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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CHARLES BRUMBAUGH, Plaintiff and Appellant, v. MUFG UNION BANK, N.A. et al., Defendants and Respondents.	B265676 (Los Angeles County Super. Ct. No. BC481089)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Reversed and remanded with directions.

Horvitz & Levy, John F. Querio, Steven S. Fleischman; Warne Law Firm and Christopher P. Warne for Plaintiff and Appellant.

Marcus, Watanabe & Enowitz, David M. Marcus and Daniel J. Enowitz for Defendants and Respondents.

INTRODUCTION

Charles Brumbaugh appeals from the judgment entered after the trial court sustained a demurrer by MUFG Union Bank, N.A. without leave to amend to his complaint for intentional misrepresentation, negligent misrepresentation, breach of contract, and common counts. Brumbaugh contends the trial court erred in sustaining the demurrer to the first three causes of action, the trial court abused its discretion in sustaining the demurrer without leave to amend, and Brumbaugh can amend his complaint to state a cause of action for promissory estoppel. We reverse and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *Brumbaugh Tries To Buy a House*

In November 2011 Brumbaugh and Stacey Sher entered into a written agreement for Sher to sell Brumbaugh her house in Beverly Hills, California. Brumbaugh paid $153,750 into an escrow account as a deposit toward the purchase price. The agreement contained a loan contingency clause allowing Brumbaugh to cancel the agreement if he were unable to obtain financing by a certain date. In December 2011 Brumbaugh cancelled the escrow because he had not been able to obtain

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[1] We assume on demurrer the facts alleged by Brumbaugh are true. (See *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) "Facts appearing in exhibits attached to the complaint also are accepted as true and are given precedence, to the extent they contradict the allegations." (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 225, fn. 1.)

financing after applying to several financial institutions, and he received his deposit back.

B. *Brumbaugh Tries Again*

In February 2012 Brumbaugh and Sher entered into another written agreement for the sale of the house. The second agreement again allowed Brumbaugh to cancel the sale and recover his deposit by March 8, 2012 if he could not obtain financing.

On February 10, 2012 Brumbaugh applied for a $3,587,500 loan from Union Bank. On February 24, 2012 Union Bank sent Brumbaugh a "loan approval notification" letter stating his loan request had been approved. Union Bank requested two categories of documents from Brumbaugh. Section I of the loan approval notification letter, titled "Items Needed Prior To Loan Documents Being Prepared," had 25 requests for financial documents and other information, such as bank statements, partnership returns, corporate resolutions, profit and loss statements, tax returns and forms, appraisals, and a preliminary title report. Section II, titled "Items Needed Prior To Closing," asked for certain tax documents. The February 24, 2012 loan approval notification letter also stated, "In the event you do not provide the items requested in Section I by 3/10/2012, we will regrettably be unable to give further consideration to your loan request." The February 24, 2012 loan approval notification letter closed with the following: "After our consideration of the information you provide relative to the items requested in Section I and of the real property offered as security, we reserve the right to add new conditions and/or to modify conditions previously provided."

On March 7, 2012, the day before the March 8, 2012 cancellation deadline, Union Bank informed Brumbaugh it required additional documentation. Although Brumbaugh tried to satisfy all of Union Bank's conditions, the bank refused to approve the loan. As a result, Brumbaugh canceled the escrow a second time and again got his deposit back.

Brumbaugh, however, remained interested in purchasing the property and continued to seek funding from Union Bank. A flurry of activity ensued aimed at reviving the transaction.

C. *The Third Time Is Not the Charm*

On March 8, 2012 Brad Jones, an employee of Union Bank, sent an email to Chris Perkins, another employee of Union Bank, asking whether the bank would approve a loan to Brumbaugh. Jones noted that a realtor, probably one of the realtors involved in the sale of the property, "is all over me at this point." Perkins responded, "Hi Brad, I can give you a verbal final approval for this loan now! We will be final approving with no additional conditions required from the borrower." Jones sent this email to Brumbaugh.

On March 9, 2012 Brumbaugh and Sher reopened escrow. This time, however, Sher insisted Brumbaugh waive the financing contingency as a condition of the escrow. Brumbaugh sent an email to Jones asking, "When can I get in writing a formal commitment letter? The Seller wants me to remove my contingencies." Jones responded, "Just a moment." Half an hour later, Jones forwarded to Brumbaugh an email Jones had received from Michelle Wester, senior loan processor, residential lending department, at Union Bank. Wester's email stated: "Attached is the updated approval letter showing no prior to doc

conditions. Chris [Perkins] moved the tax transcripts to a funding condition. I expect those back early next week. ¶ I still need hazard info and vesting before the file can be moved to closing. (I requested vesting from escrow this morning)."

The loan approval notification letter attached to Wester's March 9, 2012 email, although misdated February 24, 2012,[2] was addressed to Brumbaugh. Wester's letter states:

"Union Bank is pleased to inform you that your loan request for $3,587,500.00 has been approved. You have requested a loan to be secured by a first deed of trust or mortgage against the . . . property.

