Filed 12/20/17 Geringer Capital Inc. v. Blue Rider Finance CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GERINGER CAPITAL INC., Plaintiff and Appellant, v. BLUE RIDER FINANCE, INC., Defendant and Appellant.	B269378 (Los Angeles County Super. Ct. No. SC121803)
BLUE RIDER FINANCE, INC., Cross-Complainant and Appellant, v. GERINGER CAPITAL, INC. et al., Cross-Defendants and Appellants.	

APPEALS from judgments of the Superior Court of Los Angeles County, Lawrence Cho, Judge. Affirmed in part and reversed in part.

Law Offices of Richard A. Kolber, Richard A. Kolber and Jeffrey A. Greene for Geringer Capital, Inc.

No appearance by Cross-defendants Robert Geringer and Tricycle Entertainment LLC.

Kehr Schiff & Crane, Joel P. Schiff; Law Offices of Jeffrey S. Konvitz and Jeffrey S. Konvitz for Blue Rider Finance, Inc.

In August 2006 Blue Rider Finance, Inc. made a $4.2 million bridge loan, personally guaranteed by Robert Geringer, the principal of Geringer Capital, Inc. (GCI), to several production companies to fund preproduction of the motion picture, "Boot Camp." After the production companies defaulted on the bridge loan and Blue Rider sought to enforce Geringer's personal guaranty, Geringer proposed GCI purchase the loan from Blue Rider. In early 2009, after months of negotiations, GCI delivered a series of payments totaling $300,000 to Blue Rider in anticipation of Blue Rider's acceptance of the terms of a purchase loan agreement. When the deal fell through, Blue Rider informed GCI in May 2009 it was retaining the money as partial payment of the outstanding debt owed by Geringer and related parties as guarantors.

In December 2013, more than four years later, GCI sued Blue Rider seeking return of the funds. GCI now appeals from the judgment entered after the trial court granted Blue Rider's motion for summary judgment on the ground GCI's claims were

barred by the applicable statutes of limitation. We affirm that judgment.

Blue Rider, meanwhile, cross-complained against GCI, Geringer and Tricycle Entertainment, LLC, a Geringer-related company formed to hold distribution rights to the motion picture, asserting causes of action for fraud, conspiracy to commit fraud, reformation of contract for mistake and declaratory relief. The trial court sustained cross-defendants' demurrer to the second amended cross-complaint without leave to amend. We reverse the judgment of dismissal entered on that order and remand the action for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Bridge Loan*

In the spring of 2006 Geringer and his co-executive producer, Craig Baumgarten, approached Blue Rider for short-term bridge financing for the planned production of a movie released under the title "Boot Camp."[1] The $4.2 million loan was structured as a financing and security agreement between Blue Rider and the production companies, personally guaranteed by Geringer and Baumgarten, a transfer of certain distribution rights to Tricycle and a grant by Tricycle of a security interest in those rights to Blue Rider. The transaction was concluded in August 2006 with a repayment date of November 1, 2006.

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[1] In the context of movie production, bridge financing is "a loan made to a production prior to its primary production facility closing with another recognized lender. Without a [b]ridge [l]oan, and without cash flow, many independent producers risk losing actors and other key 'elements' while waiting for their main bank loan to close." (See http://www.blueriderpictures.com/finance.php, as of December 20, 2017.)

2. *Default and Geringer's Proposal To Purchase the Loan*

The loan was not repaid by November 1, 2006, and Blue Rider began working with the borrowers and guarantors to reduce the obligation. When the loan had not been repaid by April 2008, Blue Rider announced its intent to declare a default and to call the personal guaranties of Geringer and Baumgarten. In response Geringer and Baumgarten approached Blue Rider with a proposal to purchase the bridge loan from Blue Rider. In a formal proposal dated May 29, 2008 Geringer designated GCI as the entity to effect the purchase for the sum of $1.3 million, payable in the amount of $300,000 on signing and $1 million within 120 days. Blue Rider countered with a demand the guaranties would not be released until the entire amount had been received and, if the $1 million were not paid timely, the guaranties would be enforced and the first payment of $300,000 would be applied against the amount still owing on the loan obligations.

The initial negotiations stalled; and the guaranties were called, prompting Geringer in October 2008 to renew the negotiations. Emails confirming the parties' understanding of terms were exchanged, including Blue Rider's insistence that, if GCI failed to make all payments, the settlement and purchase agreement would be deemed null and void and Blue Rider would apply all previously paid sums to the original obligation. The personal guaranties would not be released until all payments had been made, at which time the loan would be deemed sold. Geringer accepted these and other terms by email on October 26, 2008 and asked Blue Rider to document the agreement.

Each time Blue Rider submitted a draft incorporating its requirements, GCI returned a draft that included altered terms.

Each version, however, included the term that Blue Rider would be entitled to retain the initial payments in the event GCI failed to complete the transaction and credit them to the remaining obligation.

