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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

AVETTIS AVETISYAN, et al., Plaintiffs and Appellants, v. ROBERT AZINIAN, et al., Defendants and Respondents.	B240309 (Los Angeles County Super. Ct. No. BC459263)

APPEAL from an order of the Superior Court of Los Angeles County. Rita Miller, Judge. Affirmed.

Law Offices of Richard M. Foster, Richard M. Foster, Sylvia Sultanyan and Arutyun Topchyan for Plaintiffs and Appellants.

Steckbauer Weinhart, William W. Steckbauer, James M. Gilbert and Sean A. Topp for Defendant and Respondent.

Avettis Avetisyan, Garo Ghevondian and Masis Ghevondian (plaintiffs) appeal the February 24, 2012 order sustaining the demurrer of defendant Robert Azinian (defendant) to plaintiffs' first amended complaint. Finding no error, we affirm the order.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the first amended complaint filed on September 12, 2011, defendant "induced" plaintiffs to loan money to Sanitec Industries (Sanitec), and have not been repaid. The complaint alleges that in May 2007, plaintiffs disbursed $200,000 to Sanitec by wire transfer and personal check pursuant to an oral loan agreement (the "Loan Agreement") entered into between plaintiffs and defendant. Under the terms of the Loan Agreement, Sanitec was to repay the loan principal, with interest at the rate of 12 percent per year, by making eight monthly payments of $28,000, starting in June 2007. Delinquent payments would incur a fee equal to 10 percent of the amount due. In addition, plaintiffs were to receive 500,000 shares of Sanitec stock as well as options to purchase an additional one million shares of stock at $1 per share. Sanitec and its principal, James Harkness, executed a "guarantor agreement" by which Harkness and Sanitec's related companies guaranteed the loan, provided security for the loan and memorialized the terms of the loan (the "Guarantor Agreement").[1]

Plaintiffs were not mentioned in the written materials documenting the Guarantor Agreement. Plaintiffs described defendant as their "point person" acting for them in the transaction, based on his personal relationship with Sanitec and Harkness. Defendant was to collect the loan payments from Sanitec and disburse them to plaintiffs. Defendant stated that he would invest $100,000 of his own money in Sanitec concurrently with the plaintiffs' loan, but, as plaintiffs learned in June 2007, he did not do so.

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[1]Plaintiffs also sued Sanitec and Harkness; they are not, however, parties to this appeal.

In early July 2007, Sanitec filed for Chapter 11 bankruptcy protection. Plaintiffs received no notice of the bankruptcy filing and were not included in Sanitec's list of creditors; indeed, they did not learn that Sanitec had filed for bankruptcy until well after the bankruptcy was concluded and Sanitec's plan of reorganization was confirmed in May 2009. Throughout this time period, in response to plaintiffs' numerous queries regarding the status of the loan payments, defendant made excuses for why plaintiffs were not receiving the promised monthly payments. Defendant represented that Sanitec "just needed a little more time" to start making the payments.

In December 2009, defendant informed plaintiffs that Sanitec had been in bankruptcy. At a meeting with James Harkness, it was agreed Sanitec would return to plaintiffs their $200,000 investment plus 5 percent interest, and transfer 500,000 shares of Sanitec stock. Plaintiffs received the 500,000 shares of stock. However, plaintiffs received no payments of principal or interest.

Based on the foregoing, plaintiffs filed their complaint against defendant, as well as Sanitec and Harkness, alleging four causes of action: breach of the Loan Agreement, negligent misrepresentation, constructive fraud, and unjust enrichment. The negligent misrepresentation claim, addressed solely to defendant, was based on defendant's statements that he intended to invest $100,000 in Sanitec, together with his misrepresentations regarding the status of the loan and the financial status of Sanitec, while the constructive fraud cause of action was based on defendant's confidential relationship with plaintiffs.

Defendant demurred to all four causes of action of the complaint. He argued plaintiffs had failed to adequately state a cause of action against him for breach of contract because he was not alleged to have been a party to either the Loan Agreement or the Guarantor Agreement. Defendant challenged the two fraud causes of action, based on the statute of limitations and the absence of facts showing an intent to defraud, as well as an absence of showing that defendant's alleged misrepresentations, rather than Sanitec's bankruptcy, proximately caused plaintiffs' damages. Finally, defendant maintained the unjust enrichment claim failed because the statute of limitations had expired and because,

as alleged in the complaint, defendant never had possession of the $200,000, and thus was not enriched by it.

