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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LUCKY REIM, INC.,

Plaintiff and Appellant,

v.

SIXTH & VIRGIL, LLC, et al.,

Defendants and Respondents.

B276364

(Los Angeles County  
Super. Ct. No. BC582274)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ernest M. Hiroshige, Judge. Reversed and remanded with directions.

Suh Law Group and Edward W. Suh for Plaintiff and Appellant.

Jaz and Peter F. Jazayeri; Lavelly & Singer and Michael E. Weinstein for Defendants and Respondents.

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Plaintiff, real estate broker Lucky Reim, Inc. (Lucky Reim), appeals from the trial court's dismissal with prejudice of its action seeking recovery of a broker's commission from defendants Sixth and Virgil, LLC (SVL) and Stuart Whang (Whang) (defendants). Lucky Reim alleged that SVL hired it to procure a buyer for a building it owned. Lucky Reim produced a buyer and a purchase agreement between SVL and the buyer followed, but SVL abruptly terminated the resulting escrow when one of its members objected to the sale. SVL then re-listed the building at a significantly higher price using a different broker. Lucky Reim alleged that it had a vested right to its negotiated commission despite the aborted sale, and that defendants had breached a commission agreement and acted fraudulently and in bad faith in terminating the escrow.

After Lucky Reim filed its first amended complaint, the trial court sustained defendants' demurrer without leave to amend as to all causes of actions. The trial court ruled that a statement that SVL agreed to pay the commission "at close of escrow" in one of the documents attached to the complaint established a condition precedent, and because escrow never closed, there was no breach of a contract to pay Lucky Reim a commission. Accordingly, Lucky Reim had not stated claims for breach of contract or breach of the covenant of good faith and fair dealing. The trial court found deficient Lucky Reim's cause of action alleging breach of contract as a third party beneficiary of the purchase agreement attached to the complaint because the terms of that agreement revealed that Lucky Reim was not an express third-party beneficiary. The trial court found that Lucky Reim had failed to plead its causes of action for fraud, deceit, and

conspiracy and for negligent misrepresentation with sufficient particularity, especially as to any purported misrepresentation.

Taking all inferences in favor of Lucky Reim, as we must in considering a demurrer, we conclude that Lucky Reim pled a viable cause of action for breach of an oral contract memorialized in a commission agreement attached to the complaint. Because the reference to payment at the close of escrow in the commission agreement could reasonably be interpreted either as a matter of timing or a condition precedent, the trial court erred in resolving such an ambiguous term upon a demurrer. Furthermore, because Lucky Reim alleged that SVL acted in bad faith to prevent the closing of escrow, it sufficiently pled breach of the implied covenant of good faith and fair dealing, and the trial court erred in finding otherwise.

The trial court correctly sustained defendants' demurrer to Lucky Reim's third-party beneficiary cause of action because the purchase agreement on which it was based itself demonstrated that Lucky Reim was not such a beneficiary. The trial court was also correct in sustaining defendants' demurrer to Lucky Reim's fraud, deceit and conspiracy and negligent misrepresentation causes of action. Lucky Reim failed to plead reliance and causation with the requisite particularity as to the fraud, deceit and conspiracy cause of action and failed to allege any negligent misrepresentation, reliance or causation to support its negligent misrepresentation cause of action.

We also conclude that Lucky Reim did not carry its burden of demonstrating that it could amend its first amended complaint to cure these defects despite having had opportunity to do so in the trial court and on appeal. Thus, the trial court did not abuse its discretion in denying leave to amend.

## FACTUAL HISTORY

When reviewing a demurrer ruling, we rely upon the facts alleged in the operative pleading and attached exhibits, which are summarized below. (*Picton v. Anderson Union High Sch. Dist.* (1996) 50 Cal.App.4th 726, 730 (*Picton*).)

During the time period relevant to this litigation, SVL was a California limited liability company owned by three members. SVL owned a building located at 2700 Wilshire Boulevard, Los Angeles, California (Building). Defendant Whang was SVL's managing member and represented to Lucky Reim and potential buyers of the Building that he was authorized to sell it.

In late 2012, SVL retained Lucky Reim as its broker to list and sell the Building. SVL and Lucky Reim agreed that Lucky Reim would "procure possible buyers for the Building" and would "inform SVL as to what the purchase offer amount would be. Based on the purchase price, Plaintiff and SVL would negotiate a commission on the sale."

The offers were to be conveyed to Whang or his agent, Tsoi, "through which commission amounts would be negotiated." The "initial commission amount was agreed upon to be . . . \$500,000[.]" Pursuant to this agreement, Lucky Reim submitted "numerous purchase offers to SVL, but these did not result in [the] successful opening of escrow to proceed with the sales transaction."

In early 2013, Lucky Reim procured an interested buyer, Catalina Limited Partnership (Catalina), and communicated Catalina's offer to SVL through Tsoi. SVL and Lucky Reim then agreed on a commission of \$300,000.

On approximately February 26, 2013, Catalina submitted to Whang a letter of intent (LOI), prepared by Lucky Reim,

setting forth the terms and conditions under which Catalina “or/his assignee” proposed to purchase the Building for \$14 million. Whang accepted the LOI on behalf of SVL. Lucky Reim did not sign the LOI.

The LOI included a provision regarding brokerage commissions that stated: “Buyer hereby represents and warrants to Seller that Buyer has made no statement or representation nor entered into any agreement with a broker, salesman or finder except for Lucky REIM, Inc. in connection with the transactions contemplated by this Agreement.”<sup>1</sup> Other than providing for indemnification under certain circumstances in the event of a claim for a broker’s fee or commission, this provision does not mention payment of a commission.

The LOI also included an expiration provision: “This Letter of Intent, and the obligations of the parties hereunder, is subject to the negotiation and execution by the parties of a Purchase and Sale Agreement and Escrow Instruction, consistent with the terms set forth in this Letter of Intent within Three (3) days after the date of acceptance of the Letter of Intent by Seller and Buyer, after which it shall be null and void. Neither party may claim any legal rights against the other by reason of actions taken in reliance upon this non-binding Letter of Intent, including, without limitation, any partial performance of the transaction contemplated herein.”