In January 2009 GCI forwarded to Blue Rider $50,000, the first portion of the $300,000 initial payment, along with a version of the agreement executed by Geringer for himself, GCI and Tricycle. The version forwarded by GCI, however, contained additional changes unacceptable to Blue Rider, which had also learned Geringer failed to pay for necessary music licenses and other fees for "Boot Camp." Blue Rider notified GCI it would hold the initial $50,000 "'in trust' momentarily" pending revision of the draft to meet the terms stated by Blue Rider. Although GCI continued to make the scheduled payments, the remaining issues were never resolved. On May 5, 2009 Blue Rider terminated the negotiations and in a letter advised Geringer and GCI it was no longer holding the $300,000 in trust and would apply it to the outstanding balance of the original obligation.

3. *The Guaranty Lawsuit*

In February 2010 Blue Rider sued Geringer and Baumgarten to enforce their personal guaranties. The parties negotiated a settlement of the lawsuit calling for Geringer to pay $50,000 over the course of 14 months. Geringer's lawyer prepared the settlement agreement, which Geringer signed on December 23, 2010; Blue Rider executed the agreement on December 30, 2010. Blue Rider also forwarded to GCI a fully executed copy of the January 2009 version of the loan purchase agreement, previously signed by Geringer and GCI, that Blue Rider had rejected in May 2009.

A dispute over the scope of the release in the settlement agreement and the effect of the loan purchase agreement is the subject of Blue Rider's cross-complaint in this action. The Geringer-related parties contend the settlement agreement encompasses not only the guaranty obligations but also all of the remaining bridge loan obligations. Blue Rider contends it does not, but, if the language of the release is so construed, Geringer and his affiliated companies conspired to defraud Blue Rider and the settlement agreement does not reflect the intention of Blue Rider to settle only the guaranty obligations.

4. *The Instant Lawsuit*

On December 18, 2013 GCI filed this lawsuit seeking return of the $300,000 paid to Blue Rider in the first quarter of 2009, alleging causes of action for fraud, breach of fiduciary duty, conversion and a common count for money had and received. Blue Rider answered the complaint on October 22, 2014 and filed a cross-complaint naming GCI, Geringer, Baumgarten[2] and Tricycle as cross-defendants. The cross-complaint asserted causes of action for fraud, reformation of the settlement agreement based on unilateral mistake and declaratory relief. Blue Rider filed a first amended cross-complaint in February 2015 that limited the fraud cause of action to Geringer but added a cause of action for conspiracy to commit fraud against all cross-defendants.

The cross-defendants demurred; but, before the hearing on the demurrer, the trial court struck the first amended cross-complaint (with leave to amend) on its own motion under Code of

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[2] Baumgarten was not named as a defendant in the first amended cross-complaint.

Civil Procedure section 436.[3] As the court explained in its ruling, "The manner in which the FACC is pled makes a determination of the demurrers impractible. Rather than . . . presenting a statement of the facts constituting its causes of action 'in ordinary and concise language,'" citing section 425.10, subdivision (a), "[Blue Rider] has utilized confusing allegations which, among other problems, feature many needless details. Indeed, the FACC spans 32 pages, contains over 30 defined terms spread throughout 89 paragraphs of general allegations, and is supplemented by 14 exhibits spanning another 200 or so pages. . . . [T]he main points get lost in the whirl of allegations. Further, the FACC employs the disfavored shotgun (or 'chain letter') style of pleading, wherein each claim for relief incorporates by reference all preceding paragraphs, which often masks the true causes of action," citing *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1179.

In June 2015 Blue Rider moved for summary judgment on GCI's complaint on the ground all causes of action were barred by the applicable statutes of limitation. The trial court granted the motion, ruling all causes of action had accrued with the May 5, 2009 letter and the complaint was untimely.

As to Blue Rider's second amended cross-complaint, which was substantially shorter, the trial court sustained cross-defendants' demurrer in part because Blue Rider, attempting to address the comments of the court in its earlier order, did not incorporate the charging allegations by reference in each cause of action. Because Blue Rider had been provided three

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[3] Statutory references are to this code unless otherwise stated.

opportunities to plead its cross-claims, the court denied leave to amend.

Both parties timely appealed.

GCI'S APPEAL

1. *The Trial Court Properly Granted Blue Rider's Motion for Summary Judgment on GCI's Complaint*

a. *Standard of review*

A motion for summary judgment is properly granted only when "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." (§ 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) The evidence must be viewed in the light most favorable to the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703; *Schachter*, at p. 618.)

