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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

CALIFORNIA BUSINESS BANK, Plaintiff, Cross-defendant and Respondent, v. KENMORE VILLAS, LLC, et al., Defendants, Cross-complainants, and Appellants.	B233593 (Los Angeles County Super. Ct. No. BC412112)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County. Yvette M. Palazuelos, Judge. Affirmed in part and reversed in part with directions.

Western Law Connection, Corp., and Christopher G. Weston for Defendants, Cross-complainants and Appellants.

Prenovost, Normandin, Bergh & Dawe, Tom R. Normandin and Kristin F. Godeke for Plaintiff, Cross-defendant and Respondent.

Kenmore Villas, LLC (Kenmore), and its guarantors Amco Company, Inc., Suk Myong Kim, and Kyong Hwa Pak (collectively Guarantors) appeal from a judgment and orders entered in favor of California Business Bank (Bank). Kenmore and Guarantors contend that the trial court erred in sustaining Bank's demurrer to Kenmore and Guarantors' second amended cross-complaint without leave to amend for, among other things, breach of the covenant of good faith and fair dealing; granting Bank's motion for summary judgment on Kenmore and Guarantors' third amended cross-complaint for breach of contract; and granting Bank's motion for summary adjudication as to Bank's complaint for breach of guaranty and a common count.

We conclude the trial court did not err in sustaining Bank's demurrer to the second amended cross-complaint without leave to amend as to the causes of action for intentional and negligent interference with contract/economic advantage, negligent loan administration, and intentional infliction of emotional distress. But we determine that the court erred in sustaining Bank's demurrer to the second amended cross-complaint as to the causes of action for breach of the covenant of good faith and fair dealing and rescission without leave to amend. We also conclude the court erred in granting Bank's motion for summary judgment as to the third amended cross-complaint because Kenmore and Guarantors have shown that triable issues of material fact exist as to whether Bank breached a contract. And for the same reason we determine that the court erred in granting Bank's motion for summary adjudication as to Bank's complaint for breach of guaranty and a common count. (The trial court granted Bank's request to dismiss the remaining causes of action in its complaint.) Accordingly, we affirm in part and reverse in part.

BACKGROUND

Kim and Pak, who are married to each other, are the limited liability partners of Kenmore, which in August 2006 acquired title to real property located on South Kenmore Avenue in Los Angeles (the Property). Kenmore intended to construct 28 condominium

units on the Property for sale (the Project). On August 28, 2006, Kenmore executed and delivered a promissory note to Bank in the amount of $9.5 million, secured by a first deed of trust on the Property, due and payable on February 28, 2008 (Promissory Note). Under the terms of the Promissory Note, Kenmore authorized Bank to "place $1,300,000 of the Principal Amount as an interest reserve, which is an estimate of the interest due" on the Promissory Note. On August 28, 2006, Kim and Pak also executed guaranties of the "Indebtedness" of Kenmore.

On March 17, 2008, Kenmore and Bank entered into a "Construction Loan Agreement" that extended the due date of the Promissory Note to May 31, 2008, and increased the loan amount to $10 million (Construction Loan Agreement). The Construction Loan Agreement recited that Kenmore "has applied to [Bank] for one or more loans for purposes of constructing the Improvements on the Real Property" and that Bank is willing to lend the loan amount to Kenmore under the terms and conditions of the Construction Loan Agreement. The Construction Loan Agreement required Kenmore to fulfill conditions precedent to each advance and required Pak and Kim to execute guaranties of the loan in favor of Bank. The Construction Loan Agreement provided that on the occurrence of any default, Bank could, among other things, "[b]ring an action on the Note and/or Indebtedness." On October 31, 2008, Kenmore executed a "Change in Terms Agreement" dated October 30, 2008, which extended the maturity date of the Promissory Note to January 2, 2009.

In November 2008, Bank on the one hand and Kenmore and Guarantors on the other hand entered into a forbearance agreement that recited, among other things, that the due date of the Promissory Note had been extended; the loan amount had been increased to $10 million; Kenmore had been unable to pay obligations under the Promissory Note as they became due; and Kenmore and Guarantors were in default under the loan agreement (Forbearance Agreement). Under the terms of the Forbearance Agreement, upon meeting certain conditions, Kenmore was given additional time to repay the loan up

to March 10, 2009 and Kenmore and Guarantors agreed to release Bank from all claims against Bank subject to the provisions of Civil Code section 1542.