A document entitled “Commission Agreement” was attached to the LOI, signed only by Whang on behalf of SVL, and dated February 26, 2013. The first amended complaint alleges

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<sup>1</sup> As we discuss at note 6, *infra*, Lucky Reim’s allegations and documents attached to the first amended complaint are not entirely consistent on this point.

that the Commission Agreement was “based on the agreement that Plaintiff and SVL had in place for this purchase offer.” The Commission Agreement stated:

The undersigned Seller accepts and agrees to sell the Property known as Wi-Spa Property located at 2700 Wilshire Blvd., and 2701 W. 7th Street, Los Angeles, Ca 90057 to Buyer for the price and Conditions State *[sic]* in the Letter of Intent by Catalina Limited Partnership or Dr[.] Kee Whan Ha dated February 26, 2013. [¶] The undersigned Seller agrees to pay a broker’s commission in the amount of Three Hundred Thousand dollars (\$300,000.00) to be paid to Lucky REIM, Inc. a California corporation (DRE#01247543) at close of escrow. Buyer and Seller warrants that are *[sic]* no other brokerage commissions, finder’s fee, or any other amount due to any real estate broker or finder in connection with this transaction. [¶] Said commission is payable in full on the closing date and shall be paid in cash through escrow and escrow holder is directed to make such payment immediately without further written notice from Seller. ~~However, payment of said commission is not contingent upon the closing of transaction contemplated by this agreement. Seller acknowledges and agrees that in the event completion of the sale is prevented by default of Seller, then upon such default Seller shall immediately be obligated to pay to Agent the entire commission herein above set forth.~~ [¶] THIS INSTRUCTION SHALL NOT BE REVOCABLE BY THE UNDERSIGNED UNLESS CONSENT OF

SAID BROKER, IN WRITING, IS FIRST HAD AND OBTAINED.

Next to the stricken text was a handwritten note: “Delete.”

As Lucky Reim alleged in the first amended complaint, “upon the execution of a purchase agreement and the expiration of the buyer’s due-diligence contingencies (i.e. inspection contingency), Plaintiff’s commission would become earned and vested and payable upon the close of escrow. [T]he close of escrow only indicates the typical time period as to when the commission would be paid—the closing of escrow is not a material instance that must occur in order for Plaintiff’s commission to become payable. Instead, Plaintiff’s commission is vested and payable upon the expiration of buyer’s due-diligence contingencies.”

After the LOI and Commission Agreement were executed, discussions between Catalina and SVL continued, allegedly aimed at ensuring that Whang did in fact possess full authority from SVL’s members to sell the Building. A real estate purchase and sale agreement and escrow instructions (Purchase Agreement) were not executed until March 26, 2014, more than a year later.

The Purchase Agreement set the purchase price as \$14 million, the same price specified in the LOI, but named as the buyer an entity called Wilpart One, LLC (Wilpart), allegedly “an entity designated by” Catalina pursuant to the LOI. The Purchase Agreement was signed by Kee Whan Ha, who had been named in the Commission Agreement as a possible signatory to the LOI.<sup>2</sup>

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<sup>2</sup> The copy of the Purchase Agreement attached to Lucky Reim’s first amended complaint is only signed on behalf of

The Purchase Agreement contained a provision stating: “Except for a possible commission in an amount equal to One Hundred and Fifty Thousand and 00/100 Dollars (\$150,00.00 [sic]) (the “**Commission**”) to be paid by Seller to Lucky REIM, Inc., a California corporation (“**Buyer’s Broker**”), pursuant to a separate written commission agreement to be negotiated between and executed by Seller and Buyer’s Broker (assuming such parties agree on such Commission), each Party warrants and represents to the other that no broker, salesman, or finder has been engaged by it in connection with the transactions contemplated by this Agreement.”

Neither the amended complaint nor Lucky Reim’s briefing addresses the apparent inconsistency between the 2013 Commission Agreement—which recites that SVL will pay Lucky Reim a \$300,000 commission in full at the close of escrow—and the 2014 Purchase Agreement—which merely notes a possible commission of \$150,000 based on a possible future commission agreement.

March 27, 2014 was designated as the acceptance date of the Purchase Agreement. Under the terms of the Purchase Agreement, Wilpart deposited \$2 million with the escrow holder, United Escrow Company. Wilpart had 15 calendar days thereafter to conduct due diligence, with the escrow closing date to take place on the first business day after the expiration of the due diligence period. Wilpart conducted its due diligence and did not cancel the Purchase Agreement before the April 11, 2014

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Wilpart. The copy of the Purchase Agreement submitted by defendants with its demurrer to the original complaint, and judicially noticed by the trial court, also contains Whang’s signature on behalf of SVL.



expiration of the due diligence period. As noted earlier, Lucky Reim alleges “[u]pon expiration of this due-diligence period, by rights Plaintiff’s commission would become earned and vested.”

On May 2, 2014, Christine Chung, the senior escrow officer at United Escrow Company, received an email from Peter Lee, an attorney for Young Sung Cho (Cho), who claimed to own a 1/3 interest in SVL. The email stated that Cho had not received any information about the terms of the planned sale from Whang and that he objected to the sale. SVL terminated the Purchase Agreement on May 9, 2014 and sent escrow termination instructions to United Escrow Company, which returned the \$2 million deposit to Wilpart. Lucky Reim received no commission.

Shortly after the escrow was terminated, SVL relisted the Building with a different broker and a purchase price of \$23.8 million, almost \$10 million more than the price specified in the Purchase Agreement.

## **PROCEDURAL HISTORY**

Lucky Reim filed suit against SVL and Whang on May 19, 2015, alleging that defendants had improperly failed to pay Lucky Reim a \$300,000 commission. The original complaint generally described the LOI, the Commission Agreement, and the Purchase Agreement, but did not include the documents as exhibits. Lucky Reim alleged that it had never agreed to a revocation of the Commission Agreement. Consequently, once Wilpart’s buyer’s contingencies under the Purchase Agreement had expired, the \$300,000 commission was vested, earned, and payable, and once defendants terminated the Purchase Agreement, they owed Lucky Reim the commission.

Lucky Reim also averred that Whang had alter ego liability for the actions and omissions of SVL because he was the sole managing member of SVL, owned the majority of its outstanding shares, and exercised complete control over the entity “for his sole and exclusive benefit.” At the same time, it stated: “Contrary to [SVL] and Whang’s prior assertions and representations to Lucky Reim, Whang apparently did not have full authority to authorize and approve the sale of the Building. [SVL] and Whang did not disclose to Lucky Reim that there were other members who owned [SVL] who would have to separately approve any transaction.” Based on these allegations, Lucky Reim asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of contract as a third party beneficiary, fraud and deceit, negligent misrepresentation, and concealment.

Defendants demurred to each cause of action on July 7, 2015. Among other arguments, defendants attempted to defeat the claims of fraud and deceit, misrepresentation, and concealment by arguing that, contrary to the allegations in the complaint, Whang did in fact have authority to sell the Building. As support, defendants requested judicial notice of SVL’s Operating Agreement,<sup>3</sup> which they claimed “expressly grants Whang *exclusive* ‘authority, power, and discretion to manage and control the business, property, and affairs of the LLC, to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of the LLC’s business, property and affairs.’ ”

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<sup>3</sup> The trial court denied the request.