A defendant may move for summary judgment on the ground there is an affirmative defense to the action. (§ 437c, subds. (o)(2), (p)(2); see also *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 (*Aryeh*) [statute of limitations is an affirmative defense].) Once the defendant meets the burden of establishing all the elements of the affirmative defense, the burden shifts to the plaintiff to show there is one or more triable issues of material fact regarding the defense. (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484-1485 [when a defendant moves for summary judgment, "the burden shifts to the plaintiff

to show there is one or more triable issues of material fact regarding the defense after the defendant meets the burden of establishing all the elements of the affirmative defense"]; *Mirzada v. Department of Transportation* (2003) 111 Cal.App.4th 802, 806-807 [once defendant establishes the existence of an affirmative defense, burden on summary judgment shifts to the plaintiff to produce evidence establishing a triable issue of material fact refuting the defense]; see *Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 830.)

b. *Each of GCI's causes of action accrued on May 5, 2009 and expired before the complaint was filed*

Traditionally, a claim accrues "'"when [it] is complete with all of its elements"—those elements being wrongdoing [or breach], harm, and causation.'" (*Aryeh, supra,* 55 Cal.4th at p. 1191; accord, *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 815; *Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 191 (*Stella*).) "This is [known as] the 'last element' accrual rule. . . ." (*Aryeh,* at p. 1191; see *ibid.* ["ordinarily, the statute of limitations runs from 'the occurrence of the last element essential to the cause of action'"]; *Quarry v. Doe I* (2012) 53 Cal.4th 945, 960; *Stella*, at p. 191.)

As we recently explained in *Stella,* "[a]n exception to the general rule of accrual is the delayed discovery rule, 'which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.' [Citation.] 'Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her.'" (*Stella*, *supra*, 8 Cal.App.5th at pp. 191-192; see *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807; *Jolly v.*

Eli Lilly & Co. (1988) 44 Cal.3d 1103, 1110.) "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly,* at p. 1111; accord, *Stella,* at p. 192.)

When a plaintiff reasonably should have discovered facts for purposes of the accrual of a cause of action or application of the delayed discovery rule is generally a question of fact, properly decided as a matter of law only if the evidence can support only one reasonable conclusion. (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1112; accord, *Stella*, *supra*, 8 Cal.App.5th at p. 193.)

The statutes of limitation applicable to GCI's claims are three years or, possibly, four,[4] either of which was exceeded if

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[4] Section 338, subdivision (d), specifies a three-year limitations period for actions grounded on fraud or mistake. "This section effectively codifies the delayed discovery rule in connection with actions for fraud, providing that a cause of action for fraud "'is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.'"" (*Britton v. Girardi* (2015) 235 Cal.App.4th 721, 733-734.) "The statute of limitations for breach of fiduciary duty is three or four years, depending on whether the breach is fraudulent or nonfraudulent." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1479; see also *Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 963 ["limitations period is three years . . . for a cause of action for breach of fiduciary duty where the gravamen of the claim is deceit, rather than the catchall four-year limitations period that would

GCI's causes of action accrued on May 5, 2009, as the trial court concluded. GCI argues the trial court erred because it could not have sued Blue Rider for breach of trust on that date. According to GCI, accrual did not occur until Blue Rider actually removed the money from "trust" and wrongly applied it to the debt of another without authorization. In other words, Blue Rider's May 5, 2009 letter simply announced its intent to commit a tort

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otherwise apply"]; *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 ["[b]reach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of . . . section 343"].) The limitation period governing claims for conversion is also three years (§ 338, subd. (c)). That period starts to run immediately upon the interference with a person's right of possession in personal property and may be tolled only when the defendant "fraudulently conceals the relevant facts or where the defendant fails to disclose such facts in violation of his or her fiduciary duty to the plaintiff." (*AmerUS Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631, 639; see also *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1135 [elements of conversion are plaintiff's ownership or right to possess property at time of conversion; defendant's conversion by a wrongful act or disposition of those rights of ownership or possession; and damage].) Finally, a common count for money had and received is governed by the statute of limitation that most closely fits the nature of the obligation. (See, e.g., *Creditors Collection Service v. Castaldi* (1995) 38 Cal.App.4th 1039, 1043 [common count to recover money transferred by mistake subject to three-year statute governing mistake]; *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1670 [common count to recover money obtained by fraud governed by three-year statute governing fraud].) At most, therefore, GCI should have filed its complaint within four years of the accrual of its causes of action.

in the future. Consequently, GCI argues, a triable issue of material fact precluding summary judgment exists as to the date the funds were removed and applied to its outstanding debt, a date GCI contends had to have occurred after the settlement of Blue Rider's lawsuit on the guaranties in December 2010. To support its contention, GCI cites a letter from Blue Rider's counsel stating his client withdrew the money after that dispute had been resolved.

The trial court concluded the date Blue Rider actually removed the money was irrelevant: GCI's cause of action accrued once Blue Rider had informed GCI it claimed the funds and would apply them to GCI's debt. We agree.

To begin with, GCI's reliance on the discovery rule is misconceived. For instance, in *AmerUS Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631 (*AmerUS*) the court of appeal found the discovery rule inapplicable to the plaintiff insurer's claim the defendant bank had wrongly paid checks to the insurer's agent instead of the insurer.[5] "To the extent our courts have recognized a 'discovery rule' exception to toll [a statute of limitations], it has only been when the defendant in a conversion action fraudulently conceals the relevant facts or where the defendant fails to disclose such facts in violation of his or her fiduciary duty to the plaintiff. In those instances, 'the statute of limitations does not commence to run until the

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[5] The limitations period for the wrongful negotiation or conversion of a check (the tort at issue in *AmerUS*) is three years. (See Cal. U. Com. Code, § 3118, subd. (g).) California Uniform Commercial Code section 3420 provides, "The law applicable to conversion of personal property applies to instruments." (See *AmerUS, supra,* 143 Cal.App.4th at pp. 638-639.)

aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion.'" (*Id.* at p. 639.)