The trial court sustained without leave to amend defendant's demurrer to the breach of contract and unjust enrichment causes of action and sustained with leave to amend the two fraud causes of action. With respect to the latter, the court noted the problem of causation and damages: "[T]he big problem with the second and third causes of action is damages, and it does not necessarily appear from the complaint that plaintiffs were damaged by Azinian's acts. For them to have been damaged, they would have to show that they would have recovered from Sanitec and [Harkness] if Azinian had not made his representations . . . ."

Plaintiffs filed an amended complaint alleging causes of action for intentional misrepresentation and constructive fraud against defendant. The amended complaint added new facts regarding the parties' negotiations in December 2009, but did not explain how defendant's conduct caused Sanitec to fail to repay the loan.

Defendant demurred to the amended complaint, contending, among other things, that both fraud claims failed to state a cause of action because they lacked the specificity required of fraud claims, failed to allege defendant knew or should have known of Sanitec's bankruptcy filing and had an affirmative duty to notify plaintiffs of that fact; and failed to explain how defendant caused Sanitec's breach of its obligations under the Loan Agreement or Harkness's breach of his obligations under the Guarantor Agreement.

The trial court sustained the demurrer without leave to amend. Plaintiffs' timely appealed that ruling.

II. STANDARD OF REVIEW

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' (*Serrano v.*

Priest (1971) 5 Cal.3d 584, 591.) Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42.) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. (See *Hill v. Miller* (1966) 64 Cal.2d 757, 759.) And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: If it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. (*Kilgore v. Younger* (1982) 30 Cal.3d 770, 781; *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636.) The burden of proving such reasonable possibility is squarely on the plaintiff. (*Cooper v. Leslie Salt Co.*, *supra*, at p. 636.)" (*Blank v. Kirwin* (1985) 39 Cal.3d 311, 318.)

III. DISCUSSION

Plaintiffs contend the trial court erred in ruling that their original and amended complaints failed to adequately state causes of action for breach of contract, intentional misrepresentation and constructive fraud against defendant. We review each cause of action below.

1. Breach of contract

In order to survive a demurrer on the breach of contract cause of action, plaintiffs were required to plead: (1) the terms of the contract; (2) their performance or excuse for nonperformance; (3) defendant's breach; and (4) the damage sustained by plaintiffs as a result of the breach. (*Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 Cal.App.3d 887, 913.) While the complaint adequately pleads a cause of action for breach of contract against Sanitec (for breach of the Loan Agreement), and against Harkness (for breach of the Guarantor Agreement), it fails to identify the contractual obligations which they contend defendant breached.

As alleged by plaintiffs, the Loan Agreement obliged defendant to undertake certain actions: "The terms of this loan were that Defendant Sanitec would pay directly to Defendant [Azinian] interest at 12% per year and make monthly payments starting in June 2007." Azinian was to collect the monthly payments on behalf of plaintiffs and disburse the payments to them. Thus, contrary to defendant's argument, the complaint alleges that he was a party to the Loan Agreement. However, because there is no allegation that Sanitec made any payments required under the Loan Agreement, defendant's obligation to collect and disburse them to plaintiffs was never triggered.

The allegation regarding defendant's statement that he intended to invest $100,000 of his own money in Sanitec does not amount to a covenant on his part to do so. There is no allegation the parties agreed that plaintiffs would loan Sanitec $200,000 only if defendant concurrently made a $100,000 loan to Sanitec, nor do plaintiffs allege that Sanitec's failure to repay its loan to them was caused by defendant's failure to loan Sanitec $100,000. In short, the trial court properly sustained defendant's demurrer to the breach of contract claim.

2. Intentional misrepresentation

"To establish a claim for deceit based on intentional misrepresentation, the plaintiff must prove seven essential elements: (1) the defendant represented to plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff *reasonably relied on the representation*; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff." (*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498; see also *Perlas v. GMAC Mortgage,* LLC (2010) 187 Cal.App.4th 429, 434.)

Intentional misrepresentation, like all fraud claims, must be pleaded with specificity. (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 132.) To meet this requirement, the complaint must plead facts that "'"show how, when, where, to whom, and by what means the representations were tendered."'" (*Lazar v. Sup. Ct.* (1996) 12 Cal.4th 631, 645; *Linear Technology Corp. v. Applied Materials, Inc., supra,* 152 Cal.App.4th at p. 132.) In addition, although circumstantial evidence may be used to infer fraudulent intent, "'something more than nonperformance is required to prove the defendant's intent not to perform his promise.' [Citation.]" (*Tenzer v. Superscope* (1985) 39 Cal.3d 18, 30.)

