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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CARLA E. MARTIN, Plaintiff and Appellant, v. MARK P. GROSS, Defendant and Respondent.	B264767 (Los Angeles County Super. Ct. No. PC055838)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen P. Pfahler, Judge. Affirmed.

Gordon & Rees, Douglas Smith and Michael P. Campbell for Plaintiff and Appellant.

Alpert, Barr & Grant, Gary L. Barr and Alexander S. Kasendorf for Defendant and Respondent.

Carla E. Martin appeals from the judgment entered after the trial court sustained Mark Gross's demurrer without leave to amend in this action for reformation and partition. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Martin's Complaint Regarding the Huston Street Property*

According to the allegations of the complaint she filed in July 2014, in October 2003 Martin agreed to give Gross, her son-in-law and an attorney, $100,000 to help him and her daughter purchase a home on Huston Street in Stevenson Ranch, California. Martin and Gross signed a four-sentence agreement providing Gross would execute a deed conveying a 25 percent interest in the home to Martin concurrently with the execution of the agreement. The complaint further alleged Gross would repay the funds advanced by Martin monthly.

On November 7, 2003 Gross sent Entrust, the administrator for Martin's IRA account, a facsimile transmission instructing it to wire $100,000 to an account held at California National Bank. The transmission included copies of the agreement between Martin and Gross; a letter from Martin stating she had agreed to purchase a 25 percent interest without title insurance; and an unsigned grant deed from Gross, identified as an unmarried man, conveying a 75 percent undivided interest to him, again denominated an unmarried man, and a 25 percent undivided interest to Entrust Administration Inc. for the benefit of Martin's IRA account, as tenants in common.[1] The complaint alleged, without Martin's knowledge, a grant deed had been recorded on October 29, 2003 reflecting Gross had originally taken title to the Huston Street property as an unmarried man notwithstanding he was married to Martin's daughter.[2] Although Martin had "reposed complete trust and confidence in Gross" at the time of the transfer, the complaint further alleged, "[A]fter 2003 conflicts arose between [Martin] and her daughter, and by extension with [Gross], and their communications were limited."

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1 A copy of the facsimile transmission is attached to the complaint as exhibit A.

2 A copy of the grant deed is attached to the complaint as exhibit B.

In 2009 Martin was advised she needed to take a mandatory distribution from her IRA account. She then became aware that neither she nor Entrust held a recorded interest in the Huston Street property. Although Martin was "puzzled, she saw no reason for alarm." In 2012, however, Martin learned that Gross and her daughter had been in litigation "for some time" to revoke a charitable gift made by Martin's deceased husband. (Gross was acting as counsel for his wife, in whose name the litigation was being pursued.) Martin then "became more uncomfortable with the fact that her name was not on title to the Huston Property, and the issue was raised again with [Gross]. However, [Gross] deflected inquiry and [Martin] was reticent to initiate further intra-family conflict."

In 2014 Entrust notified Martin her IRA account lacked sufficient funds to pay its management fee and, if Martin failed to pay the fee, it would distribute her (unrecorded) 25 percent interest in the Huston Street property. The distribution would constitute a taxable event. Martin retained legal counsel, and a demand was made on Gross to reform title to the property in accordance with the 2003 agreement. Gross "again attempted to deflect [Martin's] demand." On July 15, 2014 Martin filed a complaint for reformation and partition of the property.

2. *The Trial Court's Ruling Sustaining Gross's Demurrer Without Leave To Amend*

Gross demurred to the complaint, arguing the cause of action for reformation was untimely and, because she had no legal interest in the property, Martin lacked standing to seek partition. In opposition Martin contended the limitation period for the reformation action was tolled because she had been "lulled into inaction by a reasonable belief that her attorney son-in-law (and daughter) would not misappropriate the $100,000 she invested into the Property." She also argued, because Gross was a fiduciary, her duty of inquiry was substantially limited. Martin further asserted a party claiming an equitable interest may pursue a partition action.

The trial court sustained Gross's demurrer without leave to amend. The court found the complaint failed to allege, and the opposition failed to identify, any facts that

would justify tolling the three-year limitations period for reformation: "The information admittedly in [Martin's] possession in 2009 coupled [with the] allegation that 'after 2003 conflicts arose [between Martin] and her daughter, and by extension [with Gross], and their communications were limited,' would have put a reasonable person on inquiry notice of her claim." Because Martin's reformation cause of action was time-barred, the court ruled, there was no basis for partition.