On December 2, 2015, the trial court sustained the demurrer with leave to amend. Regarding the breach of contract claim, the trial court found that Lucky Reim had not sufficiently alleged the terms of the Commission Agreement. The trial court regarded the claims for breach of the implied covenant of good faith and fair dealing and breach of contract/third party beneficiary as derivative of the breach of contract claim; thus, those claims necessarily failed as well.

The trial court noted that the fraud and deceit, negligent misrepresentation, and concealment claims were based on the allegation that defendants knowingly misrepresented or concealed that they did not have authority to enter into and approve the Building purchase. It found these allegations fatally inconsistent with the alter ego allegations: “Plaintiff cannot simultaneously allege that Whang was the sole managing member of [SVL], yet did not receive authorization from other members of [SVL].” The trial court also concluded that the pleading lacked the necessary specificity about “‘how, when, where, to whom and by what means’” the alleged misrepresentations were made.

Lucky Reim then filed the first amended complaint. The LOI, the Commission Agreement, and the Purchase Agreement were exhibits to the first amended complaint. As set forth earlier, Lucky Reim averred SVL and Lucky Reim had agreed that Lucky Reim would “procure possible buyers for the Building” and would “inform SVL as to what the purchase offer amount would be. Based on the purchase price, Plaintiff and SVL would negotiate a commission on the sale.” In accordance with this agreement, SVL and Lucky Reim first agreed upon a commission of \$300,000 when Lucky Reim conveyed Catalina’s potential offer

to SVL's agent and then the Commission Agreement attached to the LOI was drafted "pursuant to the agreement made between Plaintiff and SVL."

The amended complaint dropped the alter ego allegations, as well as the contentions that SVL and Whang misrepresented that Whang was authorized to sell the Building. Instead, it alleged that, contrary to the claims in the May 2, 2014 email to the escrow company, Cho "in fact did know of and had approved the sale of the Building." Representations to the contrary "were driven by a fraudulent conspiracy hatched by Defendants in order to terminate the Purchase Agreement and related Commission Agreement with the motivation of obtaining more money for the sale of the Building by re-listing it." The amended complaint omitted the cause of action for concealment, but styled its fourth cause of action as "fraud and deceit and conspiracy." Lucky Reim also added Cho as a defendant and participant in the alleged conspiracy.

SVL and Whang filed a demurrer to the first amended complaint, which was heard on April 26, 2016. There was no court reporter at the hearing.

The trial court sustained the demurrer to the first amended complaint without leave to amend. The trial court noted that Lucky Reim had alleged it was entitled to a commission despite the termination of escrow, and further observed that "the provision that would allow Lucky Reim to recover the commission in this situation was crossed out of the Commission Agreement." Moreover, the Commission Agreement provided that the commission was to be paid at "'close of escrow,'" making the closing of the transaction a condition precedent to payment of the commission. The trial court also found Lucky Reim's breach of

contract claim as a third party beneficiary was not viable because, under Civil Code section 1559, a third party may enforce a contract only when the contract is expressly made for the benefit of that person. The trial court reasoned that Lucky Reim based its third party beneficiary claim on the LOI and the Purchase Agreement, but Lucky Rein's benefit was memorialized only in the Commission Agreement.

The trial court regarded Lucky Reim's conspiracy allegations as a new cause of action unauthorized by the leave to amend. The trial court found Lucky Reim still failed to allege fraud, misrepresentation, and conspiracy with sufficient specificity. The trial court also found that the fraud claims "sound[ed] in breach of contract." The trial court dismissed the claims against defendants with prejudice on June 3, 2016.<sup>4</sup> Lucky Reim filed its notice of appeal on July 22, 2016.

On August 1, 2016, Lucky Reim moved for the preparation of a settled statement. Lucky Reim's proposed settled statement recited that, at the demurrer hearing, its counsel represented "he would be providing more information in the amended complaint, including specific information regarding meetings and emails between the parties that would more adequately support the causes of action pled in Plaintiff's complaint." Lucky Reim further recited that the trial court did not grant leave to amend "despite oral arguments as to how the complaint could be amended to address any noted deficiencies."

Defendants opposed the motion. The trial court granted the motion and ordered defendants to file any proposed amendments to Lucky Reim's proposed settled statement. In

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<sup>4</sup> Lucky Reim appears to have requested dismissal of Cho without prejudice on May 4, 2016.

defendants' proposed statement, defendants stated that, at the hearing on the demurrer, they had argued that plaintiff did not submit a proposed second amended complaint in response to the demurrer or "identify specific emails or facts that would support a basis to assert a Second Amended Complaint."

On October 26, 2016, the trial court adopted defendants' proposed settled statement with additional comments stating that the trial court had inquired at the hearing about what "emails concerning meetings" Lucky Reim had to cure the failure to plead fraud claims with the required particularity. According to the trial court, "Counsel only made a generalization and again was vague and not specific as to how he would amend."

## DISCUSSION

### I. Standard of Review

A demurrer properly challenges only the legal sufficiency of the complaint—that is, "whether it states facts sufficient to constitute a cause of action upon which relief may be based." (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1037 (*Kong*); see *Picton, supra*, 50 Cal.App.4th at p. 732.) It does not test either the truth of the complaint's factual allegations or the plaintiff's ability to prove those allegations. (*Picton*, at p. 732.)

On appeal, we review de novo the trial court's sustaining of a demurrer without leave to amend, exercising independent judgment as to whether a cause of action has been stated.<sup>5</sup>

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<sup>5</sup> Defendants urge this Court to "simply disregard" Lucky Reim's opening brief because it does not include a statement of the case or statement of appealability. We do not conclude that the purported deficiencies warrant the relief defendants seek.

(*Kong, supra*, 108 Cal.App.4th at p. 1038.) We treat as true all of the complaint’s material factual allegations, but not its contentions, deductions or conclusions of fact or law. (*Picton, supra*, 50 Cal.App.4th at pp. 732-733; *Kong*, at p. 1037.) We may also consider facts arising by a reasonable inference from those alleged in the complaint, as well as facts appearing in exhibits attached to the complaint; if facts appearing in the exhibits contradict the facts alleged, the facts in the exhibits take precedence. (*Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567-568; *Picton*, at p. 733.) In determining whether a cause of action has been pled, we construe the complaint liberally, reading the complaint as a whole and its parts in their context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Picton*, at p. 733.)