On April 17, 2009, Bank filed a complaint against Kenmore and Guarantors for, among other things, breach of the Promissory Note; breach of the Construction Loan Agreement; breach of guaranty; breach of the Forbearance Agreement; and a common count. As to the causes of action for breach of guaranty and a common count, Bank alleged that Amco, a joint venture of Kim and Pak, executed a "Guaranty of Completion and Performance" dated March 17, 2008, which it breached on March 10, 2009; that on August 28, 2006, Kim and Pak executed guaranties, which they breached on March 10, 2009, by failing to make the payments then due and owing; and that Kenmore and Guarantors have become indebted to Bank in the sum of $6,785,839.59.

Kenmore and Guarantors filed an answer to Bank's complaint and a cross-complaint alleging causes of action for breach of the covenant of good faith and fair dealing; rescission; "intentional interference with contract and/or economic advantage"; "negligent interference with contract and/or economic advantage"; negligence; and intentional infliction of emotional distress. On July 27, 2009, Bank filed a demurrer and motion to strike portions of the cross-complaint. Before the hearing on the demurrer, on September 3, 2009, Kenmore and Guarantors filed a first amended cross-complaint.

On August 10, 2009, the Property was sold to Bank pursuant to a nonjudicial foreclosure sale. The amount of the unpaid debt was $7,016,908.97 and the bid amount was $6,793,794.93.

On October 8, 2009, Bank filed a demurrer to the first amended cross-complaint. The trial court sustained Bank's demurrer to the first amended cross-complaint "in its entirety," with 20 days' leave to amend. On November 24, 2009, Kenmore and Guarantors filed a second amended cross-complaint for breach of contract; breach of the covenant of good faith and fair dealing; rescission; "intentional interference with contract

and/or economic advantage"; "negligent interference with contract and/or economic advantage"; negligent loan administration; and intentional infliction of emotional distress.

Kenmore and Guarantors' second amended cross-complaint generally alleged that on August 28, 2006, Kenmore obtained a loan for $9.5 million for the purpose of building 28 condominium units. The loan called for an interest reserve of $1.3 million.

As to breach of contract, the second amended cross-complaint alleged that after Kenmore obtained the loan, Bank breached the loan agreement in the "following ways: [¶] (a) Cross-Defendants increased the credit reserve on the construction loan amount more than one million three hundred thousand dollars ($1,300,000.00) and as direct and proximate result the Cross-complainants were unable to and were delayed in pay contractors which resulted in the stopping and delaying completion of the condominium project. [¶] (b) The Cross-Defendants failed to provide prompt approval, provide the necessary documentation and/or sign the necessary documents which was the direct and proximate result of cancellation of the escrow and failure of four other potential sales when the bank provide the financing for unit 503 decided not finance and fund the sales of four other condominium units." (*Sic*.) It also alleged that Kenmore and Guarantors performed all conditions, covenants, and promises on the Promissory Note, but were prevented from making payment on the Promissory Note by Bank's actions.

As to breach of the covenant of good faith and fair dealing, the second amended cross-complaint alleged that Bank "destroy[ed] or injur[ed] the right of the other party to receive the fruits of the . . . loan contract" by increasing the interest reserve and failing to provide prompt approvals and causing the failure of four other sales as alleged previously. Bank caused Kenmore and Guarantors to enter into the Forbearance Agreement through fraud, duress, and undue influence.

As to rescission, the second amended cross-complaint alleged that Kenmore and Guarantors entered into the Forbearance Agreement through the fraud, duress, undue

influence, and intentional acts of Bank in delaying the presentation of the Forbearance Agreement until a few days before the foreclosure of the Property.

As to intentional interference with contract and economic advantage, the second amended cross-complaint alleged that Bank knew of the contractual relationship between Kenmore and third-party contractors and "intentionally increased the interest rate reserve account reducing the amount available for the construction project to interfere with or disrupt this relationship with the third party contractors and sub-contractors." (*Sic*.) Bank also knew of and interfered with the contractual relationship between Kenmore and Guarantors on the one hand and five parties attempting to purchase condominium units on the other hand by "failing to provide prompt approval, provide the necessary documentation and/or sign the necessary documents to allow the closure on the escrow of unit 503."