"We require the following items from you to verify the information provided on your application. Please fax items to the secure fax number provided below, or use the self[-]addressed envelope enclosed. If the required documentation is not available at this time, please send what you have and follow up with the additional information when the documentation becomes available. If you will not be able to provide a required item, please contact your Mortgage Consultant to discuss other options. The items needed are:

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[2] It appears that on March 9, 2012 Wester copied the prior loan approval notification letter, which was dated February 24, 2012, created a new letter, and forgot to change the date. The loan approval letter attached to Wester's March 9, 2012 email asked for certain documents by a deadline of March 5, 2012, which had already passed. To distinguish this letter from the other letter dated February 24, 2012, we will refer it as the "March 9, 2012 loan approval notification letter."

"I. ITEMS NEEDED PRIOR TO LOAN DOCUMENTS BEING PREPARED

"II. ITEMS NEEDED PRIOR TO CLOSING

- Signed/dated 4506t for 2008/2009/2010 1040 tax returns
- Business and personal tax returns to be signed
- Execute and validate 4506t for 2008/2009 1040 tax returns.

"Please note the items requested in Section 1 are required for the expedient processing of your loan. If you have not already provided the items to your Mortgage Consultant, please provide by 3/5/2012 to avoid processing delays. If you are unable to provide the items by 3/5/2012, please contact Michelle Wester for an extension to the deadline. If you have provided the requested items, we appreciate your promptness.

"After our consideration of the information you provide relative to the items requested in Section 1 and of the real property offered as security, we reserve the right to add new conditions and/or to modify conditions previously provided.

"Thank you for choosing Union Bank. We appreciate the opportunity to assist you with your home financing needs."

The March 9, 2012 loan approval notification letter did not include the language in the February 24, 2012 loan approval letter stating that, if Brumbaugh did not "provide the items requested in Section I" by a certain date, Union Bank would "regrettably be unable to give further consideration to [his] loan request."

After receiving Wester's March 9, 2012 loan approval notification letter from Jones, Brumbaugh agreed to reopen

escrow with Sher without the loan approval contingency. The new closing date for escrow was March 13, 2012.

Brumbaugh provided Union Bank with the three items listed in Section II of Wester's March 9, 2012 loan approval notification letter.[3] The bank subsequently stated it was unable to verify Brumbaugh's income because his 2008 and 2009 income tax returns had not been filed with the IRS. Brumbaugh explained he had filed these tax returns, but they "had been rejected because the social security number of [one of Brumbaugh's] dependents was mis-entered." As a result, Union Bank did not fund the loan by the March 13, 2012 closing date. On March 15, 2012 Brumbaugh learned Union Bank had "suspended" the loan.

D. *Brumbaugh Sues*

Brumbaugh quickly turned to litigation to solve the problem. On March 19, 2012 he sued Union Bank, two Union Bank employees, Sher, and Sher's real estate brokers.

Despite the lawsuit, Union Bank employees remained sanguine about the prospects for the loan. On March 22, 2012 Jones wrote to Jennifer Livingston, a Union Bank employee, in an email forwarded to Perkins: "I have the explanation on the different returns for Brumbaugh and it seems to be an error on behalf of the CPA. I would like to point out that the corporations['] returns in which he derives his income from are

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[3] What Brumbaugh actually alleged was that he "immediately performed the requested tasks" listed in the March 9, 2012 loan approval notification letter and "effected" the "task" of "sign[ing] and validat[ing] certain forms" the March 9, 2012 loan approval letter requested. Close enough.

filed. . . . [¶] In spite of filing a law suit he reached out to me because he sincerely wants to buy this home. Mr. Brumbaugh has really done whatever we have asked. He opened an account to move $1,000,000 over to qualify for Private Banking, supplied us with endless conditions. [¶] . . . . I believe Mr. Brumbaugh is an upstanding citizen and has no history of any tax liens or liability. [¶] I have looked at this file over and over and if we requested a larger down payment to mitigate risk, I may agree, but to just not provide financing over something that we can overcome with simply validating his sources of income from his businesses that flow[] through to the person return makes it difficult to swallow." The next day, March 23, 2012, Jones wrote to Lisa Ferguson, Sher's business manager, about the Brumbaugh loan: "I am trying to build a case to overcome a deficiency within lending guidelines. The borrower is a qualified borrower based on his income and assets provided."[4]

On March 26, 2012, "[i]n an attempt to salvage and mitigate the situation, [Brumbaugh] and a regional manager for the Bank . . . submitted corrected tax returns with the local IRS office." Despite these efforts, however, the bank, aware of the lawsuit, "maintained its refusal to fund the Loan." Brumbaugh "acted in good faith by opening an account at [the bank's] branch so as to deposit [$1 million] to qualify for private equity banking,

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[4] When Ferguson, who said she wanted to "confer with [her] clients," asked Jones what "guidelines" he was referring to and how long Brumbaugh had "known about these issues," Jones responded: "Because of the legal issues and the fact we have already been served I am not allowed to make any additional comments on any of the questions you have asked. I will say that I am hopeful that we can resolve."

[and to] mitigate his damages and cause [the bank] to reverse [its] course and fund the Loan before the Deposit was lost." He also offered a letter from his tax practitioner explaining the typographical error on his tax returns.