The *AmerUS* court also rejected the insurer's contention its cause of action did not accrue until it was forced to pay on the insured's claim, an argument similar to GCI's contention its cause of action did not accrue until the parties had entered into the December 2010 settlement. As the court noted, "'Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use.'" (*AmerUS, supra,* 143 Cal.App.4th at p. 642, fn. 4, citing *Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 543-544; see *AmerUS,* at p. 641 ["to establish a conversion claim, a "'plaintiff must establish an actual interference with his *ownership* or *right of possession*'"'"]; *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1433 ["In practical terms, a conversion can only occur after an owner has entrusted his property to another. Thereafter, if the possessor acts in a manner inconsistent with the owner's interests, the owner's cause of action for conversion accrues at that time."].)[6]

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[6] "Money may be the subject of conversion if the claim involves a specific, identifiable sum; it is not necessary that each coin or bill be earmarked." (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 209.) "California cases permitting an action for conversion of money typically involve those who have

Far from concealing its actions in this case, Blue Rider terminated the purchase agreement negotiations in May 2009 and informed GCI it would no longer treat the $300,000 as subject to those negotations and would instead apply it to satisfy the loan obligation. Already in possession of the money, Blue Rider's assertion of control over the money—an action patently inconsistent with GCI's claim to the money—was immediate, whether or not the money was physically transferred from the Blue Rider account in which it had previously been held. Accordingly, each of GCI's causes of action accrued upon its receipt of the May 5, 2009 letter and is barred by the applicable statute of limitation.

2. *Blue Rider Was Not Estopped From Asserting a Limitations Defense*

"'"Where the delay in commencing action is induced by the conduct of the defendant [the statute of limitations] cannot be availed of by him as a defense."'" (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152-1153; accord, *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1785.) Generally, four elements must be present to apply the doctrine of equitable estoppel: "'"(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the

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misappropriated, commingled, or misapplied specific funds held for the benefit of others." (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 396.)

conduct to his injury.'"'" (*Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24, 37; accord, *Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1261; *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1359.)

GCI contends that it delayed in filing its lawsuit because it was misled by Blue Rider's response to GCI's March 22, 2012 letter demanding return of the $300,000. In its April 10, 2012 response rejecting the demand, Blue Rider's counsel stated the money had been "withdrawn from trust" and applied to the debt obligations in December 2010 after settlement of the guaranty action. GCI concluded, based on this representation, any causes of action accrued at that time.

Blue Rider's statement, however, falls well short of the facts necessary to constitute equitable estoppel. Whether Blue Rider's statement was accurate or not (and there is nothing in the record suggesting it was inaccurate), Blue Rider did not tell GCI when to file its complaint. (See *Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496 ["in the absence of a confidential relationship[,] where the material facts are known to both parties and the pertinent provisions of law are equally accessible to them, a party's inaccurate statement of the law or failure to remind the other party about a statute of limitations cannot give rise to an estoppel"]; see also *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1338 [same].) GCI simply made an incorrect legal judgment as to the date of accrual for any cause of action it expected to bring and the resulting expiration of the governing statutes of limitation. The fault was GCI's, not Blue Rider's.

CROSS-APPEAL

1. *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 discloses a complete defense. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100; *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) 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. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We liberally construe the pleading with a view to substantial justice between the parties (Code Civ. Proc., § 452; *Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336, 1340.) "Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "[I]n ruling on a demurrer, the trial court is obligated to look past the form of a pleading to its substance. Erroneous or confusing labels attached by the inept pleader are to be ignored if the complaint pleads facts which would entitle the plaintiff to relief." (*Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.) The task of the reviewing court, therefore, "is to determine whether the pleaded facts state a cause of action on any available legal theory." (*Ibid.*)

"'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint."'" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.) We determine

whether the plaintiff has shown "in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) "[L]eave to amend should *not* be granted where . . . amendment would be futile." (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685; accord, *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 726; see generally *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 373-374.) We review the trial court's decision to grant or deny leave to amend for abuse of discretion and disturb that decision only if the trial court exercised its discretion in an arbitrary or capricious manner. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296; *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230.)

2. *The Trial Court Abused Its Discretion by Failing To Reach the Merits of the Demurrer and Address the Viability of the Second Amended Cross-complaint*

The trial court abdicated its responsibility to address the merits of the demurrer when it dismissed the second amended cross-complaint without leave to amend. Attempting to correct the defects identified by the court in its sua sponte dismissal of the first amended cross-complaint on the ground the pleading was confusing, Blue Rider omitted boilerplate allegations incorporating by reference all previous factual allegations. Citing that failure, the trial court then refused to evaluate the viability of Blue Rider's claims or to allow Blue Rider to amend the second amended cross-complaint. That refusal was an abuse of discretion. (See *Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal.App.4th 79, 97 [""[f]ailure to exercise a discretion conferred and compelled by law constitutes a denial of a fair

hearing and a deprivation of fundamental procedural rights, and thus requires reversal"""]; *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392 [same]; *People v. Penoli* (1996) 46 Cal.App.4th 298, 302 ["a ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law"].)