As to negligent interference with contract and economic advantage, the second amended cross-complaint alleged that Bank should have known of the relationship between Kenmore and Guarantors on the one hand and third party contractors on the other, but acted "wrongfully and negligently and without due care increased the reserve account interfering and disrupting with the contractual and business relationship of the Cross-Complainants and the third party contractors and subcontractors." (*Sic*.) Bank should have known of the contractual relationship between Kenmore and Guarantors on the one hand and five parties attempting to purchase condominium units on the other, but acted wrongfully and negligently by failing to provide prompt approval, necessary documentation, and signatures on documents to allow escrow to close on unit 503.

As to negligent loan administration, the second amended cross-complaint alleged that Bank owed a duty to Kenmore and Guarantors arising from the contract between them. It alleged Bank was negligent in administering the loan contract by increasing the interest reserve and failing to provide prompt approvals and causing the failure of four other sales as alleged previously.

As to intentional infliction of emotional distress, the second amended cross-complaint alleged that Bank's increase of the interest reserve; failure to provide prompt approval, necessary documentation, and signing of necessary documents; use of duress to force Kenmore and Guarantors to enter into the Forbearance Agreement; and use of racist and disparaging remarks against Kim and Pak resulted in severe and extreme emotional distress to Kim and Pak.

The trial court sustained Bank's demurrer to the second amended cross-complaint without leave to amend as to all but the breach of contract cause of action, with 20 days' leave to amend.

On March 22, 2010, Kenmore and Guarantors filed a third amended cross-complaint which repeated the same allegations of the breach of contract cause of action in the second amended cross-complaint and added the allegation that "[s]aid agreement for [Bank] to Advance funds pursuant to certain conditions as alleged as stated in Page 3 of the construction Loan agreement. The Conditions precedent were met but [Bank] failed and repeatedly failed to make proper payments."

On May 7, 2010, Bank filed a motion for summary judgment to the third amended cross-complaint on the basis that Bank did not breach the Construction Loan Agreement and, if there were any breach, Kenmore had released all claims against Bank in the Forbearance Agreement. In support of Bank's motion for summary judgment, Charles Wood, CEO of Bank, declared on April 27, 2010, as follows. On March 17, 2008, Kenmore and Bank entered into a Construction Loan Agreement. The Construction Loan Agreement does not specify the amount of interest required to be set aside in reserve, and at all times Kenmore was "actually aware of or had access to determine the exact amount in the interest reserve." When Kenmore fulfilled conditions precedent to each advance, Bank made timely advances to Kenmore. Kenmore entered into the Forbearance Agreement, which contains a release of all claims against Bank.

The Forbearance Agreement set forth the following recitals. On August 28, 2006, Kenmore delivered to Bank the Promissory Note in the principal amount of $9.5 million due on February 28, 2008. After Kenmore "was unable to fully pay the Promissory Note, Kenmore . . . for valuable consideration, made, executed and delivered to the Bank a Modification of Deed of Trust recorded March 27, 2008 . . . and a series of Change in Terms Agreements, essentially (a) extending the due date of the Promissory Note from time to time and finally to January 2, 2009, and (b) increasing the amount of the Promissory Note to $10 [million]." On March 17, 2008, Kenmore executed the Construction Loan Agreement. On March 17, 2008, Amco executed the "Guaranty of Completion and Performance." "Kenmore . . . previously renewed/extended its obligations to the Bank because it was unable to pay the obligations as they became due." Kenmore, Guarantors, and Amco are in default and there is currently due $7,129,941.13 plus interest from September 26, 2008. Bank is willing to forbear enforcement of the loan documents subject to the terms of the Forbearance Agreement.

The Forbearance Agreement also provided for an extension of the period Bank would forbear from enforcing the terms of the loan to February 10, 2009, then to March 10, 2009, on the conditions that Kenmore, Guarantors, and Amco were not in default of the terms of the loan and the Forbearance Agreement and Kenmore had closed on the sale of a certain number of condominium units.

