borrower already in default when stopped making loan payment in reliance on lender's representations].)

“Actual reliance occurs when a misrepresentation is “an immediate cause of [a plaintiff's] conduct, which alters his legal relations,” and when, absent such representation, “he would not, in reasonable probability, have entered into the contract or other transaction.” [Citations.]” (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1256.) Henderson could not have been relying on promises made after the fire when she quit making her mortgage payments; she had already stopped making them before the fire. She failed to allege any relation-altering conduct in which she would not have engaged without Saxon's promise to sell her property to her son.

Henderson has also failed to allege facts showing damage to herself. 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.) In her complaint, Henderson claimed to have been damaged by losing “the property, personal effects that remain with the property and the value of the property.” In her opening brief, she characterized her damages as losing

the property itself, all the money she had already paid to Saxon on the mortgage, and the fire insurance premiums. These are not items of monetary loss proximately caused by Saxon's alleged promise to short-sell the property to Henderson's son.

Henderson could not have lost her personal property – assuming, contrary to her allegations, any had survived the fire – because the foreclosure did not extend to her personal property. The only property securing the trust deed was the real estate. She still owns any personal effects remaining on the property. Likewise, she did not “lose” the premiums paid for fire insurance. Henderson acknowledged that the insurance company paid out on the fire insurance policy. She got what she paid for – fire insurance coverage. Finally, she did not “lose” her mortgage payments. She was contractually obligated to make these payments each month in order to live in the house. In fact, it appears she lived in the house for a considerable period *without* making mortgage payments. The payments she did make could not constitute damages for fraud. (See *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1185.) None of these items constitutes “loss proximately caused by the defendant's tortious conduct.” (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 65.)

That leaves the property itself. If Saxon had followed up on its promise, Henderson would not now own the property. The alleged deal was to convey the property away from Henderson while Saxon wound up with the insurance proceeds. Most importantly from Henderson's point of view, she would be out from under a debt of around a million dollars. That is what seems to have happened. Henderson did not allege, for example, that after the sale Saxon pursued her for the difference between the amount of the debt and the amount of the insurance proceeds or that she incurred some other kind of monetary loss in reliance on Saxon's promise.

The difference between what was allegedly promised and what actually happened is that Saxon, rather than Williams, owns the property. But this state of affairs does not injure *Henderson*. At the end of the day, Henderson was supposed to own

neither the property nor the insurance proceeds. She now owns neither one. Even if Saxon reneged on its promise to conduct a short sale to Williams for the amount of the insurance proceeds, Henderson suffered no loss because of Saxon's failure to keep its promise. "Deception which does not cause loss is not a fraud in the legal sense." (*Hill v. Wrather* (1958) 158 Cal.App.2d 818, 825.)

## **II. Misrepresentation or Concealment**

Henderson's other fraud claim can be stated either as a misrepresentation or as a concealment of a material fact. Either Saxon misrepresented to her that it would not foreclose on the property or it concealed from her that it intended to foreclose. Henderson alleged she relied on the representation or concealment by not bringing her loan current after the fire, when she had the funds to do so.

To state a cause of action for a fraudulent misrepresentation, the plaintiff must allege a false statement of fact (made either deliberately or recklessly), 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;<sup>8</sup> (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 Henderson failed to state a cause of action, because she did not allege the requisite monetary loss. (See *City of Vista v. Robert Thomas Securities, Inc.*, *supra*, 84 Cal.App.4th at p. 888.) Henderson did not dispute Saxon's *right* to foreclose. She conceded she was behind on her loan, and she did not dispute the accuracy of the second notice of default and the second notice of trustee's sale. If Saxon had not

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<sup>8</sup> We assume, without deciding, that Saxon had a duty to disclose to Henderson its plan to foreclose on the property.

foreclosed, she would have been in possession of a piece of real estate (just the dirt, since the house had burned down) and the proceeds from the fire insurance policy. And a debt of about a million dollars. She now has neither the real estate nor the insurance proceeds. She also does not have the debt, because, having acquired the property through nonjudicial foreclosure, Saxon cannot require Henderson to make up any deficiency. (See *Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th at p. 1236.)

Henderson did not allege that the value of the real estate in its burned-out condition plus the amount of the insurance proceeds exceeded the amount of the debt. On the contrary, she alleged a steep decline in Yorba Linda real estate values in 2008, even before the fire lowered them still further by destroying the structures on the land. This decline, she alleged, is what caused lenders such as Saxon to accept cash payments for less than the amount due on the mortgage – short sales.

Henderson did not allege facts establishing the monetary loss required to sustain a cause of action for fraud. The court properly granted Saxon’s motion for judgment on the pleadings as to Henderson’s fraud claims.

### **III. Denial of Leave to Amend Complaint**

Henderson did not state a cause of action for promissory fraud, misrepresentation or fraudulent concealment against Saxon. She has not explained how the third amended complaint could be changed to state a cause of action, as it is her burden to do. (See *Paterno v. State of California*, *supra*, 74 Cal.App.4th at p. 110.) The motion for judgment on the pleadings was properly granted without leave to amend.

**DISPOSITION**

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

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.