Filed 2/4/13 Dumas v. Nishida CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOSE DUMAS et al., Plaintiffs and Appellants, v. GARY NISHIDA, Defendant and Respondent.	B234970 (Los Angeles County Super. Ct. No. BC419171)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Judgment is affirmed; order is reversed and remanded.

John Clark Brown, Jr., for Plaintiffs and Appellants.

Henry M. Lee, Law Corporation, Henry M. Lee and Michelle P. Tran for Defendant and Respondent.

Plaintiff and appellant Jose Dumas agreed to sell a piece of agricultural property to defendant and respondent Gary Nishida. As part of the transaction, Nishida signed a note in favor of Dumas for $600,000, secured, in part, by a deed of trust on Nishida's home. When Nishida defaulted on the note, Dumas foreclosed on the deed of trust, obtaining Nishida's home with a credit bid. Dumas also brought suit against Nishida for the deficiency, as well as an additional amount which, allegedly, should have been paid to Dumas by the escrow holder for the original transaction, but was not. The trial court granted judgment on the pleadings in favor of Nishida without leave to amend Dumas's breach of contract cause of action, and denied Dumas's subsequent written motion for leave to amend the complaint to allege a cause of action for unjust enrichment. The trial court also imposed sanctions against Dumas's counsel, Attorney John Clark Brown, Jr., for bringing a frivolous motion for leave to amend the complaint. Dumas appeals the judgment and Attorney Brown appeals the award of sanctions. We affirm the judgment, reverse the sanctions order, and remand for further proceedings on the motion for sanctions.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying Transaction*[1]

Dumas owned a piece of property in Temecula (the Temecula property) which he listed for sale for $1.4 million. A man named Anthony Wells offered to purchase the property for $1.4 million; however, Wells offered a sale price "on paper" of $1.1 million, with an additional $300,000 to be paid within one year of closing.[2] At some point, however, Wells could not obtain financing, so Nishida, his business associate, became the buyer in his place.[3]

It was also agreed that Dumas would loan Wells and/or Nishida an additional $300,000. The reason for this loan was initially disputed by the parties' pleadings, but the parties ultimately both characterized the loan as one for unrelated business

---

[1] As this case was resolved on a motion for judgment on the pleadings and a motion for leave to amend, there was limited evidence before the trial court. However, at a subsequent hearing, resulting in a default judgment against another party, Dumas submitted numerous exhibits, the authenticity of which (with one exception) is not disputed. We rely on those exhibits, in part, in our discussion of the underlying transaction, as they provide some explanation for the parties' conduct. However, documents which were not before the trial court when it considered the motions at issue in this appeal will play no part in our analysis of the trial court's rulings on those motions.

[2] In Nishida's motion for judgment on the pleadings, he suggests that, after Wells initially agreed to purchase the property for $1.4 million, the property was appraised at only $1.1 million, resulting in the change in the terms of the agreement.

[3] According to Dumas's complaint, and Nishida's cross-complaint, *Wells* agreed to the price of $1.1 million plus $300,000 as a side agreement, before Nishida became the buyer. According to Nishida's motion for judgment on the pleadings, however, Nishida became the buyer *before* the appraisal came in at $1.1 million, resulting in the modification of the purchase agreement.

purposes.[4] The initial $300,000 (additional consideration) and the second $300,000 (unrelated business loan) were to result in a $600,000 note from Nishida to Dumas, secured by both a second deed of trust on the Temecula property and a second deed of trust on Nishida's personal residence in Huntington Beach.