The Forbearance Agreement required Kenmore, Guarantors, and Amco to release Bank as follows. "Kenmore . . . , Guarantors, and Amco each hereby releases, discharges, and relieves the Bank . . . from and against any and all causes of actions, claims, judgments, liabilities and demands of any kind, nature, or character, known or unknown, suspected or unsuspected. It is the intention of the parties hereto that Kenmore . . . , Guarantors, and Amco each execute a complete release in favor of the Bank of any and all claims they may possess against the Bank. In making and executing this release, it is the express understanding of Kenmore . . . , Guarantors, and Amco, and they so

warrant and represent to the Bank, that they do not rely and have not relied upon any representation or statement, oral or written, that is not contained herein, made by any party or any party's agent or representative, attorneys or employees with respect to the matters contained herein, or with respect to the advisability of entering into and executing this release. Kenmore . . . , Guarantors, and Amco each expressly assumes the risk of any mistake of law or fact and the risk that the true facts now known may turn out to be other than, or different from, the facts now known or believed to exist. Kenmore . . . , Guarantors, and Amco each expressly agree and understand that this release extends to all claims of every kind and nature, whether known or unknown, suspected or unsuspected, past or present, concerning the Bank. Kenmore . . . , Guarantors, and Amco each acknowledge that they are aware of the rights given to them by California's Civil Code Section 1542, and expressly waive all of said rights. This release is intended to be a general release. California Civil Code Section 1542 states: [¶] A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

In opposition to Bank's motion for summary judgment, Kim declared as follows. On August 28, 2006, Kenmore entered into an agreement to borrow $9.5 million from Bank. The terms of the agreement provided that $7,887,000 was available for construction and for an interest reserve of $1.3 million. The first disbursement statement from California Fund Control stated that $7.3 million was available for construction of the condominiums. There was a "discrepancy of [$577,000]." In November 2007, Bank assured Kim that Bank would fund the Project to completion, but later told Kim that she should seek additional funding to complete the Project prior to the loan due date of February 2008. Kim was unable to secure funding from other banks. In late November 2007, Bank informed Kim that there was over $1 million in the "fund control budget" and that Bank would provide funding to finish the Project. In February 2008, Bank released

$95,000. On March 13, 2008, the balance remaining in the "fund control" was $670,377.82. On March 17, 2008, Kim signed the Construction Loan Agreement that increased the total loan amount to $10 million. But the balance available in the "fund control" remained at $670,377.82, and Kim did not receive "an additional [$500,000]" to finish the Project. Bank subsequently delayed approving fund requests, which resulted in Kim's failure to pay contractors on time, which caused completion of the Project to be delayed. Kim and Pak borrowed money and finished the Project on July 30, 2008. "Many" contractors placed mechanics' liens on the Property. Kim and Bank agreed that the contractors would be paid out of the proceeds from the escrows. Seven escrows closed by October 3, 2008, and contractors were paid out of the escrows. "On the eighth and ninth escrows, Jane Auerswald started working on approving the escrow but did not pay the mechanic's liens and it close after the bank bought a bond." (*Sic*.) On October 31, 2008, Kim "signed an extension to the loan to January 2, 2009 . . . but was later to sign the forbearance agreement as part of this extension." "However, after this agreement I had approximately 14 properties in escrow, but Ms. Auerswald was delaying the close of escrow, and refused to sign documents, refused to pay out balance of the loan to pay of the mechanical liens and telling anyone involved that she was just going let the property go into foreclosure." (*Sic*.) Auerswald's actions caused Kenmore "to be unable to pay off the existing excusing the breach of the forbearance agreement." (*Sic*.)

On September 13, 2010, the trial court granted Bank's motion for summary judgment.