DISCUSSION

1. *Standard of Review*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the trial court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100; *Committee for Green Foothills v. Santa Clara Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Schifando*, at p. 1081.)

2. *The Cause of Action for Reformation Is Time-barred*[3]

a. *Governing law*

A contract or other written instrument is subject to reformation when the document does not reflect the intended agreement between the parties. (See, e.g., *Jones v. First American Title Ins. Co.* (2003) 107 Cal.App.4th 381, 388-389; see generally Civ. Code, §§ 3399, 3401.) A deed may be reformed. (*Western Title Guaranty Co. v. Sacramento & San Joaquin Drainage Dist.* (1965) 235 Cal.App.2d 815, 823 ["[r]eformation is nothing but a remedy to correct a mistake in a written instrument, and a

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3 Martin does not dispute on appeal she has no basis to seek partition if her reformation claim is time-barred.

deed may be reformed"]; see *PV Little Italy, LLC v. MetroWork Condominium Assn.* (2012) 210 Cal.App.4th 132, 152.)

An action for reformation based upon fraud or mutual mistake must be brought within three years after the plaintiff discovered, or should have with reasonable diligence discovered, the fraud or mistake. (Code Civ. Proc., § 338, subd. (d); *Schaefer v. California-Western States Life Ins. Co.* (1968) 262 Cal.App.2d 840, 845.) When the cause of action appears time-barred on the face of the complaint, it is subject to demurrer unless a party pleads the discovery rule—specific facts showing the fraud or mistake was not and could not have been discovered with reasonable diligence within the limitations period. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808 ["to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence'"]; *Bradbury v. Higginson* (1914) 167 Cal. 553, 558 [demurrer to action for reformation properly sustained; plaintiff failed to "affirmatively plead facts excusing the failure to make an earlier discovery of the mistake or fraud relied upon"].)

b. *The complaint fails to allege facts justifying application of the delayed discovery rule*

Martin contends she had no reason to suspect she had been the victim of fraud or other deceptive conduct when she learned in 2009 she was not on record title for the Huston Street property because there could have been multiple innocent explanations for the omission. Martin's cause of action for reformation, however, is not solely based on Gross's alleged wrongdoing. The complaint alleged, "The failure of the deed to reflect [Martin's] interest is based either upon mistake or fraud, but [Martin] lacks sufficient [information] or belief to allege one or the other." There is no question Martin was on notice, at minimum, of a mistake when she learned in 2009 she did not have a recorded 25 percent interest in the Huston Street property as she and Gross had agreed.

With respect to her claim of fraud, Martin's argument she had no reason to suspect wrongdoing in 2009, rather than an innocent mistake that could be easily corrected, is belied by the allegations in her complaint: By 2009 not only did Martin know that she did not have a recorded interest in the Huston Street property but also that she did not have a signed grant deed conveying to her a 25 percent interest in the property, recorded or otherwise, and had not received the promised monthly payments from her daughter and son-in-law for approximately six years[4]—relatives with whom she was having communication difficulties. That was more than enough for her to suspect her injury—the discrepancy between the terms of her agreement with Gross and the actual documentation produced—had been wrongfully caused and for her to conduct an investigation that would have disclosed Gross's alleged fraud.[5] As the Supreme Court explained in *Fox v. Ethicon Endo-Surgery, Inc., supra*, 35 Cal.4th 797, "plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Id*. at p. 808.) "[A] potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light." (*Id*. at pp. 808-809.) "[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some

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4 The complaint alleges "Defendant [Gross] has made no repayment of all or any part of the $100,000 investment."

5 Although not raised by Gross in the trial court or on appeal, and therefore not a basis for our decision affirming the judgment dismissing her complaint, we seriously question whether Martin can state a cause of action for reformation, as opposed to one for breach of contract (specific performance) or fraud, based on the facts alleged: Martin's complaint fails to identify any instrument that could properly be subject to reformation. However, any breach of contract or fraud claim also accrued no later than 2009 and would similarly be time-barred.

wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action." (*Id*. at p. 803.) Martin has wholly failed to satisfy this pleading requirement.

c. *The complaint does not allege facts sufficient to state a confidential or fiduciary relationship excusing Martin's failure to investigate her potential claims*

Martin has failed to allege an adequate factual basis for her argument she had no duty to investigate her potential claims because she had a confidential relationship with Gross.[6] (See *Knapp v. Knapp* (1940) 15 Cal.2d 237, 242 ["in cases involving confidential relationship . . . facts which justify investigation in the ordinary case would not excite suspicion where the circumstances show a right to rely upon the representations of another and the same degree of diligence should not be required"].)