The escrow was handled by Premiere Capital Escrow (Premiere). Escrow instructions were signed on August 29, 2007, providing for consideration of $1.1 million,[5] comprised of: (1) an initial cash deposit by Nishida of $25,000; (2) an additional $250,000 in cash by Nishida; and (3) a loan secured by a new first trust deed (on the Temecula property) in the amount of $825,000. In actuality, Nishida ultimately submitted a total of $270,000 in cash, resulting in a $5,000 reduction in consideration paid which the parties failed to notice.[6] The parties' transaction also included, outside

---

[4] Dumas's complaint originally alleged that, once escrow was opened, "Wells informed [Dumas] that [Dumas] would have to loan Wells *the extra $300,000 needed to close*." (Italics added.) In Nishida's cross-complaint, however, he alleged that the additional $300,000 was loaned to Nishida and Wells "for unrelated business matters." Dumas ultimately accepted Nishida's characterization of the additional $300,000 as an unrelated business loan. The difference is not relevant to our resolution of the appeal.

[5] While the escrow instructions indicate a total consideration of $1.1 million and the parties agree that the additional $300,000 of consideration was to be paid outside of escrow, we note that the final paragraph of the escrow instructions actually contemplates a total consideration of $1.4 million. The paragraph states, in pertinent part: "SELLER(S) ONLY: The foregoing terms, provisions, conditions, and instructions, and those 'General Provisions' contained herein are hereby approved and accepted in their entirety and concurred in by me. I will hand you necessary documents called for on my part to cause title to be shown as above which you are authorized to deliver when you hold for my account the sum of $1,400,000.00 within the time as above provided . . . ." The parties do not address the effect of this language.

[6] The final settlement statement indicates total consideration of $1.1 million, comprised of three deposits from Nishida, in the amounts of $170,000; $85,000; and

of escrow, an agreement that: (1) Nishida would pay an additional $300,000 consideration for the property; (2) Dumas would immediately loan Nishida and Wells $300,000 in an unrelated business loan;[7] and (3) both of those obligations would be memorialized in a $600,000 note from Nishida in favor of Dumas, secured by second deeds of trust on the Temecula property and Nishida's residence.

We take a moment to simplify the transaction. While the parties made certain agreements outside of escrow, the ultimate effect of their agreements was the following: Dumas would sell the property to Nishida for a total consideration of $1.4 million, comprised of a $825,000 loan from Countrywide secured by a first trust deed on the Temecula property, with the remaining $575,000 to be seller-financed, secured by second trust deeds on the Temecula property and Nishida's house[8] (although the note in favor of Dumas was for $600,000, and included an additional $25,000 loan).

In any event, although the $600,000 loan was to be outside of escrow, the escrow holder was, in fact, instructed to perform certain tasks related to it. The $600,000 note

---

$15,000, and a "New 1st Trust Deed" from Countrywide Financial in the amount of $825,000. The total is only $1,095,000.

[7] As Nishida was to deposit $270,000 cash into escrow and Dumas was to immediately loan Nishida and Wells $300,000, it is easy to see why Dumas initially characterized the loan as "the extra $300,000 needed to close." (See fn. 4, *ante*.)

[8] We express no opinion on the issue of *why* the parties may have chosen to arrange their transaction in the matter in which they did, rather than this more simplified manner. Nishida argued that Dumas was barred from recovery due to unclean hands, in that the transaction was arranged as it was in order to commit fraud on Countrywide. As Nishida was the party who actually obtained the loan from Countrywide, we question whether Nishida's hands would be as dirty as Dumas's, if the transaction was, in fact, arranged to commit fraud on Countrywide.

itself, which was drafted by Dumas,[9] had the escrow number at Premiere written on it. Moreover, Nishida and Dumas executed two amendments to the escrow instructions relating to the transaction which was purportedly outside of escrow: (1) an instruction providing that a deed of trust on Nishida's home would provide collateral security for the note, and would be recorded by the escrow holder immediately following the close of escrow; and (2) an instruction directing the escrow holder to obtain title insurance on the Temecula property and Nishida's home in connection with the $600,000 note.[10]

It is not clear, however, if the $300,000 business loan from Dumas was to be made through escrow, with the escrow holder simply giving Nishida $300,000 at closing, or, alternatively, if Dumas was to fund the loan outside of escrow after escrow had closed. There is some evidence suggesting each scenario. As we shall discuss, however, certain conduct and admissions of the parties render the issue irrelevant to the resolution of this appeal.