Recognizing we were unlikely to affirm the trial court's ruling on the grounds stated, GCI has addressed on appeal alternative bases for sustaining its demurrer. We consider those arguments in determining whether the order of dismissal and ensuing judgment should be affirmed.[7] (See *Ortega v. Topa Ins.*

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[7] As a preliminary matter, we reject GCI's contention Geringer and Tricycle must be dismissed from the action for lack of jurisdiction because Blue Rider failed to identify them separately as parties in its notice of appeal. (See *Luz v. Lopes* (1960) 55 Cal.2d 54, 59 ["it is and has been the law of this state that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced"]; *Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1249 [same]; cf. *D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361-363 [so long as order or judgment appealed is specified, incorrect identification of case number does not deprive court of jurisdiction; court may rely on subsequent filings to determine whether affected parties were misled or prejudiced by omission].) Blue Rider correctly identified the judgment from which its appeal was taken; and, although the notice of appeal referred to the caption of the complaint, the ensuing case information statement clarified the appeal was taken from the judgment dismissing the cross-complaint and properly identified the parties. There is no evidence Geringer

Co. (2012) 206 Cal.App.4th 463, 472 [appellate court "may affirm an order sustaining a demurrer on grounds presented by the record whether or not relied on by the trial court"]; *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1396 ["'[a]n appellate court may . . . consider new theories on appeal from the sustaining of a demurrer to challenge or justify the ruling'"]; *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 880, fn. 10 [appellate "court will still affirm the demurrers even if the trial court relied on an improper ground, whether or not the defendants asserted the proper ground in the trial court"].)

3. *The Nature of Blue Rider's Claims*

Blue Rider's primary claim is that Geringer and his related companies misled Blue Rider into executing an agreement it believed would settle only the guaranty action but, by omitting the word "Guaranty" from the agreement, fraudulently induced Blue Rider to release for the sum of $50,000 all of the "Obligations" still owing under the bridge loan. The second amended cross-complaint asserts four causes of action attempting to remedy this injury: fraud, conspiracy to commit fraud, reformation of the settlement agreement due to mistake and declaratory relief.

As to the fraud counts, Blue Rider acknowledges it read the settlement agreement when it was executed on December 30, 2010 but only learned of the fraud in April 2011 when Tricycle sent a letter demanding Blue Rider turn over MGM distributions it had previously assigned to Blue Rider as security for the loan.

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and Tricycle were misled or prejudiced by the incomplete caption on the notice of appeal.

According to Blue Rider, the discussions with Geringer leading to the settlement assumed the release would extend only to the guaranty obligation. In addition, Blue Rider understood the purchase agreement with GCI would be resurrected, allowing Blue Rider to keep the $300,000 and obligating GCI to pay an additional $1 million. By drafting the agreement to omit the word "guaranty," however, Geringer, with the cooperation of GCI and Tricycle, deceived Blue Rider into releasing all of the obligations associated with the bridge loan. Rather than rescission of the agreement, Blue Rider seeks damages in the amount of $250,000.

Blue Rider's third cause of action—reformation of the settlement agreement due to mistake—affirms the agreement but seeks to limit the scope of the release to that contemplated by Blue Rider—settlement of the guaranty action only.

Blue Rider's fourth cause of action seeks declaratory relief on the following issues: whether the settlement agreement is subject to reformation for mistake or fraud; whether the loan purchase agreement was part of the overall settlement of the guaranty action; whether Blue Rider's execution of the purchase loan agreement effectively resurrected it before GCI renounced it by its acts; the effect of these transactions on the foreign and domestic rights in the picture; and whether the bridge loan remains outstanding.

4. *Blue Rider's Causes of Action Are Not Time-barred*

As discussed, the three-year statute of limitations contained in section 338, subdivision (d), governs "an action for relief on the ground of fraud or mistake," which accrues only upon "the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (See *Britton v. Girardi* (2015)

235 Cal.App.4th 721, 733-734.) Having read the contract, but not having appreciated its import, Blue Rider's causes of action for fraud, conspiracy to defraud and reformation of contract for mistake (see *North Star Reinsurance Corp. v. Superior Court* (1992) 10 Cal.App.4th 1815, 1823 [action for reformation of contract due to mistake subject to three-year statute of limitations under § 338, subd. (d)]), accrued no later than December 30, 2010, the date it signed the settlement agreement, nearly four years before the cross-complaint was filed. (See, e.g., *Alfaro v. Community Housing Improvement System & Planning Assn., Inc., supra,* 171 Cal.App.4th at p. 1396 [plaintiff deemed to have notice of misrepresentations about contents of deed when he signed it].) As a consequence, Blue Rider's fraud- and mistake-based causes of action, as well as its request for declaratory relief to the extent based on its claim of fraud and mistake (see *Snyder v. California Ins. Guarantee Assn.* (2014) 229 Cal.App.4th 1196, 1208 ["[t]he duration of the limitations period applicable to a declaratory relief action is determined by the nature of the underlying obligation sought to be adjudicated"], are barred unless the running of the statute was tolled in some manner.