Meanwhile, Sher and Brumbaugh arbitrated their claims against each other (while the case against the other defendants was stayed), and the arbitrator subsequently ruled in favor of Sher. On September 18, 2013 the trial court confirmed the arbitrator's award.[5] Brumbaugh voluntarily dismissed all remaining defendants other than Union Bank.

On May 13, 2014 Brumbaugh filed a corrected second amended complaint against Union Bank, alleging causes of action for intentional misrepresentation, negligent misrepresentation, breach of contract, and common counts. Brumbaugh attached several exhibits, including the March 8, 2012 email from Perkins ("I can give you a verbal final approval for this loan now!"), the March 9, 2012 email from Wester ("no prior to doc conditions"), and the attached March 9, 2012 loan approval notification letter from Wester ("Union Bank is pleased to inform you that your loan request for $3,587,500.00 has been approved").

E. *Union Bank Wins on Demurrer*

Union Bank demurred to the second amended complaint. The bank argued Brumbaugh had not stated a cause of action for fraud because "neither the representations in the March 8th e-mail by Perkins nor the March 9th e-mail by Wester were

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[5] The arbitrator awarded Sher the $153,750 deposit, plus consequential damages, punitive damages, and attorneys' fees, for a total award of $524,395.38. Brumbaugh did not appeal the judgment confirming Sher's arbitration award.

'unconditional,' and both e-mails did not contain the terms of any loan to [Brumbaugh]." Union Bank argued the March 8, 2012 email stating "no additional conditions required from the borrower" was not an unconditional approval because it stated the bank would impose no "additional" conditions beyond those previously stated in the February 24, 2012 loan approval notification letter, and the March 9, 2012 loan approval notification letter approved the loan subject to verification of the information provided in the loan application. Union Bank also argued that, "even if Perkins' [March 8, 2012] e-mail did constitute an 'unconditional' representation, it is irrelevant, because . . . one day later, on March 9th, Wester informed Brumbaugh that there were still three (3) conditions that needed to be satisfied before Union Bank could fund the loan (meaning [Brumbaugh] was aware that Perkins' e-mail was not an 'unconditional' approval of his loan application prior to the time he allegedly waived the Contingency Clause on March 9th). [¶] In fact, the [second amended complaint] concedes . . . that even after receiving Perkins' e-mail on March 8th, Plaintiff still understood that he needed to obtain a formal commitment letter from Union Bank before he could waive the Contingency Clause." The bank also argued Brumbaugh had not stated a cause of action for breach of contract because there was no written contract between the parties, and he had not stated a cause of action for common counts because he did not allege Union Bank was in possession of any money rightfully belonging to him. Brumbaugh opposed the demurrer and asked for leave to amend.

The trial court sustained the demurrer without leave to amend. The court ruled Brumbaugh had not stated a cause of action for intentional misrepresentation because "[t]he e-mail

from bank representative Perkins is not a loan commitment [and] the e-mail from bank representative Wester uses the term 'funding conditions.' This is not a representation." The court also determined Brumbaugh "fail[ed] to allege any representation made by the Bank that would constitute a 'representation' as defined by law." With respect to the negligent misrepresentation cause of action, the court ruled "a lender's liability for negligent misrepresentation arises only when the lender actively participates in the enterprise beyond the domain of usual lending." The court also ruled Brumbaugh had not stated a breach of contract cause of action because there was "no written contract between Brumbaugh and the Bank providing for the loan," and "[t]he only documents to which [Brumbaugh] refers are his application, the Bank's Truth in Lending Statement and Good Faith Estimate." Finally, the court stated Brumbaugh failed to state the basis of his common count cause of action and, "[w]ithout a contract or verifiable agreement with the [bank], there can be no common count."

The trial court entered judgment in favor of Union Bank. Brumbaugh timely appealed.[6]

DISCUSSION

A. *Standard of Review*

"A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or

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[6] Brumbaugh does not challenge the court's ruling sustaining Union Bank's demurrer to his common count cause of action.

discloses a complete defense. [Citations.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. [Citations.] We liberally construe the pleading with a view to substantial justice between the parties." (*Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 725-726; see *Rufini v. CitiMortgage, Inc.* (2014) 227 Cal.App.4th 299, 303-304.)

"'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 could 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.'" (*Arce v. Childrens Hospital of Los Angeles* (2012) 211 Cal.App.4th 1455, 1471.)

A. *The Trial Court Erred in Sustaining the Demurrer to the Fraud Cause of Action*

To state a cause of action for fraudulent misrepresentation, a plaintiff must plead "(1) [a] misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance on the misrepresentation, (4) justifiable reliance on the misrepresentation, and (5) resulting damages." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469; see *Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 661.) Brumbaugh's allegations satisfied these requirements.