---

[9] Dumas subsequently testified that he drafted the note.

[10] The record on appeal does not contain any further instruction relating to the note itself, and Dumas testified, at a later hearing, that he signed no other instructions which mentioned the $600,000 note and the deeds of trust. However, there is some indication that an additional instruction pertaining to the note existed. The note was dated November 20, 2007. Both of the instructions referenced above, relating to the security for the note, *expressly referred to* an amendment to the escrow instructions dated November 20, 2007. Indeed, the second such instruction begins, "In connection with amendments to instructions dated November 20, 2007 and December 3, 2007 [the first identified instruction], in regards to the Second Note secured by Deed of Trust and Deed of Trust thereto and the Collateral Security Deed of Trust covering [Nishida's house] . . . . " This language strongly suggests the existence of an instruction on November 20, 2007, pertaining to the note of the same date.

This much is clear: Prior to sale, the Temecula property had over $270,000 obligations on it which were to be paid off through escrow. Dumas was also responsible for all closing costs,[11] which amounted to some $20,000.[12] Thus, nearly $300,000 of the proceeds of the escrow would be used to pay off the existing notes on the Temecula property and the closing costs. Of the remaining sum of approximately $800,000, $300,000 would ultimately be placed in the hands of Nishida and Wells as a business loan, and $500,000 would be Dumas's net on the transaction.

The money was not disbursed in this manner. For reasons which remain unclear, the escrow officer believed that Nishida was to be credited $500,000.[13] Moreover, Premiere had received an amended escrow instruction, allegedly signed by Nishida –

---

[11] Nishida was responsible for the costs of the title insurance relating to the second deeds of trust on the Temecula property and his home.

[12] Dumas's closing costs were approximately $6000. The closing statement indicates that Nishida received a credit for his closing costs in the amount of $13,724.56. Our review of the final settlement statement indicates that Nishida's closing costs, less the $3000 for "New Escrows for 2NDs," which appears to be a charge Nishida agreed to pay, were only $8,722.40. While it is impossible to determine the source of the remaining $2.16, it appears that the additional $5000 credited to Nishida made up for the difference between the $1,095,000 deposited into escrow and the $1,100,000 purchase price. (See fn. 6, *ante*.)

[13] The seller's final settlement statement says, of the $500,000 credit, "PER INSTRUCTIONS, $600,000 TO SELLER." The escrow instructions provided to this court, and the trial court, do not provide for any such credit. As the line item references "$600,000 TO SELLER," the inference is that the escrow officer believed this $500,000 credit was in some way related to the $600,000 note in favor of Dumas. However, there is no explanation for why the amount was $500,000, rather than $300,000 (the amount of the business loan to be made to Nishida and Wells) or $600,000 (the entire amount of the note). Indeed, Dumas's expert witness on the issue of escrows ultimately testified, "I don't know where the 500 came from. I think it should have been six, but there's no authorization to deduct any funds whatsoever from the seller."

which Nishida denied – stating that the funds due Nishida at the close of escrow were to be wired to an entity named World Enterprise Investments, LLC. According to Dumas, the agent for service of process for World Enterprise is Wei Houng. Moreover, according to Dumas, Houng was the loan officer at Countrywide who arranged the loan for Nishida to purchase the Temecula property from Dumas. Thus, at the close of escrow, Premiere wired what it believed to be all of the funds due Nishida – an amount in excess of $474,000 – to World Enterprise, where it was, presumably, placed in the hands of Houng. In short, of the approximately $800,000 proceeds of the escrow, of which Nishida and Wells were to ultimately receive $300,000 and Dumas was to ultimately receive $500,000, Houng received approximately $500,000 and Dumas received approximately $300,000.