a. *Blue Rider's causes of action against GCI relate back to the filing of the complaint*

Courts have long held that the time to file a cross-complaint deemed compulsory within the meaning of section 426.30 is tolled by the filing of the complaint in the action: "Although '[o]rdinarily the statute of limitations will bar a cross-complaint in the same fashion as if the defendant had brought an independent action,' the rule is different when 'the original complaint was filed before the statute of limitations on the cross-complaint had elapsed.' [Citation.] Such a cross-complaint need only be subject-matter

related to the plaintiff's complaint—i.e., arise out of the same occurrence (see §§ 426.10, 428.10)—to relate back to the date of filing the complaint for statute of limitation purposes." (*Sidney v. Superior Court* (1988) 198 Cal.App.3d 710, 714; accord, *Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 69-70.) The principle underlying the rule is that ""'the plaintiff has [by filing the complaint] thereby waived the [statute of limitations] claim and permitted the defendant to make all proper defenses to the cause of action pleaded.'"" (*Sidney,* at pp. 714-715, quoting *Trindade v. Superior Court* (1973) 29 Cal.App.3d 857, 859-860; accord, *Boyer,* at p. 70.)

After reviewing this caselaw and the statutory bases for cross-complaints, the court of appeal in *ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd.* (2016) 5 Cal.App.5th 69 (*ZF Micro Devices*) recently held this long-recognized tolling doctrine extends to permissive cross-complaints, that is, cross-complaints that are not logically related to the subject matter of the complaint. (*Id.* at p. 92.) We agree with the *ZF Micro Devices* analysis: Any defendant who cross-complains against the plaintiff who filed the original complaint is entitled to rely on the tolling doctrine recognized in *Sidney* and *Trinidade*.

While the complaint and second amended cross-complaint in this action arise from a logically related nexus of facts—the default on the bridge loan and Blue Rider's attempt to collect from Geringer and his related companies—it does not matter whether the second amended cross-complaint is labeled compulsory or permissive. Under *ZF Micro Devices* Blue Rider is entitled to the benefit of the tolling doctrine. Because GCI filed its complaint on December 18, 2013, less than three years from

the December 30, 2010 date Blue Rider signed the settlement agreement, Blue Rider's claims against GCI are timely.

b. *Blue Rider's claims against Geringer and Tricycle are timely under the alter ego doctrine*

"A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice." (*Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1358.) If the doctrine is properly pleaded, "the *alter* ego is bound by the procedural rules applicable to the instrumentality, when to hold otherwise would allow a perpetration of the very fraud or injustice the doctrine seeks to avoid." (*People v. Clauson* (1964) 231 Cal.App.2d 374, 380; accord, *Hennessey's Tavern*, at p. 1359.) This principle includes the alleged alter ego's asserted defense of the statute of limitations. (*Clauson*, at 380 ["[i]n the cases at bench this means that the statute of limitations applicable to the corporations is applicable to the individual owners"]; *Hennessey's Tavern*, at p. 1359 ["[i]t is established that an action may be brought against an alter ego defendant after the statute of limitations applicable to the cause of action alleged in the original complaint has expired," citing *Most Worshipful Sons v. Sons Etc. Lodge* (1958) 160 Cal.App.2d 560, 564-567].)

Although typically invoked to add an individual judgment debtor as the alter ego of the original defendant (see, e.g., *Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership*

(2013) 222 Cal.App.4th 811, 815 [alter ego doctrine is an equitable procedure based on theory court is not amending judgment to add new defendant but is "merely inserting the correct name of the real defendant"]; *NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778-779 ["'[s]uch a procedure is an appropriate and complete method by which to bind new individual defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit'"]), the alter ego doctrine has been interpreted to apply to corporate alter egos as well as individual alter egos. (See *NEC Electronics,* at p. 778 ["[j]udgments are often amended to add additional judgment debtors on the grounds that a person or entity is the alter ego of the original judgment debtor"]; *Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1029 [same]; *Most Worshipful Sons v. Sons Etc. Lodge*, *supra*, 160 Cal.App.2d at pp. 566-567 [affirming overruling of demurrer based on statute of limitations because building corporation was properly alleged to be alter ego of defendant lodge].)

In this case, Blue Rider has alleged generally that GCI, Geringer and Tricycle are each alter egos of the others. Based on the special allegations Blue Rider apparently believes it can prove Geringer is using the corporate entities to shield himself from liability. Geringer, therefore, is subject to the relation-back doctrine as GCI's alter ego. Although it is far from clear how Blue Rider can establish that Tricycle is also operating as GCI's (rather than Geringer's) alter ego, at this stage of the litigation it is proper to allow Blue Rider to include Tricycle as a cross-defendant based on the allegations the entities are related. (See *Greenspan*

v. LADT LLC (2010) 191 Cal.App.4th 486, 517 ["if before filing suit, the plaintiff reasonably believes that an alter ego relationship exists among various individuals and companies, the complaint should probably include alter ego allegations and name the alleged alter egos as defendants"]; cf. *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 365 [reversing judgment on demurrer; plaintiff should be allowed on remand to add specific allegations that trusts were alter egos of individual defendants].)