1. *Misrepresentation*

Brumbaugh alleged Union Bank made at least three written misrepresentations that caused him to waive the loan contingency clause: Perkins's March 8, 2012 email to Jones ("I can give you a verbal final approval for this loan now!" with "no additional conditions required from the borrower"); Wester's March 9, 2012 email to Jones ("Attached is the updated approval letter showing no prior to doc conditions"); and Wester's March 9, 2012 loan approval notification letter to Brumbaugh ("Union Bank is pleased to inform you that your loan request for $3,587,500.00 has been approved," with no items listed in Section I and three items in Section II). These allegations sufficiently alleged Union Bank falsely represented it had approved Brumbaugh's loan.

Citing *Peterson Development Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, Union Bank argues Brumbaugh can state a cause of action for fraud only if (1) Union Bank made an unconditional representation it "would make a loan to Brumbaugh to enable him to purchase" the property or (2) Union Bank made a conditional representation and Brumbaugh satisfied the conditions. (See *id.* at p. 115 ["'[a] loan commitment is not binding on the lender unless it contains all of the material terms of the loan, and either the lender's obligation is unconditional or the stated conditions have been satisfied'"].)[7] Union Bank asserts that the representations of approval by Perkins and Wester were conditional and that Brumbaugh never satisfied the conditions. Brumbaugh disputes both assertions.

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[7] Union Bank does not argue Brumbaugh did not state a fraud cause of action because the loan approvals did not contain the material terms of the loan.

Putting aside, as Brumbaugh points out, that the requirement of an unconditional approval or a conditional approval with conditions satisfied is for breach of contract causes of action not fraud causes of action,[8] Union Bank allegedly made at least one (potentially) unconditional representation of approval and one representation of approval with conditions Brumbaugh satisfied. As noted, Perkins's March 8, 2012 email stated he was giving "verbal final approval for this loan now," "with no additional conditions required from the borrower." Union Bank argues "no additional conditions" meant no conditions "beyond those already contained in its February 24th letter"; i.e., Wester's February 24, 2012 loan approval notification letter. That is one interpretation of Jones's March 8, 2012 email. But an equally plausible one is Brumbaugh's interpretation that "no additional conditions" meant no conditions in addition to those conditions Brumbaugh had already satisfied. Indeed, the subsequent removal by Union Bank of the 25 conditions previously listed in Section I of its February 24, 2012 loan approval notification letter suggests Brumbaugh's interpretation is more reasonable.

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[8] The other case cited by Union Bank, *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, also involved breach of contract, not fraud. The court in that case stated, "Where contractual liability depends upon the satisfaction or performance of one or more conditions precedent, the allegation of such satisfaction or performance is an essential part of the cause of action. [Citation.] This requirement can be satisfied by allegations in general terms. It is sufficient for a plaintiff to simply allege that he has 'duly performed all the conditions on his part.'" (*Id.* at p. 1389.)

We do not, however, need to decide that issue now. At the demurrer stage, we adopt Brumbaugh's interpretation of Perkins's March 8, 2012 email that it was an unconditional and immediate ("now!") approval. """[I]n passing upon the sufficiency of the complaint, we must accept as correct plaintiff's allegations as to the meaning of the agreement."""" (*Russell City Energy Co., LLC v. City of Hayward* (2017) 14 Cal.App.5th 54, 62; see *Chisom v. Board of Retirement of Fresno County Employees' Retirement Assn.* (2013) 218 Cal.App.4th 400, 410-411 ["'if the exhibits are ambiguous and can be construed in the manner suggested by plaintiff, then we must accept the construction offered by plaintiff"']; *Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 538 ["[d]ue to the ambiguity, in passing upon the sufficiency of the complaint, we must accept as correct [the plaintiff's] allegation as to the meaning of the agreement"].) Of course, after the parties have had an opportunity to take discovery on, and litigate the meaning of, Perkins's statements, Union Bank may be able to prove to the trier of fact that Perkins's March 8, 2012 approval of the loan was conditional and, if so, what the conditions were. At the pleading stage, however, Brumbaugh sufficiently alleged Perkins represented that Union Bank had given unconditional approval for the loan, which Brumbaugh alleges (and we assume) was not true.

But there's more. Union Bank is correct that Wester's March 9, 2012 loan approval notification letter was conditional: It listed three conditions Brumbaugh had to satisfy. Brumbaugh alleged, however, he satisfied all three conditions by submitting the documentation Union Bank requested. Therefore, in connection with Wester's March 9, 2012 loan approval

notification letter, Brumbaugh sufficiently alleged a misrepresentation by alleging the bank represented it would approve the loan if Brumbaugh satisfied the three conditions, which Brumbaugh alleges was false because the bank refused to fund the loan even though he satisfied the conditions.

Union Bank argues Brumbaugh's allegations and exhibits demonstrate he did not satisfy the conditions. Union Bank argues "the exhibits attached to the [second amended complaint] demonstrate that Brumbaugh was required to provide Union Bank with his validated 2008-2009 tax returns as a condition precedent to Union Bank's funding of his loan," and Brumbaugh's allegations "concede[] that he did not satisfy this condition because his 2008 and 2009 tax returns had been rejected by the IRS."