In reviewing the denial of leave to amend, we apply the abuse of discretion standard. (*Kong, supra*, 108 Cal.App.4th at p. 1038.) “[I]t is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

## **II. The Trial Court Erred in Sustaining the Demurrer to Lucky Reim’s Cause of Action for Breach of Contract.**

Lucky Reim contends the trial court erred in sustaining the demurrer to its breach of contract claim on the ground that the Commission Agreement made the close of escrow a condition precedent to the payment of a commission. Lucky Reim argues the Commission Agreement contained no such contingency and Lucky Reim “earned the commission when Defendants entered into the purchase agreement to sell the building.”

Defendants counter that the trial court properly sustained their demurrer for four reasons: (1) Lucky Reim could not enforce the Commission Agreement or the LOI because it was not a party to either ; (2) Lucky Reim lacked an enforceable contract on which to bring suit because the LOI expired three days after it was executed and the Commission Agreement therefore was “part of a null and void contract”; (3) the Purchase Agreement related to a sale involving different buyers than the sale identified in the Commission Agreement; and (4) the Commission Agreement made the close of escrow a condition precedent to Lucky Reim’s right to a commission.

We discuss each of these contentions and conclude that Lucky Reim had an enforceable contract with SVL. We further conclude, after taking all inferences in favor of Lucky Reim, it adequately pled an oral agreement for a commission not conditioned upon closing the sale, which oral agreement was memorialized in the Commission Agreement. In addition, the reference in the Commission Agreement to payment upon the close of escrow is ambiguous. It was error for the trial court to have resolved this ambiguity on a demurrer. Where, as here, Lucky Reim alleged SVL prevented the close of escrow in bad faith, it also sufficiently alleged a viable cause of action for breach of the covenant of good faith and fair dealing, which is implied in every contract.



**A. Lucky Reim Has Standing to Enforce the Commission Agreement.**

Defendants argue that Lucky Reim could not enforce the Commission Agreement because it was “not a party or signatory to the Commission Agreement or LOI.”<sup>6</sup>

In California, to satisfy the statute of frauds, a real estate broker may recover compensation only if it has an agreement with its principal and there is a written memorandum of that agreement signed by the principal. (See Civ. Code, § 1624, subd. (a)(4); 2 Miller & Starr, California Real Estate (4th ed. 2016) (Miller & Starr) § 5:6, pp. 5-30 to 5-32.) The statute of frauds is satisfied if a “broker . . . perform[s] services pursuant to an oral agreement with the principal . . . when there is a *subsequent* written document executed by the principal after the services have been rendered that ratifies the oral agreement and

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<sup>6</sup> At oral argument, defense counsel argued that Lucky Reim was never SVL’s broker, but instead was a broker for prospective buyers. The complaint alleges SVL retained Lucky Reim in 2012 “as its broker to list and sell the Building” and, for purposes of reviewing a demurrer, we accept the allegation as true. The Commission Agreement attached to the complaint is not inconsistent with these allegations. We acknowledge that the LOI is somewhat ambiguous on this point, when it states: “**Buyer** hereby represents and warrants to Seller that Buyer has made no statement or representation nor entered into any agreement with a broker, salesman or finder except for Lucky REIM, Inc. in connection with the transactions contemplated by this Agreement.” (Italics and boldface added.) The Purchase Agreement, executed over a year later, identified Lucky Reim as “Buyer’s Broker” and stated “Buyer’s Broker is representing Buyer exclusively in connection with this Agreement.” These ambiguities cannot be resolved on demurrer.

promises to pay a commission.” (Miller & Starr § 5.6, p. 5-38 [citing cases].)

Such a memorandum is sufficient if it recites the contract’s essential terms, but it need not contain all contractual terms to pass muster under the statute of frauds. (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 765-766 (*Sterling*).) As our Supreme Court observed in *Sterling*, “The primary purpose of the Statute is evidentiary, to require reliable evidence of the existence and terms of the contract and to prevent enforcement through fraud or perjury of contracts never in fact made. The contents of the writing must be such as to make successful fraud unlikely, but the possibility need not be excluded that some other subject matter or person than those intended will also fall within the words of the writing.’” (*Id.* at p.766 [quoting Rest.2d Contracts, § 131, com. c, p. 335].)

Courts have thus found an oral promise to pay a broker’s commission enforceable when the promise has been memorialized in escrow instructions signed by the seller (*Coulter v. Howard* (1927) 203 Cal.17, 22-23 (*Coulter*) and in a statement written by the seller on the back of a contract of sale (*Johnson v. Krier* (1922) 59 Cal.App. 330, 331-332).

For example, in *Weber v. Dobyys* (1961) 193 Cal.App.2d 402, the court concluded a broker could enforce the sellers’ promise to pay a commission included in the sellers’ written acceptance of the buyers’ offer to exchange properties—even though the broker was not a party to the exchange agreement itself and the exchange agreement was not consummated. (*Id.* at pp. 403-405, 407-408.) The court reasoned that when the sellers signed the acceptance, they “in effect made two contracts, one with the [buyers], for the exchange, and one with [the

broker], to pay for his services in procuring the exchange agreement for them.” (*Id.* at p. 407.) More precisely, the second “contract” was a memorialization of a prior oral agreement between the broker and the sellers. (*Id.* at pp. 407-408.)

Similarly, here Lucky Reim alleged that “[t]he agreement between Plaintiff and SVL was for Plaintiff to procure possible buyers for the Building, and to inform SVL as to what the purchase offer amount would be. Based on the purchase price, Plaintiff and SVL would negotiate a commission on the sale.” Lucky Reim then alleged that SVL and Lucky Reim negotiated a price of \$300,000 for the proposed sale to Catalina, and the Commission Agreement “was based on the agreement that Plaintiff and SVL had in place for this purchase offer.” The Commission Agreement was signed by Whang on behalf of SVL—the party to be charged. (See Civ. Code, § 1624, subd. (b)(3)(D).) These were sufficient allegations of a writing memorializing an oral contractual obligation to Lucky Reim on which to base Lucky’s Reim’s standing to enforce that obligation.<sup>7</sup>

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<sup>7</sup> We note that defendants also argued on appeal that their demurrer to the breach of contract cause of action must be sustained because Lucky Reim was not a party or signatory to the LOI. The breach of contract cause of action did not allege breach of the LOI. As noted below in relation to the LOI’s expiration provision, the LOI does not include Lucky Reim as a signatory or party. We acknowledge that Lucky Reim argued that it was a third-party beneficiary of the LOI in opposing defendants’ motion to strike paragraphs in the original complaint seeking attorneys’ fees based on the LOI. Because the trial court sustained the demurrer to the entire original complaint, it did not rule on the motion to strike. We thus do not address the merits of that motion, including Lucky Reim’s contention that it was a third-party beneficiary of the LOI.