On November 10, 2010, Bank filed a motion for summary adjudication as to Bank's cause of action for breach of guaranty and a common count. Jane Auerswald, executive vice-president and chief credit officer of Bank, declared in support of Bank's motion for summary adjudication as follows. On August 28, 2006, Kenmore executed the Promissory Note in the original principal amount of $9.5 million, due and payable on February 28, 2008. On August 28, 2006, Kenmore also executed and delivered to Bank a

construction deed of trust encumbering the Property. Concurrently with the execution of the Promissory Note, Guarantors executed guaranties in which they agreed to pay Bank the indebtedness "owed by Kenmore." Bank performed all conditions precedent under the Promissory Note and the guaranties. On March 10, 2009, Kenmore failed to pay amounts due under the Promissory Note and Guarantors failed to pay amounts due under the guaranties. Bank made demand on Kenmore and Guarantors to pay. On August 10, 2009, the Property was sold to Bank pursuant to a nonjudicial foreclosure sale, at which time the amount of the unpaid debt was $7,016,908.97 and the bid amount was $6,793,794.93. Guarantors are responsible for the deficiency amount of $223,114.04 plus interest at the legal rate of 10 percent per annum.

Kim filed a declaration in support of the opposition to Bank's motion for summary adjudication that was identical to the declaration filed in support of the opposition to Bank's motion for summary judgment.

The trial court granted Bank's motion for summary adjudication on March 16, 2011. The court granted Bank's request for dismissal of the remaining causes of action in Bank's complaint and entered judgment in favor of Bank and against Guarantors in the amount of $258,808.13 plus interest. Kenmore and Guarantors appealed.

DISCUSSION

A. Demurrer to second amended cross-complaint

1. Standard of review

"For purposes of this appeal we accept as true the properly pled factual allegations of the complaint. (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 746.) Furthermore, the allegations of the complaint must be read in the light most favorable to the plaintiff and liberally construed with a view to attaining substantial justice among the parties. (Code Civ. Proc., § 452; *King v. Central Bank* (1977) 18 Cal.3d 840, 843.) With these considerations in mind, we review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under *any* legal theory. If it does not, we

next determine whether the complaint reasonably could be amended to state a cause of action. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)" (*Westinghouse Elec. Corp. v. Newman & Holtzinger* (1995) 39 Cal.App.4th 1194, 1199.)

2. Breach of the covenant of good faith and fair dealing

Kenmore and Guarantors urge that the second amended cross-complaint stated facts sufficient to constitute a cause of action for breach of the covenant of good faith and fair dealing. We agree.

"It has long been recognized, of course, that every contract imposes upon each party a duty of good faith and fair dealing in the performance of the contract such that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36.) The Supreme Court has clarified, however, that an implied covenant of good faith and fair dealing cannot contradict the express terms of a contract." (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55.) "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. [Citation.] The covenant thus cannot '"be endowed with an existence independent of its contractual underpinnings."' [Citations.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349.)

For the implied covenant "[t]o be imposed '"(1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered

by the contract."' [Citations.]" (*Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 804.)

Liberally construing the second amended cross-complaint, as we must, we conclude that Kenmore and Guarantors alleged facts sufficient to state a breach of the covenant of good faith and fair dealing before and after the parties signed the Forbearance Agreement. The second amended cross-complaint alleged that Kenmore entered into an agreement to borrow $9.5 million from Bank; the agreement called for an interest reserve of $1.3 million; and Bank breached the implied covenant of good faith and fair dealing by increasing the interest reserve more than $1.3 million, which caused Kenmore and Guarantors to delay paying contractors and delay completion of the Project. Bank contends that these alleged actions occurred prior to the date of the Forbearance Agreement and are therefore barred. But, as we explain later, the trial court erred in granting Bank's demurrer without leave to amend the cause of action for rescission of the Forbearance Agreement. Thus, if Kenmore and Guarantors prevail on the cause of action for rescission, the Forbearance Agreement cannot bar a claim for relief based on actions that occurred before the parties executed the Forbearance Agreement.

And the second amended complaint also alleged that Bank "failed to provide prompt approval, provide the necessary documentation and/or sign the necessary documents which was the direct and proximate result of cancellation of the escrow and failure of four other potential sales when the bank provide the financing for unit 503 decided not finance and fund the sales of four other condominium units." (*Sic*.) These alleged actions occurred after the parties entered into the Forbearance Agreement and are not barred by it.