As we noted above, it is not clear whether the $300,000 business loan was to be paid Nishida and Wells *through* escrow or by Dumas *after* escrow. Dumas took the position that the $300,000 was to be paid Nishida and Wells *after* escrow and that *he did not ever make the loan* because Houng walked off with the lion's share of the proceeds. In other words, Dumas argues that he was entitled to the entire $800,000 escrow proceeds, from which he would have funded the $300,000 business loan. Thus, Dumas takes the position that the entirety of the $500,000 paid to Houng should have been paid to him. However, at other times, Dumas assumes that $300,000 of the $500,000 paid to Houng did, in fact, constitute the business loan to Nishida and Wells. We emphasize these two different positions as they will ultimately be relevant to our disposition of the appeal.

One further event occurred on which Dumas placed substantial reliance. It appears that Nishida did, in fact, receive $160,000 toward the business loan, presumably from Houng.[14] Nishida filed a declaration in which he stated, "the only money that I ever received from Mr. Dumas was $160,000[15] which was part of the $300,000 business loan that was supposed to be given to me and . . . Wells." As Dumas states that he did not fund the loan directly, Dumas infers that this $160,000 was transferred to Nishida from Houng.

Nishida and Wells did not repay the $600,000 note to Nishida. Apparently, they defaulted on the Countrywide mortgage as well.

2. *The Complaint*

On August 4, 2009, Dumas brought the instant action against Nishida, Wells, Premiere, Houng, and Countrywide.[16] As against Nishida, Dumas alleged causes of action for fraud and breach of contract. Alleging that all of the defendants worked together to defraud him, Dumas alleged that Nishida and Wells never intended to perform the " 'side deals' " outside of escrow. He sought recovery of the $300,000 reduction in purchase price plus the $500,000 paid out of escrow to Houng.

---

[14] There is no evidence in the record as to how Nishida obtained $160,000 of the funds he argues were forwarded to Houng pursuant to an escrow instruction which he asserts was a forgery.

[15] Nishida's declaration stated that the amount he received was $160,000. However, the motion to which it was attached repeatedly states that Nishida received only $120,000. The parties do not discuss this disparity.

[16] The complaint was not drafted by Attorney Brown, who substituted in the action at a later date. In his brief on appeal, Attorney Brown argues that prior counsel poorly drafted the complaint.

3. *The Foreclosure and Cross-Complaint*

Prior to filing the complaint, Dumas recorded a notice of default on Nishida's residence. He commenced foreclosure proceedings. On October 6, 2009, Nishida filed a cross-complaint against Dumas for wrongful foreclosure, fraud, and quiet title. Nishida alleged that he and Wells never received the promised $300,000 business loan. As such, he sought to enjoin the foreclosure.

It appears that a preliminary injunction was issued staying the foreclosure. That document is not in the record on appeal. However, in later discussing the injunction, Attorney Brown, on behalf of Dumas, represented that the preliminary injunction was granted based on "Nishida's claim that he never received the $300,000 for the business loan, hence, there was no consideration for the second deed of trust on his house and Dumas should not be allowed to foreclose." The injunction was ultimately set aside, however, as Nishida lacked the funds to obtain the required injunction bond, and his application to set aside the injunction bond requirement was denied. Thus, on March 3, 2010, Dumas purchased Nishida's home at a nonjudicial foreclosure sale, with a credit bid of $495,000.

Countrywide foreclosed on the Temecula property. Dumas's deed of trust was junior to Countrywide's, and he recovered nothing.

4. *The Motion for Judgment on the Pleadings*

Because Dumas had conducted a nonjudicial foreclosure on Nishida's home, in connection with the $600,000 note, the issue arose as to whether Dumas's current complaint was barred in whole or in part by the anti-deficiency statutes and the one