5. *Blue Rider Has Adequately Stated a Cause of Action for Fraudulent Misrepresentation*

The elements of a fraudulent misrepresentation claim are "'(1) the defendant represented to the 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 . . . ; (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.'" (*Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434, italics omitted; see *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 991.)

In support of its fraud claims Blue Rider alleges Geringer and his lawyer represented that the December 2010 settlement would resolve only the guaranty lawsuit while intending to draft the agreement to encompass the entirety of the bridge loan obligation. To effect the fraud, Geringer's counsel "substituted" terms in the settlement agreement, which, relying on previous discussions about the scope of the agreement, Blue Rider and its counsel missed when the document was reviewed and signed.

GCI contends these fraud causes of action fail on two grounds: 1) the asserted misrepresentations were not misrepresentations of any fact; and 2) Blue Rider's execution of the agreement precludes a finding of reasonable reliance as a matter of law.

Taking the allegations of the second amended cross-complaint as true, as we must, Geringer's purported misrepresentations concerning the scope of the settlement agreement are actionable misstatements of fact. Whether Blue Rider reasonably relied on those representations when it had the chance to review the document before signing it—and admittedly did so—presents a more difficult question.

"'"The general rule is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding."'" (*Jefferson v. Department of Youth Authority* (2002) 28 Cal.4th 299, 303.) However, when a person is induced to give his or her consent based upon intentional and material misrepresentations by the party seeking his or her agreement, the contract is voidable and may be rescinded at the request of the person whose agreement was fraudulently obtained. (*Ibid.*; see *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415 (*Rosenthal*); Civ. Code, § 1689, subd. (b).)

In *Rosenthal, supra,* 14 Cal.4th 394 the Supreme Court considered the enforceability of a predispute arbitration clause against Great Western Bank clients who decided to invest in securities sold by a bank-affiliated company housed in the bank's offices. The plaintiffs, who failed to read the agreements before signing them, claimed there had been fraud rendering the

agreements void and the arbitration clause ineffective. (*Id.* at p. 419.) Addressing the reasonableness of the plaintiffs' reliance on an agreement they admittedly had not read, the Court distinguished fraud in the execution, where the promisor does not know what he or she is signing or does not intend to enter into a contract at all, thus rendering the contract void, from fraud in the inducement, where the promisor knows what he or she is signing but his or her consent is induced by fraud, rendering the contract voidable. (*Id.* at p. 415.) Equitable relief in the form of rescission or reformation of a contract may be available "despite the defrauded party's failure to read the contract, [but] our law is clear that misrepresentation does not render the contract *void* unless the misled party, before making the agreement, lacked a reasonable opportunity to learn its terms." (*Id.* at p. 421; see also *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 233 ["[a]lthough the failure to read a contract precludes a claim of fraud in the execution, so as to render the contract completely void [citation], it does not necessarily preclude equitable relief from the contract terms based on a misrepresentation"].)

Pointing to its earlier decision in *California Trust Co. v. Cohn* (1932) 214 Cal. 619, which granted reformation of a contract despite the plaintiffs' failure to read it, *Rosenthal* explained, "'There has always been a sharp struggle in the courts between the desire to repress fraud upon the one hand, and on the other to discourage negligence and the opportunity and invitation to commit perjury.' [Citation.] We concluded that 'where the failure to familiarize one's self with the contents of a written contract prior to its execution is traceable solely to carelessness or negligence, *reformation* as a rule should be denied; but that where such failure, and perhaps negligence, is induced, as alleged and

admitted by the demurrer in this case, by the false representations and fraud of the other party to the contract that its provisions are different from those set out, the courts, even in the absence of a fiduciary or confidential relationship between the parties, *should reform, and in most cases have reformed*, the instrument so as to cause it to speak the true agreement of the parties.'" (*Rosenthal*, *supra,* 14 Cal.4th at p. 421, quoting *Cohn*, at p. 627.)[8]

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[8] Some years later, in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169 (*Riverisland*), the Court reaffirmed the necessity of providing relief for plaintiffs alleging fraudulent inducement of contract by disapproving *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, which had long ago established a rule limiting the ability of plaintiffs to introduce evidence of fraudulent statements directly at variance with the terms of an agreement. (See *Riverisland,* at p. 1172.) Tracing the doctrine through earlier cases and statutes, the Court concluded the *Pendergrass* rule "was plainly out of step with established California law" (*Riverisland,* at p. 1181) and the parol evidence rule "'was never intended . . . [to] be used as a shield to prevent the proof of fraud'" (*ibid.*). Describing its decision in *Rosenthal*, the *Riverisland* Court stated, "In *Rosenthal* . . . we considered whether parties could justifiably rely on misrepresentations when they did not read their contracts. We held that negligent failure to acquaint oneself with the contents of a written agreement precludes a finding that the contract is void for fraud in the execution. [Citation.] In that context, '[o]ne party's misrepresentations as to the nature or character of the writing do not negate the other party's apparent manifestation of assent, if the second party had "reasonable opportunity to know of the character or essential terms of the proposed contract." [Citation.]' [Citation.] [¶] We expressed no view in *Rosenthal* on the 'validity' and 'exact parameters' of a more

