

TOM RIGBY, Plaintiff and Appellant,
v.
WELLS FARGO BANK NATIONAL ASSOCIATION et al.,
Defendants and Respondents.

[2d Civ. No. B281196.](#)

Court of Appeals of California, Second District, Division Six.

Filed March 1, 2018.

Appeal from the Superior Court of San Luis Obispo County, Super. Ct. No. 15CVP-0121, Roger T. Picquet, Judge, Donald G. Umhofer, Judge.

Wiley Ramey for Plaintiff and Appellant.

Kutak Rock and Steven M. Dailey for Defendants and Respondents.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

PERREN, J.

Plaintiff Tom Rigby, formerly known as John Roebuck, filed a third amended complaint (TAC) for constructive fraud, promissory estoppel and negligent misrepresentation against defendants Wells Fargo Bank National Association (Wells Fargo)^[1] and Williams & Company, Inc. d.b.a. Keller Williams Realty Central Coast (Keller Williams). Plaintiff appeals the judgment entered after the trial court sustained defendants' demurrer to the TAC without leave to amend. He contends the trial court erred by denying him leave to amend. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff obtained a loan to purchase real property located in Paso Robles ("the property"). The loan was secured by a deed of trust. Plaintiff claims the

property was both his residence and his "sole source of income from operating a Bed and Breakfast business."

Plaintiff defaulted on the loan and, according to plaintiff, he began discussing potential foreclosure alternatives with Wells Fargo representatives. On August 29, 2012, a notice of default was recorded. The amount of the arrearages was \$371,652.93.

Plaintiff alleges that for the next three years, he engaged in loan modification discussions with Wells Fargo, and that there were "represent[ations] that a foreclosure option payment would be entered into." He further alleges he was told "there would be no foreclosure" pending the loan modification review process. He also claims there were representations that he could purchase the property after a foreclosure sale occurred.

The property was sold at a foreclosure sale on August 5, 2013. According to plaintiff, he remained on the property "in order to make an offer for full cash based on [the] appraised value." On March 16, 2015, a loan servicer employee allegedly told plaintiff that he needed to present the offer to Keller Williams. Plaintiff claims he "obtained an appraisal and submitted a cash offer," which was rejected. Keller Williams purportedly represented the offer could not be accepted unless plaintiff closed the Bed and Breakfast and vacated the property.

Plaintiff filed an action (Case No. 14CVP-0022) challenging the foreclosure based on alleged representations that plaintiff would be considered for a loan modification. The trial court consolidated that case with Wells Fargo's unlawful detainer action. Ultimately, the court dismissed plaintiff's case and issued a post-judgment writ of possession in Wells Fargo's favor.

Plaintiff filed the instant action (Case No. 15CVP-0121) against defendants on May 4, 2015. He asserted causes of action for fraud and deceit, promissory estoppel, negligent misrepresentation and tortious interference with economic advantage. Defendants demurred, but prior to the hearing, plaintiff voluntarily filed a first amended complaint (FAC) and then an amended FAC. Plaintiff alleged the same causes of action set forth in his original complaint.

The trial court sustained defendants' demurrer to the amended FAC with leave to amend. The court found that the fraud, negligent misrepresentation and promissory estoppel claims failed for lack of sufficient facts. It further

found that there were no viable allegations as to wrongful acts or disruption of a business relationship to support an interference claim.

Plaintiff filed a second amended complaint (SAC), which alleged the same four causes of action. Once again, the trial court sustained defendants' demurrer with leave to amend. It determined the allegations lacked specificity to support the claims for constructive fraud and negligent misrepresentation. The court stated the allegations of "representations and [p]laintiff's reliance are general" and the "pleading should be alleged with greater specificity." The court also found the promissory estoppel claim "does not specifically reference a clear and unambiguous promise." Even more "significant [was] the lack of allegations of reliance with injury resulting." The court concluded that procuring financing for the potential purchase of the property does not establish detrimental reliance.

Plaintiff subsequently filed the TAC, alleging causes of action for constructive fraud, promissory estoppel and negligent misrepresentation. The allegations were again based on purported representations that plaintiff could repurchase the property after the foreclosure sale, and on claims that Wells Fargo made certain statements as to forbearance and possible alternatives to foreclosure.

The trial court sustained defendants' demurrer to the TAC without leave to amend. The court had issued a tentative ruling stating its intent to allow leave to amend, but after oral argument, the court modified its tentative to deny such leave.^[2] The court found that the allegations as to constructive fraud were too general to support a cause of action that met the heightened pleading standard. It noted the "property sale allegations are general and do not provide the actual terms that would be required by the [d]efendant." The court also found that any representations relating to "modification discussions" were pleaded "general[ly] as to their content and timing." It further concluded that the causes of action for promissory estoppel and negligent misrepresentation failed because, once again, plaintiff did "not allege the promise or promises with clear and unambiguous terms." The court found overall the allegations remained "fairly general" and "inconsistent." Plaintiff appeals from the judgment.