**B. The Commission Agreement Did Not Expire  
Along With the LOI.**

Defendants next argue that, even if Lucky Reim were otherwise entitled to enforce the Commission Agreement, that agreement was no longer enforceable at the time Lucky Reim brought suit because the LOI, to which the Commission Agreement was attached, became “null and void” when SVL and Catalina failed to execute a purchase agreement within three days.

Defendants’ contention conflicts with the terms of the Commission Agreement and the LOI itself. Although the Commission Agreement conditioned SVL’s obligation to pay a commission on a sale according to the terms outlined in the LOI, the Commission Agreement was not conditioned on a specific purchase agreement being executed within three days. On the contrary, it provided that absent Lucky Reim’s written consent, SVL could not revoke the Commission Agreement. Nor did the LOI make its expiration provision applicable to any parties other than the signatories, SVL and Catalina. It stated: “This Letter of Intent, and the obligations of the parties hereunder” are subject to the execution of a purchase agreement within three days. Lucky Reim was not a party to the LOI.

Defendants’ contention also does not comport with case law holding that when there is a commission agreement for a particular sale, the buyer and seller cannot subsequently contract around that agreement to avoid paying the agreed-upon commission. In *Torelli v. J.P. Enterprises, Inc.* (1997) 52 Cal.App.4th 1250 (*Torelli*), for example, a broker found a buyer for the seller’s property and presented to the seller a

standard form real estate purchase agreement signed by the buyer, which called for the broker to be paid a 2.5 percent commission. (*Id.* at p. 1252.) The seller signed a counteroffer that largely accepted the terms set out in the purchase contract, including payment of the commission. (*Ibid.*) The buyer did not accept the counteroffer prior to its expiration a few days later. (*Ibid.*) After the expiration, the parties negotiated on their own and came to an agreement that did not include a broker's commission. (*Ibid.*) The broker sued to recover his commission and the seller moved for summary judgment, claiming that the agreement to pay a commission expired along with the counteroffer. (*Ibid.*) The trial court granted the motion. (*Ibid.*) The Court of Appeal reversed. (*Ibid.*)

The Court of Appeal explained “[t]he promise to pay *the broker* a commission did not die with the expiration of the counteroffer *to the buyer*.” (*Torelli, supra*, 52 Cal.App.4th at p. 1252.) The appellate court acknowledged the general rule that, where a broker lacks a listing agreement and a contract between a buyer and seller “‘is the only written document providing for the payment of the commission, he is subject to the terms and conditions of payment contained in the agreement.’” (*Id.* at p. 1254, quoting 1 Miller & Starr, California Real Estate (2d ed. 1989) § 2:33, p. 635; see also Miller & Starr, *supra*, § 5:57, pp. 266-267.)

The appellate court observed, however, that “[i]t is . . . an error to slide from the idea that a broker’s right to a commission depends on an agreement the function of which is to serve as a contract between two other parties—the buyer and seller—to the idea that the broker’s right to a commission necessarily may be defeated if the buyer and seller do not sign the precise piece of

paper *embodying* that agreement. As far as the broker's right to a commission is concerned, the *broker-seller* contract set forth in a counteroffer must be distinguished from the *seller-buyer* contract which *would* be formed *if* the buyer signed the counteroffer." (*Torelli, supra*, 52 Cal.App.4th at p. 1254.)

The *Torelli* court further reasoned that permitting a broker to be deprived of an agreed-upon commission whenever a buyer and seller circumvent a commission agreement—as occurred in *Torelli* and as alleged here—would run counter to cases holding that where a seller defaults on a sale, the broker may recover a commission even if that commission is contingent upon the closing of the sale.<sup>8</sup> (*Torelli, supra*, 52 Cal.App.4th at pp. 1255-1256.) In both instances, the law protects the broker from tactics that prevent the broker from receiving the agreed-upon commission. As the *Torelli* court noted, "just because the seller was not at fault for the nonacceptance of the counteroffer does not mean the seller could, with impunity, breach its *existing* contract to pay a commission to the broker." (*Id.* at p. 1257.)

We conclude that although the LOI between SVL and Catalina expired after three days, SVL's contractual obligations to Lucky Reim memorialized in the Commission Agreement did not.

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<sup>8</sup> See *Collins v. Vickter Manor, Inc.* (1957) 47 Cal.2d 875, 881 (*Collins*); *Coulter, supra*, 203 Cal. at p. 23.

**C. The Purchase Agreement Does Not Reference a Different Sale Than That Described in the Commission Agreement.**

Defendants argue that the Commission Agreement references a different sale than that contemplated by the Purchase Agreement because it names Wilpart, rather than Catalina, as the buyer. Defendants appear to conclude from this observation that the Commission Agreement would not apply to the sale to Wilpart even if the sale had been completed.

First, defendants ignore the allegations of an oral contract between Lucky Reim and SVL in the first amended complaint, which agreement was memorialized in the Commission Agreement. Second, even if we were to focus only on the documents attached to the first amended complaint, we respectfully submit defendants misread them. The Commission Agreement states that SVL agrees to sell the Building “to Buyer for the price and Conditions State [sic] in the Letter of Intent by Catalina Limited Partnership or Dr[.] Kee Whan Ha dated February 26, 2013.” (Italics omitted.) The LOI defines “ ‘Buyer’ ” as “*Catalina Limited Partnership, a California Limited Partnership or/his assignee*,” and Lucky Reim avers in the first amended complaint that the buyer named in the Purchase Agreement, Wilpart, “was an entity designated by [Catalina] as was authorized pursuant to the LOI.”

In sum, the factual allegations of the first amended complaint establish that the Purchase Agreement provided for a sale consistent with the terms of the LOI and to which the Commission Agreement applied. The fact that the Purchase Agreement named Wilpart as the buyer is not fatal to Lucky Reim’s enforcement of its commission agreement with

SVL because Wilpart was alleged to be an “assignee” contemplated by the very documents on which defendants rely.

**D. The Trial Court Erred In Concluding the Commission Agreement Contained an Unambiguous Condition Precedent.**

The trial court found, and defendants likewise argue,<sup>9</sup> that the close of escrow was a condition precedent to payment of Lucky Reim’s commission. According to the trial court, because escrow did not close, there was no breach of contract. In making this finding, the trial court cited what it characterized as the

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<sup>9</sup> For the first time on appeal, at oral argument, defendants cite *City of Turlock v. Paul M. Zagaris, Inc.* (1989) 209 Cal.App.3d 189, an eminent domain proceeding, for the proposition that *City of Turlock* is among many cases holding that in the absence of a listing agreement, a broker’s commission is earned only if the sale is consummated. There, a broker sought to enforce a promise to pay a broker’s commission in a sales agreement between the prospective buyer and seller, but not the broker itself. (*Id.* at p. 191.) The sale did not go through when the property was acquired by eminent domain. (*Id.* at p. 192.) The appellate court held that where the only agreement to pay a commission was in a sales agreement between the prospective purchaser and seller, and the sale was aborted because of an eminent domain proceeding, the broker could not recover its commission. (*Id.* at pp. 194-195.) We fail to see how *City of Turlock* is applicable here where Lucky Reim alleged a separate oral agreement with SVL to pay a commission, which agreement was memorialized in the Commission Agreement. Defendants’ argument, moreover, does not take into account venerable case law discussed *infra*, refusing to enforce even an undisputed condition requiring consummation of the sale where the seller engaged in tactics to frustrate that consummation.



following “unambiguous terms” of the Commission Agreement: (1) the provision that the commission was to be paid at close of escrow, and (2) the crossing out of sentences stating that the commission was not contingent on the successful completion of the contemplated transaction.