Union Bank misreads Brumbaugh's allegations and Wester's March 9, 2012 loan approval notification letter. That letter did not list filed 2008 and 2009 tax returns as a condition of approval. Instead, the letter stated the Bank required, for closing, copies of IRS Form 4506-T for 2008-2010, all signed, dated, executed, and "validated." An IRS Form 4506-T is a form a borrower gives to a lender to obtain tax returns; it is not a tax return. (See *Curley v. Wells Fargo & Co.* (N.D. Cal. 2015) 120 F.Supp.3d 992, 995 ["[t]he purpose of the IRS Form 4506-T is to give the loan servicer consent to obtain copies of a borrower's tax returns"].) Brumbaugh alleges he submitted dated, signed, and validated copies of IRS Form 4506-T, as the bank requested. Brumbaugh thus alleged he complied with the conditions in

Wester's March 9, 2012 loan approval notification letter. [9] As Jones wrote on March 22, 2012, Brumbaugh "really [did] whatever [Union Bank] asked."

Union Bank argues Brumbaugh did not comply with the requirements in Wester's March 9, 2012 loan approval notification letter "because, as it turned out, his 2008 and 2009 income taxes were never filed with the Internal Revenue Service," which means, according to Union Bank, "Brumbaugh could not satisfy the condition he provide Union Bank with the required executed IRS Form 4506-T's as to his 2008 and 2009 1040 tax returns." Union Bank again confuses the tax form with the tax return. As Brumbaugh argued to the trial court, "All he needs to do is sign and validate the form; NOT the returns themselves." In fact, the reasonable inference from Brumbaugh's allegations is that Union Bank received Brumbaugh's signed and dated copies of Form 4506-T because, by submitting them to the

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[9] Union Bank argues "the Court should not be fooled" about what Brumbaugh alleged. According to Union Bank, "The Second Amended Complaint, very clearly, alleges that Brumbaugh could not satisfy the condition that he provide Union Bank with his validated 2008 and 2009 tax returns, because those returns had been rejected by the IRS." Union Bank repeats this argument throughout its respondent's brief. Union Bank misreads the exhibits to Brumbaugh's complaint. Wester's March 9, 2012 loan approval notification letter did not require filed, "validated," or unrejected tax returns. It required validated copies of Form 4506-T and "signed" tax returns.

IRS, the bank would have learned about any problems with Brumbaugh's 2008 and 2009 tax returns.[10]

Moreover, Wester's March 9, 2012 loan approval notification letter does not state that if Brumbaugh failed to submit the tax documents requested in Section II Union Bank would not approve his loan. The letter states the bank "require[s] the following items from you to verify the information provided on your application," but the letter does not say what the consequences are for inability to verify. The letter says only that "the items requested in Section [I]," of which there are none, "are required," not for approval, but "for the expedient processing of your loan." The letter says nothing about the consequences of failing to provide the items requested in Section II. And what if Brumbaugh is "unable to provide the items by" the already-passed deadline of March 5, 2012? All the letter says he has to do is "contact Michelle Wester for an extension to the deadline."

Union Bank also relies on language in Wester's March 9, 2012 loan approval notification letter stating, "After our consideration of the information you provide relative to the items requested in Section I and of the real property offered as security,

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[10] Although Union Bank does not make this argument, the second item in Section II of Wester's March 9, 2012 loan approval notification letter required "[b]usiness and personal tax returns to be signed." Even if, as Brumbaugh alleges, the IRS rejected his tax returns because of a typographical error in the social security number of one of Brumbaugh's dependents, the second condition of Wester's letter did not require filed or accepted tax returns; it only required "signed" tax returns. Brumbaugh alleges he complied with this requirement, and the bank does not argue he did not sign his tax returns.

we reserve the right to add new conditions and/or to modify conditions previously provided." Because the letter did not list any items in Section I, however, this sentence was inapplicable. Moreover, Brumbaugh did not allege, and Union Bank does not contend, the bank ever exercised any such right to add or modify any conditions or, if so, what those new modified conditions were.[11]

2. *Knowledge of Falsity*

Brumbaugh alleged Jones, Perkins, and Wester made the statements in their emails and letters knowing they were false, and they "had no intention of funding the loan" by March 16, 2012. Knowledge of falsity of a representation is generally a question of fact. (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 86-87; see *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062 ["by sufficiently pleading [the defendant's] promise was false at the time [the defendant] made it, [the plaintiff] sufficiently pled the element of scienter"];

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[11] Union Bank does not argue that Brumbaugh's fraud cause of action is one for promissory fraud, so that in order to prevail Brumbaugh must allege "'something more than nonperformance'" to show Union Bank's intent not to perform its promise. (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30; see *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1183 ["the intent element of promissory fraud entails more than proof of an unkept promise or mere failure of performance"].) In any event, fraudulent intent may be inferred from the defendant's "hasty repudiation of the promise" (*Tenzer*, at p. 30), which Brumbaugh alleged occurred here.

Radinsky v. T.W. Thomas, Inc. (1968) 264 Cal.App.2d 75, 80 ["[w]hether there has been fraud by misrepresentation is a question of fact"]; *Buist v. C. Dudley De Velbiss Corp.* (1960) 182 Cal.App.2d 325, 332 [for purposes of fraud, "knowledge of the party" is a "question[ ] of fact"]; see also *Palmquist v. Mercer* (1954) 43 Cal.2d 92, 100 ["[a]ctual fraud is a question of fact . . . , and like any other fact, it may be proved by circumstantial evidence"].) Union Bank does not argue Brumbaugh did not sufficiently allege knowledge of the allegedly false representations.