DISCUSSION

Plaintiff does not contest the trial court's decision to sustain the demurrer to the TAC. He asserts the court erred by sustaining it without leave to amend. We are not persuaded.

Standard of Review

We review the trial court's decision to deny leave to amend for an abuse of discretion. ([Freeny v. City of San Buenaventura \(2013\) 216 Cal.App.4th 1333, 1339.](#)) The trial court abuses its discretion in denying leave to amend when there is a reasonable possibility the existing defects can be cured by amending the pleading. ([McAllister v. Los Angeles Unified School Dist. \(2013\) 216 Cal.App.4th 1198, 1206.](#)) The plaintiff has the burden of demonstrating that the defect can be cured. ([May v. City of Milpitas \(2013\) 217 Cal.App.4th 1307, 1324.](#)) This showing may be made for the first time in the reviewing court. ([Kong v. City of Hawaiian Gardens Redevelopment Agency \(2002\) 108 Cal.App.4th 1028, 1041-1042](#); [Careau & Co. v. Security Pacific Business Credit, Inc. \(1990\) 222 Cal.App.3d 1371, 1386](#) [showing on appeal that complaint can be amended to state a cause of action is sufficient despite inadequate showing in trial court].)

Effect of the Trial Court's Tentative Ruling

Plaintiff suggests the trial court erred by deviating from its tentative ruling to sustain the demurrer to the TAC with leave to amend. He is incorrect. "A tentative ruling is just that, tentative." ([Guzman v. Visalia Community Bank \(1999\) 71 Cal.App.4th 1370, 1378.](#)) "[A] trial court's tentative ruling is not binding on the court; the court's final order supersedes the tentative ruling." ([Silverado Modjeska Recreation & Park Dist. v. County of Orange \(2011\) 197 Cal.App.4th 282, 300](#); see Cal. Rules of Court, rule 3.1590(b.))

Moreover, a tentative ruling carries no weight on appeal. ([In re Marriage of Ditto \(1988\) 206 Cal.App.3d 643, 646-647](#)); [Wurzl v. Holloway \(1996\) 46 Cal.App.4th 1740, 1756](#) [court's tentative decision may not be relied upon either to support or impeach the court's judgment].) Thus, the court's decision to change its tentative ruling is immaterial to this appeal.

Plaintiff Has Not Shown That the Pleading Defects Can be Cured

Plaintiff made no showing in the trial court regarding how the TAC could be amended to correct the various defects identified by the court. Plaintiff's opposition to the demurrer to the TAC focused on his argument that the causes of action were properly pled. With respect to a possible amendment,

plaintiff stated: "[S]hould the Court find that the [complaint] could be improved, Plaintiff[] shall immediately amend the [T]AC to meet any and all of the Court's directives and findings." This showing was inadequate to support the grant of leave to amend.

Plaintiff's showing in this court is similarly inadequate. In his opening brief, plaintiff asserts that his proposed amendment would include claims for fraud, promissory estoppel and specific performance, but he does not specify the allegations he would add or change to correct the defects found by the trial court. Indeed, with respect to the fraud claim, he concedes that correcting the pleading defects would require "specificity," which he states he "is prepared to generate." The law requires, however, that plaintiff affirmatively demonstrate that the pleading defects can be cured. ([May v. City of Milpitas, supra, 217 Cal.App.4th at p. 1324.](#)) Plaintiff's willingness to try to cure the defects on remand is insufficient to satisfy his burden of demonstrating that the TAC can be amended to state a cause of action. (See [Careau & Co. v. Security Pacific Business Credit, Inc., supra, 222 Cal.App.3d at p. 1386.](#))

Apparently recognizing that he had failed to meet his burden, plaintiff included a draft Fourth Amended Complaint as an appendix to his reply brief. That pleading alleges causes of action for fraud, promissory estoppel^[3] and specific performance. There are two problems with this proposed amendment.

First, "[a]s a general rule, points not addressed until a reply brief will not be considered unless good reason is shown for failing to address them earlier." ([Benach v. County of Los Angeles \(2007\) 149 Cal.App.4th 836, 852, fn. 10.](#)) "Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it. . . . Hence the 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. [Citations.]" ([Neighbours v. Buzz Oates Enterprises \(1990\) 217 Cal.App.3d 325, 335, fn. 8.](#)) No good reason for the delay is shown here. Plaintiff merely "proposes the . . . Fourth Amended Complaint in response to the [defendants'] position on [a]ppeal."

Second, the substantive allegations in the Fourth Amended Complaint are almost identical to those made in the TAC. Thus, even if plaintiff had a good

reason for waiting until the reply brief to show how he would amend the TAC, we conclude he has not demonstrated he can amend the pleading to state a valid cause of action.