"A fiduciary relationship is '"any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent."'" (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29.) Traditional examples of fiduciary relationships in the commercial context include trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers and agent/principal. (*Id*. at p. 30.) As for a confidential relationship that gives rise to a fiduciary duty, the essential elements are "'"1) the vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself."'"

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6 Martin's alternative argument the limitations period was tolled because Gross failed to respond to her inquiries about the Huston Street property similarly fails in the absence of allegations establishing a confidential relationship.

(*Persson v. Smart Inventions, Inc*. (2005) 125 Cal.App.4th 1141, 1161; see *In re Estate of Miller* (1936) 16 Cal.App.2d 141, 152 ["[c]onfidential relations are presumed to exist between priest and parishioner, principal and agent, counsel and client, and in each of said relations the party in whom the confidence is reposed must stand in his dealings with the other party unimpeached of the slightest abuse of the confidence reposed"].)

Martin has alleged her attorney son-in-law Gross occupied a confidential relationship with her, had previously rendered legal advice and counsel to her from time to time, and Martin had, as Gross knew, reposed confidence and trust in him. She argues those allegations are sufficient to establish a fiduciary relationship at the pleading stage. A plaintiff, however, "must allege ultimate facts, not conclusions of law. . . ." (*Estate of Archer* (1987) 193 Cal.App.3d 238, 245; accord, *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 178, fn. 9.) Martin has failed to do so. The complaint does not allege Martin retained Gross as an attorney in connection with this transaction or that any occasional attorney-client relationship that may have existed with respect to some unspecified past matters, whether formal or informal, continued through 2009. To the contrary, she specifically alleged that since 2003 she and Gross had had only limited communications due to ongoing conflicts between Martin, on the one hand, and Gross, on the other.

The fact Gross was Martin's son-in-law, without more, is insufficient to create a fiduciary relationship. "Consanguinity of itself does not create a fiduciary relationship." (*Estate of Lingenfelter* (1952) 38 Cal.2d 571, 585; see *Bacon v. Soule* (1912) 19 Cal.App. 428, 434 [although confidential relationships are presumed to exist between husband and wife, partners and parent and child, "[n]o such confidential relation, however, is presumed to exist between brother and sister merely because of their blood relationship"].) Similarly, familial relationships created by marriage, other than between spouses, do not come with a presumption of a confidential relationship. For example, in *Chamberlain v. Chamberlain* (1908) 7 Cal.App. 634, Joel Chamberlain lived on property with his son William Chamberlain and William's wife E.J. Chamberlain. Joel conveyed

the property to E.J. after she falsely represented to Joel that an action was about to be filed against a corporation in which Joel owned shares of stock and encouraged Joel to do so. Joel subsequently learned the corporation was not at risk and requested the return of the property. E.J. refused. In an action by Joel to have a constructive trust declared, the court held, "The fact that [E.J.] was his daughter in law is not of itself sufficient to prove the fiduciary relation, but this is an important circumstance, and there is substantial support in the record for the conclusion that she had become involuntary trustee of [Joel] as she had certainly assumed 'a relation of personal confidence' with him." (*Id.* at p. 638.) Significantly, the evidence established William and E.J. had lived with Joel on the land for several years and "[t]heir relations were of a friendly and confidential character." (*Id.* at p. 635.)

In contrast, the complaint in the instant action failed to allege any substantive facts about the nature of the relationship between Martin and Gross leading up to the transaction in November 2003 that satisfy the pleading requirements for imposing a confidential relationship. Moreover, Martin alleged conflicts arose between Martin, on the one hand, and her daughter and Gross, on the other, after 2003, strongly suggesting whatever relationship they may have had had—even if at one time of a confidential nature—was strained and distant.[7] It further alleged Martin did not press Gross in 2012 for an explanation of the situation with respect to the Huston Street property after he had deflected her inquiry because she was "reticent to initiate further intra-family conflict." While that goal may be laudable, it does not indicate any reliance upon Gross because of the trust and confidence Martin had in him.

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[7] Although Martin correctly states the trial court abuses its discretion if it sustains a demurrer without leave to amend if the defect can be cured, she does not identify any facts she can allege that would sufficiently state the existence of a fiduciary relationship. (See *Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081 ["plaintiff has the burden of proving that an amendment would cure the defect"].)

DISPOSITION

The judgment is affirmed. Gross is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.