By alleging that Bank unfairly frustrated Kenmore's and Guarantors' right to receive the benefits of the agreement actually made by increasing the interest reserve over $1.3 million and failing to provide prompt approvals, documents and signatures—leading to the inability of Kenmore and Guarantors to pay back the loan—the second

amended cross-complaint stated a cause of action for breach of the covenant of good faith and fair dealing.

We conclude that the trial court erred in sustaining the demurrer as to the cause of action for breach of the covenant of good faith and fair dealing.

3. Rescission

Kenmore and Guarantors contend that the trial court erred in sustaining the demurrer without leave to amend as to the cause of action for rescission of the Forbearance Agreement because the second amended cross-complaint "contains sufficient facts for rescission with specific allegations of economic duress" and the second amended cross-complaint could be amended to include allegations that the Forbearance Agreement should be rescinded as void against public policy. We conclude that based on Kim's declaration and counsel's statements at oral argument, the second amended cross-complaint can be amended to allege Bank breached the terms of the Promissory Note by increasing the interest reserve over $1.3 million, forcing Kenmore and Guarantors into signing the Forbearance Agreement.

"'Typically, those claiming [economic duress] are attempting to avoid the consequences of a modification of an original contract or of a settlement and release agreement.'" (*Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1158.) The doctrine of economic duress "may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure. [Citations.]" (*Ibid*.) "The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress doctrine. [Citations.] Further, a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin. [Citations.]" (*Id*. at p. 1159 [settlement agreement and release was rescinded where defendant company acted in bad faith by

refusing to pay contractor's final billing and offering to pay compromise amount, knowing that contractor was a new company faced with imminent bankruptcy if not paid its final billing].)

The second amended cross-complaint alleged that Kenmore's and Guarantors' consent to enter into the Forbearance Agreement was coerced by Bank's "purposeful" delay in presenting the Forbearance Agreement until a few days before the foreclosure of the Property. Although we reject Kenmore's and Guarantors' argument that the second amended cross-complaint can be amended to allege facts sufficient to state a claim for rescission by simply urging that they could allege the Forbearance Agreement is void against public policy and that it had not been explained to them, based on Kim's declaration and counsel's statements at oral argument, the second amended cross-complaint can be amended to allege Bank breached the terms of the Promissory Note by increasing the interest reserve over $1.3 million, forcing Kenmore and Guarantors into signing the Forbearance Agreement.

Accordingly, we conclude that the trial court erred in sustaining the demurrer without leave to amend as to the cause of action for rescission.

4. Intentional and negligent interference with contract and economic advantage

On appeal, the appellant must present an intelligible legal argument as to why the trial court's ruling was reversible error. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.) With respect to challenges to an order sustaining a demurrer, the burden is on the appellant to demonstrate how a complaint might be cured by amendment. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Kenmore and Guarantors have failed to present a cogent argument as to why the trial court erred in sustaining the demurrer to the second amended cross-complaint as to the causes of action for intentional and negligent interference with contract and economic advantage and have not shown how the second amended cross-complaint can be cured by amendment.

Accordingly, we conclude the trial court did not err in sustaining the demurrer without leave to amend as to the causes of action for intentional and negligent interference with contract and economic advantage.

5. Negligent loan administration

As previously stated, on appeal, the appellant must present an intelligible legal argument as to why the trial court's ruling was reversible error. (*Niko v. Foreman*, *supra*, 144 Cal.App.4th at p. 368.) With respect to challenges to an order sustaining a demurrer, the burden is on the appellant to demonstrate how a complaint might be cured by amendment. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126.) Kenmore and Guarantors have failed to present a cogent argument as to why the trial court erred in sustaining the demurrer to the second amended cross-complaint as to the cause of action for negligent loan administration and have not shown how the second amended cross-complaint can be cured by amendment.

Accordingly, we conclude the trial court did not err in sustaining the demurrer without leave to amend as to the cause of action for negligent loan administration.

6. Intentional infliction of emotional distress

On appeal, the appellant must present an intelligible legal argument as to why the trial court's ruling was reversible error. (*Niko v. Foreman*, *supra*, 144 Cal.App.4th at p. 368.) With respect to challenges to an order sustaining a demurrer, the burden is on the appellant to demonstrate how a complaint might be cured by amendment. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at 1112, 1126.) Kenmore and Guarantors have failed to present a cogent argument as to why the trial court erred in sustaining the demurrer to the second amended cross-complaint as to the cause of action for intentional infliction of emotional distress and have not shown how the second amended cross-complaint can be cured by amendment.