The first cause of action in the proposed Fourth Amended Complaint is for actual fraud. The elements of actual fraud are: "(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." ([Anderson v. Deloitte & Touche \(1997\) 56 Cal.App.4th 1468, 1474.](#)) In California, fraud must be pled with specificity, which requires "*facts* which "show how, when, where, to whom, and by what means the representations were tendered."" ([Lazar v. Superior Court \(1996\) 12 Cal.4th 631, 645.](#))

The trial court determined "the allegations of the [TAC] concerning the representations, although made by Wells Fargo employees during the course of modification discussions, remain general as to their content and timing. In addition, there are allegations inconsistent with allegations that could be interpreted to suggest that a loan modification was actually promised." The court further noted that the TAC "adds additional uncertainty because it mixes the two separate bases of alleged fraud, namely the alleged promise of a loan modification and the promise to sell the property to [p]laintiff after the foreclosure sale."

The proposed Fourth Amended Complaint does not adequately address these deficiencies. Plaintiff alleges only that there were discussions, over a period of years, regarding a possible loan modification along with representations that he could repurchase the property after a foreclosure sale. With respect to the latter claim, the proposed pleading alleges that "[t]he offer to repurchase the property was made in the form of a written offer," a copy of which is attached as an exhibit to the proposed pleading. According to the exhibit, the offer was made by Donna J. Taylor, and not by plaintiff. Plaintiff fails to explain who Taylor is and why her offer is relevant to his fraud claim. Indeed, the exhibit is inconsistent with his allegation that "the offer [was] wrongfully rejected in violation of the agreement to permit [p]laintiff to repurchase the property as indicated above." (Italics added.)

The second cause of action in the proposed Fourth Amended Complaint is for promissory estoppel. **To support a claim for promissory estoppel, a plaintiff must identify a promise that is "clear and unambiguous."**

[*Lange v. TIG Ins. Co.* \(1998\) 68 Cal.App.4th 1179, 1185.](#)) **Promissory estoppel may not be invoked to enforce preliminary negotiations or discussions between the parties.** ([*Garcia v. World Savings, FSB* \(2010\) 183 Cal.App.4th 1031, 1044.](#)) Further, in the specific context of negotiations over the terms of a loan, **case law establishes that PRELIMINARY NEGOTIATIONS TO ENTER INTO A LOAN CONTRACT, WITHOUT ANY SPECIFIC TERMS OF THE CONTRACT DECIDED UPON, DO NOT GIVE RISE TO A CLAIM FOR PROMISSORY ESTOPPEL.** ([*Laks v. Coast Fed. Sav. & Loan Assn.* \(1976\) 60 Cal.App.3d 885, 891.](#))

In sustaining the demurrer to the TAC, the trial court found plaintiff did "not allege the promise or promises with clear and unambiguous terms. Rather, the causes of action incorporate the earlier allegations of the [S]AC that Wells Fargo made representations that it would not foreclose and would deliver a foreclosure option in the form of a reduced payment and that it would sell the property to plaintiff after foreclosure." The proposed Fourth Amended Complaint does not cure these deficiencies. As previously stated, the substantive allegations in the new pleading are virtually identical to those in the TAC. Neither pleading alleges a promise with clear and unambiguous terms.

Finally, plaintiff's proposed cause of action for specific performance fails because **SPECIFIC PERFORMANCE IS A REMEDY, NOT A CAUSE OF ACTION. The underlying cause of action is breach of contract.** ([*Wong v. Jing* \(2010\) 189 Cal.App.4th 1354, 1361, fn. 2;](#) [*Real Estate Analytics, LLC v. Vallas* \(2008\) 160 Cal.App.4th 463, 472.](#)) Here, there is no allegation of breach of contract. Consequently, plaintiff has not alleged a basis for specific performance.

A trial court's sustaining of a demurrer without leave to amend is appropriate when, based on "the nature of the [complaint's] defects and [the plaintiff's] previous unsuccessful attempts to plead," it is improbable the plaintiff can state a cause of action." ([*Jenkins v. JPMorgan Chase Bank, N.A.* \(2013\) 216 Cal.App.4th 497, 534,](#) disapproved on another ground in [*Yvanova v. New Century Mortgage Corp.* \(2016\) 62 Cal.4th 919, 939, fn. 13.](#)) Plaintiff has made five unsuccessful attempts to plead a cause of action. (See [*Titus v. Canyon Lake Property Owners Assn.* \(2004\) 118 Cal.App.4th 906, 918](#) ["P]laintiff has already filed an original complaint and two amended complaints without including these allegations. She has thus had `a

fair opportunity to correct any defect.' [Citation]"'.) Given plaintiff's repeated inability to state a valid claim, we conclude the trial court did not abuse its discretion by sustaining the demurrer to the TAC without leave to amend.

DISPOSITION

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

GILBERT, P. J. and TANGEMAN, J., concurs.

[1] Wells Fargo is sued in its capacity as Trustee on behalf of the Harbor View Mortgage Loan Trust Loan Pass Through Certificates, Series 2006-12.

[2] It is unclear from the record why the trial court changed its tentative ruling with respect to leave to amend. There was no court reporter at the hearing, and the settled statement does not address the issue. The record reflects, however, that neither plaintiff nor his counsel was present at the hearing.

[3] The second cause of action is labeled "negligent misrepresentation," but the allegations confirm that it is a claim for promissory estoppel.