form of action rule. (Code Civ. Proc., §§ 580b, 580d, & 726.) In light of these statutes, Dumas changed his position. While, in his complaint, he had sought recovery of the $300,000 *additional consideration* plus the $500,000 paid out of escrow to Houng; in his trial brief, he argued that he was entitled to recover the $300,000 *business loan* plus the $500,000 paid out of escrow to Houng.[17] What Dumas failed to realize is that while the half of the $600,000 note which constituted additional consideration for the purchase of the Temecula property was unrelated to the $500,000 paid out of escrow to Houng, the half of the $600,000 note which constituted a business loan in favor of Nishida and Wells *was funded by* part of the $500,000 paid out of escrow to Houng. Putting it another way, Dumas could not recover the $300,000 business loan unless he had, in fact, funded that loan with $300,000 of the $500,000 paid to Houng. Thus, in seeking both the $300,000 business loan and the $500,000 paid to Houng, Dumas sought to recover the same $300,000 twice.

Moreover, he could not recover it even once. The anti-deficiency statute of Code of Civil Procedure section 580d barred a deficiency judgment for the $300,000 business loan.[18]

---

[17] Dumas conceded that the anti-deficiency law of Code of Civil Procedure section 580b prevented him from recovering the $300,000 additional consideration, as this was purchase money.

[18] On appeal, Dumas "waives his claim to the $300,000 Business Loan." This is indisputably correct. Before the trial court, Dumas took the position that the anti-deficiency statute did not prevent him from obtaining a deficiency judgment on the $300,000 business loan because, although he had nonjudicially foreclosed on one piece of property securing the loan (Nishida's house), he was a sold-out junior lienholder with respect to the other piece of property securing the loan (Temecula property). *In re*

After a lengthy hearing, the trial court granted judgment on the pleadings with respect to Dumas's breach of contract cause of action. The court concluded that, to the extent Dumas sought recovery for the $300,000 business loan, his claim was barred by the anti-deficiency statute. The court also concluded that, to the extent Dumas sought recovery for the $500,000 paid from escrow to Houng, Dumas's breach of contract claim was against Premiere, for violating the escrow instructions, not against Nishida. However, the court did not grant judgment on the pleadings on Dumas's cause of action for fraud.

5. *Oral Motion for Leave to Amend*

After the trial court announced its ruling, Dumas made an oral motion for leave to amend the complaint, arguing that he could amend the complaint to clearly allege "that the $500,000 obligation was not a secured obligation, that Dumas was entitled to get that money out of escrow, and that was consideration that he was entitled to receive which had nothing to do with the $600,000 note." Dumas argued that he did not receive the $500,000 "due to the participation of all the defendants in a breach of contract scheme whereby the $500,000 was improperly disbursed from escrow." The trial court denied the motion stating, "The breach of contract is on the note. You seem to be stating a different claim. Perhaps you're restating your fraud claim, which still exists."

Marriage of Oropallo (1998) 68 Cal.App.4th 997 held that, while a sold-out junior trust deed holder is not generally precluded from suing on the obligation, the sold-out junior trust deed holder is precluded from seeking a deficiency judgment on the obligation once it has chosen to nonjudicially foreclose on any other real property securing the debt. (*Id*. at pp. 1005-1007.)

6. *Written Motion for Leave to Amend*

Two weeks later, on February 28, 2011, Dumas filed a written motion for leave to amend his complaint. He no longer sought to pursue a breach of contract claim;[19] instead, he sought to amend his complaint to allege a cause of action for restitution/unjust enrichment[20] against Nishida for the $160,000 Nishida admitted receiving from the escrow. We note that when Nishida admitted receiving the $160,000, he admitted receiving "$160,000 which was part of the $300,000 business loan that was supposed to be given to me and . . . Wells." Nishida could not possibly have been unjustly enriched by receiving loan proceeds to which he was entitled.[21] Thus, in order for Dumas's cause of action to be viable, he had to allege that the $160,000 which Nishida admitted receiving as part of the business loan was not, in fact, part of the business loan.

Dumas alleged in his proposed first amended complaint that, at the time Nishida executed the note and deeds of trust, he did so as a personal favor to Wells and "did not expect to receive any of the proceeds from the Note; he did not know who would receive the proceeds from the Note, and he did not even know what the Note and Deeds

---

[19] The proposed first amended complaint restated all of the allegations of the initial complaint. Attorney Brown indicated, however, that he was not attempting to revive the breach of contract cause of action; he simply restated all of the original allegations for clarity.