Accordingly, we conclude the trial court did not err in sustaining the demurrer without leave to amend as to the cause of action for intentional infliction of emotional distress.

B. Summary judgment on third amended cross-complaint

1. Standard of review

A "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subdivision (c).) A defendant in moving for summary judgment has met his burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (*Id.*, § 437c, subdivision (p)(2).) "Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Ibid*.)

Where the plaintiff appeals from an order granting the defendant's summary judgment motion, we must independently examine the record to determine whether the defendant has conclusively negated a necessary element of the plaintiff's case or demonstrated that no triable issues of material fact exist. (*Saelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.)

2. Breach of contract

Kenmore and Guarantors contend that the trial court erred in granting Bank's motion for summary judgment on the cause of action for breach of contract alleged in the third amended cross-complaint because there were triable issues of fact as to whether the Construction Loan Agreement was funded properly and as to the enforceability of the Forbearance Agreement. We conclude that Kenmore and Guarantors raised a triable issue of fact as to whether Bank breached the Promissory Note and Construction Loan Agreement before and after the parties entered into the Forbearance Agreement.

The elements of breach of contract are: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. [Citation.]" (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

Kenmore and Guarantors alleged in their third amended cross-complaint for breach of contract that Bank breached the Construction Loan Agreement for $10 million by increasing the interest reserve on the loan amount more than $1.3 million and delaying providing approvals, documentation, and signatures on documents. The third amended cross-complaint alleged that Bank's breaches caused delay of the completion of the Project and sales of condominium units. It also alleged that Kenmore and Guarantors performed all conditions, covenants, and promises on the Promissory Note, but were prevented from making payment on the Promissory Note by Bank's actions.

Kim declared that there was a discrepancy of "$577,000" between the amount available for construction under the Construction Loan Agreement and the amount disbursed to Kenmore and Guarantors. After signing the Construction Loan Agreement that increased the total loan amount to $10 million, Kenmore and Guarantors did not receive the additional "$500,000" called for under the agreement to finish the Project. Kim declared that Bank delayed approving funding requests, resulting in Kenmore's and Guarantors' failure to pay contractors, which resulted in the delay of the completion of the Project. Subsequently, unpaid contractors placed mechanics' liens on the Property. Bank on the one hand and Kenmore and Guarantors on the other hand agreed to pay the contractors out of proceeds from the escrows. Kim declared that on October 31, 2008, she signed an extension to the loan to January 2, 2009, and the Forbearance Agreement. She declared that after signing the Forbearance Agreement, 14 properties were in escrow. But Bank delayed closing of escrow, refused to sign documents, and refused to pay out the balance of the loan to pay off mechanics' liens. She declared that Bank's actions caused Kenmore to be unable to pay off the loan.

Thus, a fact finder could conclude that Bank breached the Promissory Note before and after it entered into the Forbearance Agreement by increasing the interest reserve requirement and refusing to pay out the balance of the loan.

Accordingly, we conclude that triable issues of material fact exist and the trial court erred in granting Bank's motion for summary judgment.

3. Breach of guaranty and a common count

In light of the foregoing conclusion, we determine the trial court erred in granting Bank's motion for summary adjudication on its complaint for breach of guaranty and a common count.

DISPOSITION

The order sustaining Bank's demurrer to the second amended cross-complaint without leave to amend as to the causes of action for intentional and negligent interference with contract/economic advantage, negligent loan administration, and intentional infliction of emotional distress is affirmed. The order sustaining Bank's demurrer to the second amended cross-complaint as to the causes of action for breach of the covenant of good faith and fair dealing and rescission is reversed, and the trial court is directed to allow Kenmore and Guarantor leave to amend the second amended cross-complaint to state a cause of action for rescission. The order granting Bank's motion for summary judgment as to the third amended cross-complaint is reversed. The order and judgment entered granting Bank's motion for summary adjudication as to Bank's complaint for breach of guaranty and a common count is reversed. Appellants are entitled to costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.