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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ANTHONY UDOM,

Plaintiff and Appellant,

v.

BOARD OF TRUSTEES OF CALIFORNIA
STATE UNIVERSITY,

Defendant and Respondent.

B282032

(Los Angeles County
Super. Ct. No.
BC632220)

APPEAL from a judgment of the Superior Court of Los Angeles County, Randolph Hammock, Judge. Affirmed.

Anthony Udom, in pro. per., for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Richard J. Rojo,
and Jessica R. Marek, Deputy Attorneys General, for
Defendant and Respondent.

I. INTRODUCTION

Plaintiff Anthony Udom appeals from a judgment following the sustaining of a demurrer without leave to amend. Plaintiff alleged defendant the Board of Trustees of California State University committed fraud and infliction of emotional distress. We affirm.

II. BACKGROUND

A. *Pleadings*

According to the factual allegations in the first amended complaint, which we accept as true (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6), plaintiff was formerly a student at California State University, Long Beach. Defendant fraudulently created outstanding student loans in plaintiff's name, and cashed \$13,706 in loan proceeds that were due to plaintiff as a "loan disbursement refund." On March 7, 2016, Navient, a student loan collection agency, sought to recover from plaintiff the student loan obligation plus interest, with the total amounting to over \$24,000.

On March 7, 2016, defendant concealed and failed to disclose to plaintiff the existence of the loans. Defendant allegedly breached a legal duty owed to plaintiff. As a consequence of defendant's conduct, plaintiff became homeless, lacked transportation, and could no longer attend the university. Finally, plaintiff suffered damages, including emotional distress.

On December 19, 2016, plaintiff filed a first amended complaint. He listed in his caption causes of action for "Negligent

Fraud,” “Fraudulent [F]raud,” “Actual Fraud,” “Constructive Fraud,” and “Infliction of Emotional [D]istress.” He also cited Civil Code sections 1709, 1572 and 1573.

B. Demurrer and Trial Court’s Ruling

Defendant demurred on February 17, 2017. The record on appeal does not include the demurrer, plaintiff’s opposition to the demurrer, or defendant’s reply.

On April 13, 2017, the trial court held a hearing on defendant’s demurrer. Prior to the hearing, the court issued a tentative ruling sustaining defendant’s demurrer without leave to amend, “unless [p]laintiff can specify a statutory basis of liability against a public entity (which is not subject to a statutory immunity), or a specific contractual basis of liability against [d]efendant.” The record on appeal does not indicate what occurred at the hearing, as it does not include a reporter’s transcript of the proceedings or a suitable substitute for the transcript, such as a settled or agreed statement. The court issued a written ruling, concluding that defendant was immune from liability as a public entity. The trial court noted that pursuant to Government Code section 815.2, a public entity could be liable under a respondeat superior theory for the actions of its employees. The trial court found, however, that “[n]o facts are pled as to liability against a public employee[.]”

As to whether the demurrer would be granted with or without prejudice, according to the minute order, “[b]ased upon offer of proof, [the trial court] finds no reasonable probability that [p]laintiff can state any viable cause of action against

[d]efendant. Therefore the demurrer is sustained without leave to amend.” The trial court dismissed the case with prejudice.¹

III. DISCUSSION

A. *Standard of Review*

On demurrer, we review a complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory and thus determine whether the trial court erroneously sustained the demurrer as a matter of law. (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 791; *Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152.) “The judgment must be affirmed ‘if any one of the several grounds of demurrer is well taken. [Citations.]’” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

¹ Plaintiff’s notice of appeal was filed April 14, 2017. Judgment in this action was issued April 21, 2017. Plaintiff’s appeal therefore is premature. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695 [no direct appeal may be taken from orders sustaining demurrer; appeal can be taken only after court enters order or judgment of dismissal].) Nonetheless, we exercise our discretion to construe the notice of appeal as filed immediately after the judgment. (Cal. Rules of Court, rule 8.104(d); *Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 202).

B. *Inadequate Record*

Defendant argues that plaintiff's failure to designate an adequate record is fatal to his appeal. We agree. Plaintiff failed to submit defendant's demurrer, plaintiff's opposition to the demurrer, defendant's reply, and a reporter's transcript (or adequate substitute) of the hearing. "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) An appellant must affirmatively establish error by an adequate record. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.)

Here, without the motion papers or a record of the hearing, we are hampered in our ability to meaningfully determine whether the trial court erred by sustaining the demurrer as to the first amended complaint without leave to amend. On appeal, we could sustain the judgment on any ground set forth in the demurrer, but we cannot assess any such ground without a copy of the demurrer. Plaintiff thus has failed to establish error by an adequate record and we affirm the judgment on this basis.