3. *Intent To Induce Reliance*

An element of fraud is "intent to induce another's reliance on the misrepresentation." (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.) Liability exists not only where the defendant intends to induce reliance, but also where such reliance is reasonably expected to occur. (*Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 93.) "'[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.'" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974; accord, *Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 767.) Intent to defraud "is an issue of fact, and '[its] proof is peculiarly dependent upon the circumstances which surround the questioned transaction, and the inferences which the trier of fact may reasonably draw therefrom.'" (*Bulmash v. Davis* (1979) 24 Cal.3d 691, 699; see *Beckwith v. Dahl*, *supra*, 205 Cal.App.4th at p. 1061 ["'[f]raudulent intent is an issue for the trier of fact to

decide"']; *Distefano v. Hall* (1963) 218 Cal.App.2d 657, 680 ["intent to defraud always presents a factual question"].)

Brumbaugh alleged Union Bank made the false statements to induce him to deposit $1 million in the bank as part of the transaction and to "forbear from seeking funding from another financial institution." It is a reasonable inference from these allegations that Perkins and Wester intended to induce Brumbaugh's reliance by making the statements they made. Union Bank does not argue Brumbaugh did not sufficiently allege intent to induce reliance.

4. *Justifiable Reliance*

Brumbaugh alleged he relied on the March 8, 2012 and March 9, 2012 representations of approval by agreeing "to reopen escrow a second time and, for the first time throughout this transaction's history, release the Loan Contingency." He further alleged that, in reliance on the misrepresentations, he deposited $1 million with Union Bank "as a condition of providing the Loan," "was required to prefund $400,000 into [the] bank, which [he] deposited," and lost his $153,750 deposit and the arbitration with Sher. Brumbaugh also alleged the misrepresentations kept him "from seeking funding from alternative and competing financial institution[s]." Brumbaugh sufficiently alleged justifiable reliance, which, moreover, is generally a question of fact. (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1194; see *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 ["'[e]xcept in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact'"]; *Public Employees' Retirement*

System v. Moody's Investors Service, Inc., *supra*, 226 Cal.App.4th at p. 672 [""[w]hether a plaintiff's reliance [on a misrepresentation] is reasonable is a question of fact""].)

Union Bank argues Brumbaugh did not rely on Perkins's March 8, 2012 email because, Union Bank asserts, Brumbaugh alleged "he did not 'rely' on it in waiving the Contingency Clause." Union Bank cites Brumbaugh's email to Jones the next day, March 9, 2012, asking, "'When can I get in writing a formal commitment letter?'" According to Union Bank, this shows Brumbaugh could not have relied on the March 8, 2012 email from Perkins because Brumbaugh "still understood that he needed to obtain a formal, written commitment letter from Union Bank before he could waive the Contingency Clause."

Not really. Brumbaugh alleges Perkins's March 8, 2012 email stated Union Bank was giving "verbal approval now." On March 9, 2012 Brumbaugh was asking for something different than approval: He was asking for a "formal commitment letter" confirming what Union Bank had already stated. Brumbaugh alleged he relied on both Perkins's March 8, 2012 email and Wester's March 9, 2012 email and attached letter. As the Supreme Court has stated: "While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. "'It is not . . . necessary that [the plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.'" (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 326; see *Engalla v. Permanente Medical Group, Inc.*,

supra, 15 Cal.4th at p. 977 ["a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material"]; *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 229 [same].) Brumbaugh's allegations of justifiable reliance were sufficient.

Union Bank also argues Brumbaugh did not allege he relied on Wester's March 9, 2012 email and loan approval notification letter because they were not unconditional. Union Bank, noting Wester's March 9, 2012 email uses the words "funding condition," argues Brumbaugh "cannot seriously contend" Wester's March 9, 2012 loan approval notification letter "was an 'unconditional' representation that Union Bank would make him a loan to enable him to purchase the Subject Property from Sher. That is just silly." The funding conditions Wester was referring to, however, were "the tax transcripts" in her email and attached letter, which, as noted, Brumbaugh satisfied.

5. *Resulting Damage*

Brumbaugh alleged that as a result of the misrepresentations he lost his security deposit and the arbitration against Sher. He also lost the use of $1 million. These allegations sufficiently alleged damage. Union Bank does not argue otherwise.

B. *The Trial Court Erred in Sustaining the Demurrer to the Negligent Misrepresentation Cause of Action*

"The elements of negligent misrepresentation are similar to intentional fraud except for the requirement of scienter; in a claim for negligent misrepresentation, the plaintiff need not allege the defendant made an intentionally false statement, but simply one as to which he or she lacked any reasonable ground for believing the statement to be true." (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184; see *Conroy v. Regents of University of California*, *supra*, 45 Cal.4th at p. 1255 ["tort of negligent misrepresentation, a species of the tort of deceit [citation], does not require intent to defraud but only the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true"]; *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166 ["[t]he elements of a claim for negligent misrepresentation are nearly identical" to the "elements of a cause of action for intentional misrepresentation"; "[o]nly the second element is different, requiring the absence of reasonable grounds for believing the misrepresentation to be true instead of knowledge of its falsity"].) Brumbaugh satisfied this requirement by alleging that, when the Union Bank employees "made the representations alleged in the [fraud] cause of action," they had "no reasonable ground for believing them to be true."