[20] The cause of action was entitled "Restitution." However, after Nishida opposed the motion on the basis that there is no cause of action for restitution, Dumas argued that the cause of action was, in fact, for unjust enrichment.

[21] This is particularly true as Dumas had foreclosed on Nishida's house for not repaying the loan.

of Trust were for." Dumas also alleged that Wells (not Nishida) subsequently admitted the $300,000 loan was fully funded. As such, Dumas alleged that, of the $474,000 which Premiere mistakenly distributed to Huong, $300,000 properly funded the loan to Wells, and the $160,000 which Nishida admitted receiving constituted unjust enrichment, as Nishida had not expected to receive any funds.

In support of his motion for leave to amend the complaint, Dumas relied on several exhibits[22] and a declaration from Attorney Brown. Attorney Brown's declaration indicated that the allegations of the new cause of action were based on the deposition of Nishida, which he took on November 22, 2010,[23] and a February 21, 2011 interview with the escrow officer. He did not support the motion for leave to amend with excerpts from Nishida's deposition or a declaration from the escrow officer. Instead, he simply summarized what he believed Nishida and the escrow officer had told him.

---

[22] One of the documents on which he relied was a letter from Wells which purportedly established that Wells admitted the loan was fully funded. The subject matter of the letter was Wells's plan to refinance the loan from another source and pay off the $600,000 note to Dumas. The letter stated, "There is approximately $193,000.00 still owed. This will be correctly calculated. I agreed to give you a side note for this figure by myself not [Nishida]. This was a handshake deal between you and I that we agreed to in the beginning of the purchase[] of your property." The letter is ambiguous at best. The statement that there is $193,000 "still owed" may refer to Wells's belief that Nishida has not yet funded $193,000 of the note, Wells's belief that all but $193,000 of the note had been repaid, or a different obligation entirely which did not involve Nishida.

[23] Attorney Brown's declaration first states that the deposition was taken on February 22, 2011. It then states that the deposition was taken on November 22, 2010. The memorandum of points and authorities uses only the November date, which it mentions twice.

After the motion was fully briefed, the trial court denied leave to amend the complaint. The trial court concluded that the cause of action for return of the $160,000 was included in the earlier breach of contract cause of action (which sought return of the entire $500,000). As such, the court viewed the motion for leave to amend as an improper motion for reconsideration. Moreover, the court concluded that the untimely amendment would cause a delay in trial and would prejudice Nishida.

7. *Intervening Procedural Events*

Nishida next filed a motion for sanctions against Dumas and Attorney Brown, under Code of Civil Procedure section 128.7, on the basis that the motion for leave to amend was frivolous and lacked evidentiary support. However, before the motion for sanctions was heard, several events took place.

First, Dumas dismissed with prejudice his fraud cause of action against Nishida.[24] Second, Nishida dismissed his cross-complaint against Dumas, without prejudice.

Third, Dumas had previously taken the default of Premiere, and now proceeded to a default prove-up hearing. After hearing testimony from Dumas's escrow expert and Dumas himself, the trial court entered default judgment against Premiere in the amount of $500,000, plus prejudgment interest.[25]

---

[24] In the course of arguing the motion for leave to amend the complaint to allege unjust enrichment, Attorney Brown argued that the proposed cause of action was "based upon the admission by the escrow officer that she disbursed this $474,000 by mistake. I didn't know about that until I was finally able to find her and interview her . . . . "

[25] The propriety of this judgment is not before us.