C. *Demurrer*

Even if we were to consider the merits of the appeal, we would affirm. It appears from the court's written ruling that defendant generally demurred on the grounds that plaintiff failed to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

“One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.” (Civ. Code, § 1709.) However, “[a] public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional.” (Gov. Code, § 818.8.) Defendant is a public entity. (Gov. Code, § 811.2.) Government Code section 818.8’s immunity applies to misrepresentations interfering with a commercial or financial interest, such as plaintiff’s alleged student loans. (*Burden v. County of Santa Clara* (2000) 81 Cal.App.4th 244, 248-249.) Here, based on the pleadings, Government Code section 818.8 provides defendant with immunity from liability for any fraudulent deceit by a public employee under Civil Code section 1709. (*Johnson v. State of California* (1968) 69 Cal.2d 782, 800; *Finch Aerospace Corp. v. City of San Diego* (2017) 8 Cal.App.5th 1248, 1252-1253.) The trial court therefore did not err by sustaining defendant’s demurrer to the cause of action for fraudulent deceit on Government Code immunity grounds.

As to plaintiff’s purported causes of action based upon Civil Code sections 1572 and 1573, for actual and constructive fraud, those causes of action arise in the context of a contract. (See Civ. Code, §§ 1567 [“An apparent consent [to a contract] is not real or free when obtained through: [¶] . . . [¶] 3. Fraud”], 1571 [“Fraud is either actual or constructive”].) Plaintiff has identified no contract that forms the basis of a cause of action in the amended complaint. Therefore, we conclude that the trial court did not err by sustaining the demurrer as to plaintiff’s causes of action for actual and constructive fraud.

Finally, plaintiff also failed to state a cause of action for infliction of emotional distress. Negligent infliction of emotional distress is a type of negligence. (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 356-357.)² Under Government Code section 815, “Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.” Government Code section 815 thus codifies governmental immunity from common law torts, such as negligent infliction of emotional distress, absent liability imposed by statute. (See *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183 [applying Gov. Code, § 815 immunity to torts arising under the general tort statute of Civ. Code, § 1714].)

To the extent plaintiff argues Government Code section 815.2 imposes liability, plaintiff still did not state a cause of action. Government Code section 815.2, subdivision (a) provides, “A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.” This section codifies the doctrine of respondeat superior, and makes a public entity vicariously liable for the conduct of its employees, to the same extent as a

² Plaintiff did not state a cause of action for intentional infliction of emotional distress, which is a distinct tort. Rather, plaintiff alleged that defendant had a legal duty to use care and breached such duty, proximately causing injury to plaintiff.

private employer. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 868-869.)

The complaint, however, fails to state a cause of action for negligent infliction of emotional distress under a theory of vicarious liability or otherwise. The elements of this cause of action include: defendant breached a duty of care owed to plaintiff; plaintiff suffered serious emotional distress; and defendant's negligence caused plaintiff serious emotional distress. (*Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124, 129; *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205-206.) Here, while plaintiff alleged the existence of "(1) a legal duty to use due care," plaintiff failed to allege any *facts* that would support a claim that defendant owed plaintiff any such duty. (See *Susman v. City of Los Angeles* (1969) 269 Cal.App.2d 803, 810 [demurrer appropriate if no showing of any duty that was breached]; *Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814, 821-825 [while recognizing the "truism" that "public authorities who are dutybound to educate are also bound to do it with 'care[.]'" concluding that plaintiff failed to state a cause of action for negligence where he claimed defendant failed to provide adequate education].) While the trial court assumes the truth of all properly pled material allegations, it does not "assume the truth of contentions, deductions or conclusions of law." (*County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1010.) Accordingly, the trial court did not err in sustaining defendant's demurrer to the cause of action for negligent infliction of emotional distress.

D. *Leave to Amend*

“If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment would cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

The trial court specifically indicated in its tentative ruling that it would sustain the demurrer without leave to amend unless plaintiff could demonstrate at the hearing how he could amend his pleadings to state a cause of action. As noted, the only record of the April 13, 2017 hearing is the minute order, which indicated plaintiff failed to demonstrate he could amend his pleadings to state a cause of action. Additionally, plaintiff fails to present any argument on appeal demonstrating how an amendment would cure the deficiencies in his pleadings. (See *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711 [suggested amendments may be raised for first time on appeal].) Accordingly, we find the trial court did not err by denying plaintiff leave to amend.

IV. DISPOSITION

The judgment is affirmed. Defendant is entitled to recover its costs on appeal from plaintiff.

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KIM, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.