Plaintiffs identify the misrepresentations of fact to be defendant's statement he would invest $100,000 in Sanitec concurrently with plaintiffs, and that, in return for their loan to Sanitec, plaintiffs would be repaid in eight months' time, earn interest at the annual rate of 12 percent and receive shares of stock in Sanitec.[2]

As to the former representation, plaintiffs do not explain why defendant's statement of intention to invest his own funds was a material fact, or why they were justified in relying on it. More importantly, plaintiffs do not allege that, had defendant made good on his stated intention, Sanitec would have honored the Loan Agreement or Harkness would have satisfied his obligations under the Guarantor Agreement, or even that they would not have loaned the money to Sanitec.

With regard to defendant's alleged misrepresentation of the loan terms, plaintiffs appear to take the position defendant's description of the proposed loan terms was the equivalent of a guarantee that the lenders would receive the full benefit of their bargain. But, plaintiffs acknowledge that defendant did not sign the Guarantor Agreement.

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[2] Plaintiffs also contend defendant made a misrepresentation when he promised "to invest the $200,000 on [p]laintiffs' behalf and promised to distribute payments to [p]laintiffs when he received [them] from [d]efendant Sanitec." However, the complaint alleged plaintiffs disbursed the $200,000 loan "directly to [d]efendant Sanitec" and did not allege Sanitec paid sums to defendant which he then failed to deliver to plaintiffs. Because, according to the complaint, defendant received no funds from either plaintiffs or Sanitec, there existed no fraudulent conduct related to the undelivered funds.

Plaintiffs have not articulated any legal theory which would hold defendant liable as a guarantor of Sanitec's obligations in the absence of his express promise to do so.

3. Constructive fraud

The elements of an action for a constructive fraud claim are: (1) a fiduciary or confidential relationship between the plaintiff and defendant; (2) nondisclosure by the defendant; (3) justifiable reliance; and (4) resulting injury. (See *Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 415*; Younan v. Equifax Inc*. (1980) 111 Cal.App.3d 498, 517, fn.14.)

"'"'[F]iduciary" and "confidential" have been used synonymously to describe "'. . . 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 [or she] voluntarily accepts or assumes to accept the confidence, can take no advantage from his [or her] acts relating to the interest of the other party without the latter's knowledge or consent. . . .'" [Citations.] Technically, a fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client [citation], whereas a "confidential relationship" may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship. [Citations.] The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.' [Citation.]" (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 270-271.)

The first amended complaint contained no factual allegations which would impose a fiduciary duty upon defendant. Defendant did not hold a fiduciary relationship with plaintiffs, such as principal/agent or trustee/beneficiary, and the complaint did not allege

any facts upon which a trier of fact could conclude that the parties shared a confidential relationship founded upon a moral, social, domestic or personal relationship. To the contrary, plaintiffs alleged defendant's personal relationship was with Harkness and Sanitec. The complaint did not allege the parties dealt on unequal terms, or that defendant was in a position to exert unique influence over plaintiffs. Rather, the complaint described defendant's role vis-a-vis plaintiffs as that of a "point person." In sum, the factual allegations in the amended complaint did not support a finding that defendant held a fiduciary or confidential relationship, a necessary element of a cause of action for constructive fraud.

Finally, plaintiffs maintain the trial court erred in sustaining the demurrer without leave to amend. Plaintiffs rely on the general rule that it is an abuse of discretion for a trial court to sustain a demurrer without leave to amend if it is reasonably possible the fatal defects in the complaint can be cured by amendment. (*Aubry v. Tri-City Hospital District* (1992) 2 Cal.4th 962, 971-972.) However, there exists an important corollary to this principle: "It is the plaintiff's burden on appeal to show in what manner it would be possible to amend a complaint to change the legal effect of the pleading; *we otherwise presume the pleading has stated its allegations as favorably as possible*. [Citations.] At this stage in the proceedings, we are concerned only with whether a plaintiff has stated a hypothetical case; whether or not it can be proven is beyond our review. [Citations.]" (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App. 4th 955, 962-963, italics added, fn. omitted.) Plaintiffs have not met their burden and it is beyond the scope of our review to speculate that they may have the ability to allege facts necessary to cure the defects in the complaint to prove their case.

IV. DISPOSITION

The order is affirmed. Defendant, Robert Azinian, is awarded his costs on appeal from plaintiffs, Avettis Avetisyan, Garo Ghevondian and Masis Ghevondian.

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KUMAR, J.*

We concur:

MOSK, J., Acting P. J.

KRIEGLER, J.

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