The trial court sustained the demurrer to the negligent misrepresentation cause of action for the same reasons it sustained the demurrer to the fraud cause of action. Therefore, the trial court erred for the same reasons. Because Brumbaugh stated a cause of action for intentional misrepresentation, he stated a cause of action for negligent misrepresentation. (See *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016)

245 Cal.App.4th 821, 845 [a complaint that states a cause of action for fraud "necessarily sufficiently pleads the elements of . . . negligent misrepresentation"]; *Blankenheim v. E. F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1472-1473 ["negligent misrepresentation is included within the definition of fraud"]; see also *Gagne v. Bertran* (1954) 43 Cal.2d 481, 487 ["[t]o be actionable deceit, the representation need not be made with knowledge of actual falsity, but need only be an 'assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true'"].)

Union Bank argues the trial court "correctly determined that, as a matter of law, Brumbaugh could not validly allege a cause of action for Negligent Misrepresentation against a lender such as Union Bank involved in a garden-variety loan transaction." Union Bank contends "any liability on the part of Union Bank to Brumbaugh is solely contractual in nature (and that is presuming a valid and binding contract exists between the parties), and, *as a matter of law*, Union Bank cannot be held liable in 'tort' concerning its alleged broken promise to make Brumbaugh a loan to enable him to purchase the Subject Property from Sher." Citing *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096, Union Bank argues that, "'as a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as mere lender of money.'" (See *Conroy v. Wells Fargo Bank, N.A.* (2017) 13 Cal.App.5th 1012, 1029.)

That general rule is for negligence, not negligent misrepresentation. (*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 946; *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 60-62; see *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407 ["neither the courts (ourselves included), the commentators, nor the authors of the Restatement Second of Torts have made clear or careful distinctions between the tort of negligence and the separate tort of negligent misrepresentation"]; accord, *Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Co., Inc.* (2004) 125 Cal.App.4th 152, 173.) Brumbaugh does not "allege negligence. [He] alleges negligent misrepresentation. They are different torts." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 227.)[12] The "conventional lender role" rule for negligence causes of action against lenders does not preclude otherwise valid negligent misrepresentation causes of action against lenders.

C. *The Trial Court Erred in Sustaining the Demurrer to the Breach of Contract Cause of Action*

As an "alternative theory," Brumbaugh alleged that, if the representations by Perkins and Wester on March 8, 2012 and March 9, 2012 were true rather than false (as he alleged in his

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[12] "Negligence and negligent misrepresentation are different torts and to confuse the two . . . is to ignore the lesson taught by this court . . . and by commentators. Negligence took shape as a separate tort in the early part of the 19th century. [Citation.] Negligent misrepresentation was not actionable in this country until 1922 [citation] and in England until 1963." (*Garcia v. Superior Court* (1990) 50 Cal.3d 728, 748 (dis. opn. of Mosk, J.).)

fraud cause of action), Union Bank entered into a contract with Brumbaugh to make him a loan, which the bank breached. (See *Adams v. Paul* (1995) 11 Cal.4th 583, 593 ["a party may plead in the alternative and may make inconsistent allegations"]; *Crogan v. Metz* (1956) 47 Cal.2d 398, 403 ["[i]t is well established that a complaint may plead different theories on which relief is sought with legal propriety"]; *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1388 ["if a plaintiff was uncertain as to whether the parties had entered into an enforceable agreement, the plaintiff would be entitled to plead inconsistent claims predicated on both the existence and absence of such an agreement"]; *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402 ["[w]hen a pleader is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows that party to plead in the alternative and make inconsistent allegations"]; *Perry v. Robertson* (1988) 201 Cal.App.3d 333, 340 [plaintiff may pursue contract and tort based on the same set of operative facts "until an occasion for an election of remedies arises"].) As noted, the trial court ruled Brumbaugh did not allege a written contract.

But he did. "[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821; see *Crossroads Investors, L.P. v. Federal National Mortgage Assn.* (2017) 13 Cal.App.5th 757, 792; *Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 645.) Brumbaugh alleged he submitted a written application for a $3,587,500 loan, and Union Bank approved it. Brumbaugh

alleged the terms of the loan were that the "loan amount was $3,587,500.00 at an interest rate of 2.875% for a period of 480 months; the purpose of the Loan was the purchase of the Property; the Property was to be the primary residence." Brumbaugh also alleged he was attaching to his complaint the bank's truth in lending statement and good faith estimate of charges "to give Defendants sufficient facts to apprise Defendants of the basis upon which this cause of action is based." Union Bank even conceded it "never contended that the documents attached to the [second amended complaint] did not contain all of the essential terms for a potential loan to [Brumbaugh] to enable him to purchase the Subject Property from Sher." Brumbaugh sufficiently alleged the existence of a contract with Union Bank.