The trial court, as well as defendants, do not give full measure to the allegations of the first amended complaint. As detailed in our factual presentation above, Lucky Reim pled an oral agreement to procure buyers for the Building and to negotiate a commission agreement based on the purchase price once Lucky Reim brought a buyer to SVL. Lucky Reim expressly alleged that closing escrow was not a condition precedent to earning its commission in its agreement with SVL. To the contrary, Lucky Reim alleged that under its agreement with SVL, it earned its commission upon the opening of escrow and expiration of the buyer’s due diligence contingencies.

We disagree with the trial court’s conclusion that the reference in the Commission Agreement to payment at the close of escrow was unambiguous in light of the crossed-out sentences stating that the commission was not contingent on the successful completion of the contemplated transaction. Lucky Reim alleged, and argues on appeal, that the following sentence in the Commission Agreement relates merely to the timing of when its commission is paid, and not to whether it gets paid at all: “Said Commission is payable in full on the closing date and shall be paid in cash through escrow.”

We conclude that Lucky Reim’s interpretation of the Commission Agreement is reasonable. We recognize that defendants—and the trial court—have argued a reasonable interpretation as well. Under these circumstances, in ruling

upon a demurrer, a trial court must accept a plaintiff's interpretation as true. "Where a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible." (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239.) If, as here, the incorporated contract is ambiguous, it is proper for a plaintiff to allege its construction of the agreement. (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 132.) When that interpretation is not "clearly erroneous," the court may not resolve the ambiguity on a demurrer. (*Ibid.*; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶7:48.25, p. 7(1)-30.)

We express no opinion on whether Lucky Reim's interpretation will ultimately prevail, but reverse because the trial court could not resolve this issue in ruling on a demurrer.<sup>10</sup>

### **III. The Trial Court Erred in Sustaining the Demurrer to Lucky Reim's Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing.**

In its second cause of action, Lucky Reim alleged: "SVL breached the covenant of good faith and fair dealing by engaging in fraudulent tactics so as to coerce a termination of [the] Purchase Agreement, and thereby trying to avoid having to pay

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<sup>10</sup> On remand, extrinsic evidence would be admissible to elucidate the parties' intent and assist the trier-of-fact. (*Sterling, supra*, 40 Cal.4th at p. 767 ["[W]hen ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty."].)

any commissions pursuant to the Commission Agreement.” The trial court did not analyze this cause of action separately from the breach of contract cause of action in sustaining the demurrer to both causes of action without leave to amend.<sup>11</sup>

A covenant of good faith and fair dealing is implied by law in every contract. (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.) The covenant supplements the express contractual provisions “ “to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party’s rights to the benefits of the contract.” ’ ” (*Ibid.*, quoting *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032; see also *Colwell Co. v. Hubert* (1967) 248 Cal.App.2d 567, 575.) The implied covenant “requires each party to do everything the contract presupposes the party will do to accomplish the agreement’s purposes.” (*Thrifty Payless, Inc.*, at p. 1244.) A plaintiff need not allege a breach of a specific contractual provision to make out a claim for breach of the implied covenant. (*Ibid.*)

These principles informed our Supreme Court’s observation in *Stromer v. Browning* (1966) 65 Cal.2d 421 (*Stromer*) that where the payment of a commission is contingent upon consummation of a sale, the prospective seller “owes a duty to the broker not to act arbitrarily or in bad faith to prevent

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<sup>11</sup> On appeal, Lucky Reim does not distinguish between the first two causes of action either. Defendants argue primarily that the second cause of action fails because the Commission Agreement does not constitute an enforceable contract. As discussed above, we conclude otherwise.

consummation of the transaction where the broker has found a prospective buyer who is ready, able, and willing to purchase the property, and the prospective buyer and the prospective seller have agreed upon the terms and conditions of the sale.” (*Id.* at p. 424.) An abrogation of this duty cannot properly deprive a broker of the agreed-upon commission: “[I]f a sale is not consummated because the seller, acting arbitrarily or in bad faith, prevented consummation, the broker is entitled to his commission even though his contract provides that payment shall be made out of the proceeds of the sale [citations] or upon successful completion of the escrow [citation].” (*Id.* at pp. 424-425; see *Coulter, supra*, 203 Cal. at p. 23.)

In *Stromer*, the Supreme Court concluded that the defendant seller had not acted in bad faith. (*Stromer, supra*, 65 Cal.2d at pp. 427-428.) In other cases, however, the Court has held that brokers were entitled to their commissions when a seller defaulted. *Stromer* cited with approval *Coulter v. Howard, supra*, in which the escrow instructions stated that the broker’s commission was to be paid “ ‘at close of escrow but only out of funds then due and payable to [seller] out of this escrow.’ ” (*Stromer*, at p. 425, quoting *Coulter, supra*, 203 Cal. at p. 20.) When the seller sold the property to another buyer at a higher price, the Supreme Court held that because the seller had acted in bad faith, the seller was liable to the broker for the commission. (See *Stromer, supra*, 65 Cal.2d at p. 425, citing *Coulter, supra*, 203 Cal. at p. 23; see also *Stromer*, at p. 425, quoting *Coulter, supra*, 203 Cal. at p. 25 [“ ‘The law requires of the vendor good faith and the doing of no intentional act to discourage, embarrass, or prevent the completion of the purchase’ ”].)

In *Collins, supra*, the Supreme Court reversed the sustaining of a demurrer to the brokers' suit to recover a commission where the brokers had made an oral agreement with the seller for a \$3,000 commission. (*Collins, supra*, 47 Cal.2d at pp. 878, 880.) The brokers averred that when they found a buyer, the seller and buyer executed a deposit receipt, which was attached to the complaint. (*Id.* at pp. 878-879.) The deposit receipt memorializing the oral commission agreement was signed by the buyer, the seller, and the broker.<sup>12</sup> (*Id.* at pp. 878.) The deposit receipt required the seller to provide a "satisfactory soil compaction report" and certain maps. (*Id.* at p. 878.) When the seller failed to deposit the required documents in escrow and withdrew from the escrow, the brokers sued for their \$3,000 commission. (*Id.* at p. 879.)