Thus, a negligent failure to read or understand the terms of an agreement does not necessarily bar relief. Reliance on a misrepresentation remains "'a question of fact for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion.'" (*Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 638; accord, *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'"].) "'Generally, "[a] plaintiff will be denied recovery only if his conduct is manifestly unreasonable in the light of his own intelligence or information. It must appear that he put faith in representations that were 'preposterous' or 'shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.' [Citation.] Even in [the] case of a mere negligent misrepresentation, a plaintiff is not barred unless his conduct, in the light of his own information and intelligence, is preposterous and irrational."'" (*Broberg v. The Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912, 921-922 (*Broberg*); accord, *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 865.)

When there is fraud in the inducement, as alleged here, the allegedly defrauded party is aware he is signing a contract, but

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lenient rule that has been applied when equitable relief is sought for fraud in the inducement of a contract. [Citations.] Here as well we need not explore the degree to which failure to read the contract affects the viability of a claim of fraud in the inducement." (*Riverisland*, at p. 1183, fn. 11.)

may not be aware of all of its terms. For instance, if the defrauding party attempts to induce a party to sign the contract by misrepresenting the terms it contains, or misrepresenting that it contains the terms the parties already agreed to, it may take more than a brief reading or review of the contract to discover the falsity of that representation. A jury may well decide, however, that Blue Rider's reliance on Geringer's purported misrepresentations concerning the scope of the settlement agreement and its apparent failure to understand the scope of the release as actually drafted were manifestly unreasonable. Because this case is only at the demurrer stage, we cannot agree that Blue Rider's claim of reasonable reliance must be rejected as a matter of law. (See *Broberg*, *supra*, 171 Cal.App.4th at p. 921; see generally *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 922 [in evaluating the sufficiency of a complaint, "'the question of plaintiff's ability to prove [her] allegations, or the possible difficulty in making such proof does not concern the reviewing court'"].)

6. *Blue Rider's Prayer for Damages Arising from Fraud May Require It To First Seek Equitable Relief in the Form of Rescission*

In *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913 (*Village Northridge*) the Supreme Court revisited the principles concerning relief for fraud in the inducement in the context of an insured's request for additional damages after it had entered a settlement agreement allegedly prompted by the insurer's misrepresentations of policy limits. In that case the plaintiff homeowners association had settled a disputed insurance claim with its insurer, executed a full and complete release of the claim, kept the money the insurer paid in the claim settlement without rescinding the release and

then sued the insurer for allegedly fraudulently inducing it to settle the claim for less than it was worth under the policy. (*Id.* at p. 917.) The Court held that, with certain limited and well-established exceptions,[9] "a release of a disputed claim, like the one here, does not permit a party to elect the remedy of a suit for damages when the release itself bars that option. Instead, the insured party to the release must follow the rules governing rescission of that release before suing the insurer for damages." (*Id.* at pp. 917-918, fn. omitted; see *Garcia v. California Truck Co.* (1920) 183 Cal. 767, 769; *Taylor v. Hopper* (1929) 207 Cal. 102, 103-105; see also Civ. Code, §§ 1691, 1693.)

Blue Rider has stated it does not seek to rescind the settlement agreement; nor has it offered to restore the $50,000 paid by Geringer. Blue Rider is instead asking for an award of damages of $250,000 and reformation of the contract to reflect its alleged intention in granting the release. Absent an applicable exception, Blue Rider must rescind the settlement agreement and offer to restore the $50,000 it received from Geringer before seeking damages on its fraud claim. On remand, Blue Rider is to be permitted leave to amend the second amended cross-complaint to allege, if it can in good faith, facts supporting its desired remedy of damages and justifying its delay in seeking rescission. (See *Village Northridge, supra,* 50 Cal.4th at pp. 926-929; *Saret-Cook v. Gilbert*, *Kelly, Crowley & Jennett* (1999) 74 Cal.App.4th 1211, 1226 [waiver of a right to rescind is presumed when a party, "having full knowledge of the circumstances which would

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[9] See *Village Northridge, supra,* 50 Cal.4th at pages 923-926 (discussing cases); *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1155-1156; *Sime v. Malouf* (1949) 95 Cal.App.2d 82, 112-113.

warrant" rescission, "accepts and retains benefits" under the contract].)

DISPOSITION

The judgment against GCI and in favor of Blue Rider on GCI's complaint is affirmed. The judgment dismissing Blue Rider's cross-complaint is reversed, and the cause remanded for further proceedings consistent with this opinion. Blue Rider is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

BENSINGER, J.*

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