Union Bank argues "Brumbaugh cannot seriously contend that the fact he was provided with a Truth In Lending Statement and Good Faith Estimate on the same day he submitted his Loan Application means that the parties had a valid and binding agreement for a loan." Maybe not, but that is not what Brumbaugh alleged. He alleged the bank approved his loan application and agreed to loan him the money. It may be, as Union Bank argues, that "Brumbaugh cites no authority which holds that documents such as a Truth In Lending Statement and/or a Good Faith Estimate can constitute a valid and binding contract." But Brumbaugh did not need to cite such authority because he stated a breach of contract cause of action without relying on those documents.

In *SCC Acquisitions, Inc. v. Central Pacific Bank* (2012) 207 Cal.App.4th 859, 865, on which Union Bank places principal reliance, there were no representations by bank employees that the bank had approved the loan, as there were here. In *SCC*

Acquisitions there was only a "term" sheet that "plainly state[d] it was not a commitment, representation, or promise to renew the loan on the terms set forth therein" and included the language "'Please be advised that this is *for discussion purposes only,* is *subject to Bank approval* and *should not be construed as a commitment to lend*.'" (*Id.* at p. 865.) Similarly, in *Nungaray v. Litton Loan Servicing, LP* (2011) 200 Cal.App.4th 1499, also cited by Union Bank, the "loan work-out plan" stated it was "'not a modification of the Loan Documents' and the documents will not be modified unless the [plaintiffs] 'meet all of the conditions required for modification,' including the [plaintiffs'] receipt of a 'fully executed copy of a Modification Agreement,'" and it further "required the [plaintiffs] to submit financial information regarding their hardship and state[d] that [the loan servicer and the bank] would determine whether [the plaintiffs] 'qualif[ied] for the Offer.'" (*Id.* at p. 1504.) There was no such qualifying language here. The statements by the bank employees in this case ("I can give you a verbal final approval for this loan now!" and "Union Bank is pleased to inform you that your loan request for $3,587,500.00 has been approved") are qualitatively different from the carefully qualified statements in *SCC Acquisitions* and *Nungaray*.

D. *Brumbaugh May Have Leave To Amend To Allege a Promissory Estoppel Cause of Action*

"The doctrine of promissory estoppel 'make[s] a promise binding under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange.' [Citations.] 'Under this doctrine a promisor is bound when he should reasonably expect a substantial change of

position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement.' [Citation.] "'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.'" [Citations.] "'In such a case, although no consideration or benefit accrues to the person making the promise, he is the author or promoter of the very condition of affairs which stands in his way; and when this plainly appears, it is most equitable that the court should say that they shall so stand.'"" (*Garcia v. World Savings FSB* (2010) 183 Cal.App.4th 1031, 1040-1041.)

"The elements of a cause of action for promissory estoppel are (1) a promise, (2) the reasonable expectation by the promisor that the promise will induce reliance or forbearance, (3) actual reliance or forbearance, and (4) the avoidance of injustice by enforcing the promise. [Citation.] A cause of action for promissory estoppel is a claim in equity that substitutes reliance on a promise for consideration 'in the usual sense of something bargained for and given in exchange.' [Citation.] If actual consideration was given by the promisee, promissory estoppel does not apply. [Citations.] [¶] Although a cause of action for promissory estoppel is inconsistent with a cause of action for breach of contract based on the same facts [citation], '[w]hen a pleader is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows that party to plead in the alternative and make inconsistent allegations.'" (*Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1412-1413.)

Brumbaugh, correctly pointing out that he never had an opportunity to amend in response to the trial court's ruling, asks for leave to amend to allege a cause of action for promissory estoppel, arguing he can allege all of the required elements. And, given his allegations of the written communications from Union Bank and his reasonable and forseeable reliance on the statements in those communications, he probably can. (See *Fleet v. Bank of America N.A.*, *supra*, 229 Cal.App.4th at p. 1413 [borrowers "alleged facts that could support a cause of action for promissory estoppel against [the bank] in the event that they cannot establish a cause of action for breach of contract"].) Although he did not assert, or seek leave to assert, such a cause of action in the trial court, he is still entitled to leave to amend. (See Code Civ. Proc., § 472c, subd. (a) ["[w]hen any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made"]; *Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1044 ["plaintiff may request leave to amend for first time on appeal"]; *Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 668 [a plaintiff can make a showing how he or she can amend a complaint "'for the first time to the reviewing court'"].) Of course, whether he "can prove this cause of action awaits further development." (*Fleet*, at p. 1413.)

DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order sustaining Union Bank's demurrer to

Brumbaugh's corrected second amended complaint without leave to amend, and to enter a new order overruling the demurrer to Brumbaugh's causes of action for intentional misrepresentation, negligent misrepresentation, and breach of contract, sustaining the demurrer to the cause of action for common count without leave to amend, and giving Brumbaugh leave to amend to allege a cause of action for promissory estoppel. Brumbaugh is to recover his costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

MENETREZ, 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.