The Supreme Court held that these allegations were sufficient to state a breach of contract claim against the seller. (*Collins, supra*, 47 Cal.2d at p. 880.) The Court explained that "the complaint alleges (and the demurrer admits) facts from which, under the established liberal rules of construction [citations], we must infer that plaintiffs and the buyer did everything which the agreement required of them and that consummation was prevented solely by the arbitrary refusal of defendant corporation and its officers to proceed with the transaction. . . . In these circumstances, the defendants will not be allowed to take advantage of their own remissness to defeat plaintiff's recovery." (*Id.* at p. 881; see also

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<sup>12</sup> The Court noted that the deposit receipt contained a somewhat different amount for the commission, but accepted the averments of the complaint for the purpose of reviewing the demurrer. (*Id.* at p. 878, fn. 2.)

*Prudential Realty etc. Co. v. Clarewood Co.* (1960) 187 Cal.App.2d 320, 323 [“seller cannot rely upon his own prevention of performance” to defeat broker’s claim to a commission].) To reiterate, this rule applies even where a contract expressly conditions payment of a commission on consummation of the contemplated sale. (*Stromer, supra*, 65 Cal.2d at pp. 424-425.)

Lucky Reim’s allegations come within the scope of this rule. As discussed above, the oral agreement memorialized in the Commission Agreement constituted an enforceable contract and the Purchase Agreement constituted a contract for sale pursuant to the terms of the LOI. Lucky Reim alleged that defendants conspired with Cho to manufacture an objection to the proposed sale with the purpose of terminating escrow—although Cho and defendants knew the objection was specious. Lucky Reim further averred that Cho and defendants conspired “with the motivation of obtaining more money for the sale of the Building by relisting it” and defendants hoped to avoid paying Lucky Reim’s commission. These allegations, which we assume are true for purposes of ruling on a demurrer, describe bad faith tactics designed to prevent consummation of the sale. Lucky Reim thus stated a viable cause of action for breach of the implied covenant of good faith and fair dealing.<sup>13</sup>

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<sup>13</sup> In so holding, we recognize that in the Commission Agreement the following sentence was stricken: “Seller acknowledges and agrees that in the event completion of the sale is prevented by default of Seller, then upon such default Seller shall immediately be obligated to pay to Agent the entire commission herein set forth above.” We can only speculate as to the meaning of the strike-out; for example, it could indicate that the parties regarded the provision as unnecessary. In short, the

#### **IV. The Trial Court Properly Sustained the Demurrer to Lucky Reim's Cause of Action for Breach of Contract as a Third Party Beneficiary.**

Lucky Reim's third cause of action for breach of contract relies on Civil Code section 1559, which provides that "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." An agreement between a buyer and seller that expressly provides for the payment of a broker's commission makes the broker a third party beneficiary within the meaning of section 1559. (*Chan v. Tsang* (1991) 1 Cal.App.4th 1578, 1583; Miller & Starr, *supra*, § 5:62, p. 284.)

Lucky Reim does not base this cause of action on the Commission Agreement, but on the Purchase Agreement, alleging that "[b]y entering into the Purchase Agreement, Defendants and Buyer expressly intended for Plaintiff to be a third party beneficiary pursuant to the terms of the Purchase Agreement for purposes of Plaintiff's right to receive a commission" and that "Defendants materially breached the Purchase Agreement by failing to sell the Building as required under the terms of the Purchase Agreement . . . ."

The Purchase Agreement itself does not make Lucky Reim a third party beneficiary. A third party qualifies as a beneficiary under a contract only if the contracting parties so intended and "such intent appears on the terms of the contract." (*Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1724; see *Luis v. Orcutt Town Water Co.* (1962)

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meaning of the stricken sentences cannot be resolved on demurrer.

204 Cal.App.2d 433, 441-442 [“The test in deciding whether a contract inures to the benefit of a third person is whether an intent to so benefit the third person appears from the terms of the agreement”].)

The Purchase Agreement indicated, at most, that Lucky Reim might receive a commission, albeit for less than \$300,000 from the contemplated sale. The document stated: “Except for a possible commission in an amount equal to One Hundred and Fifty Thousand and 00/100 Dollars (\$150,000.00) (the ‘**Commission**’) to be paid by Seller to Lucky REIM, Inc., a California corporation (‘**Buyer’s Broker**’), pursuant to a separate written commission agreement to be negotiated between and executed by Seller and Buyer’s Broker (assuming such parties agree on such Commission), each Party warrants and represents to the other that no broker, salesman, or finder has been engaged by it in connection with the transactions contemplated by this Agreement.” Thus, the very tentative language of the Purchase Agreement reveals that it was not “made expressly for the benefit” of Lucky Reim and that Lucky Reim was not a third-party beneficiary of the Purchase Agreement.

For these reasons, the trial court did not err in sustaining the demurrer to Lucky Reim’s third party beneficiary cause of action.

**V. The Trial Court Properly Sustained the Demurrer to Lucky Reim’s Cause of Action for Fraud, Deceit, and Conspiracy.**

Lucky Reim alleged in its fourth cause of action for fraud, deceit, and conspiracy that when defendants Cho, Whang, and SVL realized they could procure a better price for the Building,



they conspired to have Cho protest the sale, providing grounds for termination of the escrow, even though Cho actually knew of and approved the sale, thereby defrauding Lucky Reim of its commission.<sup>14</sup> The trial court found that Lucky Reim failed to allege specific misrepresentations, “or how, when, where, to whom, and by what means such misrepresentations were tendered.” The trial court also found that the fraud claim was just a disguised breach of contract claim. Although we disagree with the trial court’s reasoning, the trial court properly sustained the demurrer to this cause of action because Lucky Reim failed to plead reliance and causation with sufficient particularity.

The elements of fraud are: “(1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages.” (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816.) Each element in a cause of action for fraud must be pleaded with factual particularity, showing “ ‘how, when, where, to whom, and by what means’ ” the

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<sup>14</sup> In connection with these allegations, defendants argue that the demurrer order should be affirmed because Lucky Reim “submitted a sham pleading.” They point out that, in the original complaint, Lucky Reim alleged Whang lacked authority to sell the Building, while in the first amended complaint it alleged Whang did possess the requisite authority. The trial court did not treat the amended complaint as a sham pleading; nor do we. Lucky Reim explained the revised allegations in its amended complaint as resulting from defendants’ own disclosures in demurring to the original complaint—specifically, defendants’ request that the trial court take judicial notice of SVL’s Operating Agreement, which defendants argued granted Whang the authority to sell the Building.

representations were made. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.) When fraud is alleged against a corporate defendant, the pleading must “allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.” (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

The trial court found that Lucky Reim failed to allege specific misrepresentations. To the contrary, Lucky Reim alleged that on May 2, 2014, Peter Lee, an attorney for Cho, sent an email to Christine Chung, the senior escrow officer at United Escrow Co. (the Lee email), stating that Cho owned a third interest in SVL, had not been informed about the proposed sale to Wilpart, had no information about the terms of the sale, and objected to the sale. Lucky Reim further alleged these representations were false because Cho knew of and had approved the sale. These allegations sufficiently set forth “how, when, where, to whom and by what means” the alleged misrepresentations were made.

Lucky Reim did not allege specific misrepresentations by defendants SVL and Whang, but this omission does not defeat the fraud and deceit claim because Lucky Reim alleged this cause of action on a conspiracy theory. Civil conspiracy “imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration.”<sup>15</sup> (*Applied Equipment Corp. v.*

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<sup>15</sup> The elements of civil conspiracy are “ ‘the formation and operation of the conspiracy’ ” and injury arising from an “ ‘an act or acts done in furtherance of the common design.’ ” (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*

*Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) Lucky Reim sufficiently alleged such a common plan: “Defendants decided that Cho would protest the sale of the Building under the pretense that Cho did not know of the sale and did not authorize the sale of the Building and that Whang was not authorized to sell the Building . . . .” Shortly after Lee sent the May 2, 2014 email to the escrow company on behalf of Cho, Whang terminated the escrow.

Nevertheless, Lucky Reim failed to allege with particularity any reliance on the misrepresentations in the Lee email and causation resulting from that reliance. It alleged that “Cho requested that this email be forwarded to both the seller and the buyer, and of course knew that this information would be passed along to Plaintiff,” and further stated: “Since such representation came from Cho’s attorney and cited California statutes in making what seemed at the time to be reasonable statements and raising a valid dispute, Plaintiff reasonably relied on such representations in not immediately pursuing the commission that had been earned by Plaintiff and had already become vested and payable upon the execution of the Purchase Agreement and subsequent expiration of the due-diligence period.”

Despite the reference to Lucky Reim’s reliance, the allegation failed to specify how Lucky Reim relied on the alleged misrepresentation. Other than referring vaguely to “not

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(1994) 7 Cal.4th 503, 511.) Civil conspiracy is “not an independent tort.” (*Id.* at p. 514). For this reason, the trial court erred in sustaining the demurrer on the additional ground that, in sustaining the demurrer to the original complaint, it “did not grant leave to amend the complaint to add new causes of action.”

immediately pursuing the commission,” Lucky Reim failed to specify what it did or did not do in reliance on the alleged misrepresentation, or what steps it could have, but did not take. Nor did Lucky Reim allege any causal connection between any reliance and actual harm to it from the alleged fraud, as distinct from harm caused by the breach of contract itself.

**VI. The Trial Court Properly Sustained the Demurrer to Lucky Reim’s Cause of Action for Negligent Misrepresentation.**

Lucky Reim alleged in its fifth cause of action for negligent misrepresentation that defendants represented to it that “Cho did not know of and did not authorize the sale of the Building, and Whang was not authorized to sell the Building.” It further stated that “[e]ven if Defendants may have honestly believed that the representations were true,” they lacked any reasonable basis for that belief because Cho had authorized the sale and Whang was authorized to sell the Building “both by agreement by SVL’s members and by SVL’s Operating Agreement.”

The elements of negligent misrepresentation are similar to those of fraud, except that a plaintiff need not prove intent to deceive. Instead, a plaintiff must show “(1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.” (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196.) Like fraud, negligent misrepresentation must be pled with particularity. (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 231.)

Apart from the claims made in the Lee email, Lucky Reim did not allege any particular misrepresentation. Thus, as noted above, Lucky Reim failed to allege any specific negligent misrepresentation by Whang or SVL. According to the amended complaint, Lee acted as Cho's attorney; there were no allegations he acted on behalf of SVL and/or Whang. Although we recognize that conspiracy to commit a negligent misrepresentation may be theoretically possible (see *Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1293-1294), Lucky Reim has not pled such a conspiracy in the first amended complaint. Lucky Reim's negligent misrepresentation claim also suffers from the same insufficient allegations of reliance and causation described above regarding its fraud claim.

## **VII. The Trial Court Did Not Abuse Its Discretion In Denying Lucky Reim Leave to Amend.**

When a demurrer is sustained without leave to amend, the plaintiff bears the burden of proving there is a reasonable possibility that the complaint could have been amended to cure the defect. (*Kong, supra*, 108 Cal.App.4th at pp. 1037-1038.) Lucky Reim failed to carry this burden.

Lucky Reim's third party beneficiary contract claim failed because the terms of the Purchase Agreement did not support it. Lucky Reim has never suggested how it could amend that cause of action if leave to do so were granted.

Lucky Reim did recite in its proposed settled statement that its counsel argued at the hearing on the demurrer that it could add to a second amended complaint "specific information regarding meetings and emails between the parties that would more adequately support the causes of actions pled in Plaintiff's complaint." The trial court acknowledged counsel's

representation about the existence of emails about meetings that could “overcome the purported lack of specificity required in pleading fraud allegations.” The trial court additionally noted, however, that when asked to elaborate, “[c]ounsel only made a generalization and again was vague and not specific as to how he would amend.”

During oral argument in this Court, we gave Lucky Reim’s counsel a second opportunity to make an oral offer of proof as to how Lucky Reim could amend to cure the first amended complaint’s deficiencies—specifically as to the lack of particular allegations about reliance and causation in its fraud and negligent misrepresentation claims. Lucky Reim still failed to offer particulars.

For all these reasons, Lucky Reim did not establish that there was a reasonable possibility that it could allege causation or reliance with the required particularity in an amended complaint. Nor has Lucky Reim indicated what particular misrepresentations by Whang and SVL it could allege to cure its deficient negligent misrepresentation claim.

## **DISPOSITION**

The judgment dismissing defendants SVL and Whang is reversed, with directions to the trial court to (1) vacate its order sustaining the demurrer without leave to amend as to the entire first amended complaint; and (2) enter a new order (a) overruling the demurrer as to the first and second causes of action (breach of contract and breach of the implied covenant of good faith and fair dealing), and (b) sustaining the demurrer without leave to amend as to the third, fourth and fifth causes of action (breach of contract as to third party beneficiary; fraud, deceit and conspiracy; negligent misrepresentation). The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.