In the course of the default prove-up hearing, Dumas testified as follows: (1) After Wells agreed to purchase the property, Wells asked Dumas for "an additional 300,000 for his business," to which Dumas agreed; (2) Nishida was Wells's business partner in an import/export business; it was that business which was to receive the benefit of the loan; (3) Dumas intended to fund the business loan with the proceeds of the escrow; the business loan was not to be directly funded; (4) Dumas believes that he did not "really fund[]" the business loan; (5) When Dumas did not receive the expected amount from escrow, he questioned the escrow officer, who told him that all of her instructions had come from Houng; (6) Dumas also spoke to Wells about not having received the correct proceeds; Wells told Dumas that he was certain it was a mistake and that he (Wells) would take care of it; and (7) Wells never asserted that he and Nishida did not owe Dumas the $600,000.

After Dumas testified that Wells never denied the debt, the trial court stated, "I don't know that you've gotten testimony that that money was actually handed over." Attorney Brown responded, "Never was." The trial court asked if there would be testimony regarding how the transaction "ended up." Attorney Brown responded that Dumas could not testify to that, "but I think it's pretty clear what happened." The trial court indicated that Attorney Brown could explain in argument. Subsequently, in argument, Attorney Brown stated that "the $300,000 business loan we know was funded

and that was instead of Dumas funding it from proceeds that he was to receive from close of escrow, it was funded by escrow when it wired $474,000 to [Houng]."[26]

8. *The Sanctions Motion*

Nishida's motion for sanctions had argued that sanctions were appropriate because Dumas's written motion for leave to amend was legally untenable and lacked evidentiary support. In opposition to Nishida's motion for sanctions, Dumas and Attorney Brown argued that sanctions should be denied on the basis that the evidence at the default prove-up hearing retroactively established that Dumas did, indeed, have valid causes of action for breach of contract and unjust enrichment against Nishida.[27] The opposition did not specifically argue, as the proposed amended complaint had alleged, that the $160,000 admittedly received by Nishida was an improper payment over and above the $300,000 business loan. Instead, the opposition argued that the testimony at the default prove-up hearing "*establish[ed] the funds which Escrow wired to [Houng]* from which Nishida admits he received $160,000, were not proceeds of the $600,000 Note, and were not secured by the Second Deeds of Trust, which secured that Note." (Emphasis added.) This was argued despite the fact Attorney Brown had

---

[26] Attorney Brown also represented that Nishida's declaration stated, " 'I received $160,000 from escrow.' " This is incorrect. Nishida's declaration states he received "$160,000 which was part of the $300,000 business loan"; he does not state a source of the funds.

[27] Dumas requested that the court, on its own motion, reconsider its orders denying leave to amend. Dumas also sought sanctions against Nishida and his counsel for a purportedly frivolous motion for sanctions.

expressly argued to the court that "the $300,000 business loan . . . was funded by escrow when it wired $474,000 to [Houng]."

The motion was supported by a declaration from Attorney Brown setting forth his purported factual basis for filing the motion for leave to amend. The declaration again contained his summaries of what the escrow agent and Nishida had allegedly told him, with no attached declarations or deposition excerpts. Moreover, it contained his summary of the testimony at the default prove-up hearing, with no attached transcript.

Nishida filed a reply in support of the sanctions motion. Nishida also filed objections to Attorney Brown's declaration. While numerous objections were filed, Nishida specifically asserted that the great bulk of the declaration constituted hearsay.

A hearing was held on the sanctions motion.[28] The court sustained the objections to Attorney Brown's declaration. The court indicated a tentative belief that sanctions were appropriate on the basis that Attorney Brown's written motion for leave to amend was an improper third attempt to state a cause of action which the court had twice ruled was barred by the anti-deficiency statutes. Attorney Brown argued that the evidence showed, and proposed first amendment complaint alleged, "that the $160,000 which Nishida received had nothing to do with a mortgage loan. It had nothing to do with

---

[28] In fact, there were two hearings. In his brief on appeal, Attorney Brown argues that the court gave him five minutes to argue and "cut[] off [his] argument." In fact, the court ended the hearing as it was the end of the day, but set a new date to allow Attorney Brown to finish his argument. In his brief on appeal, Attorney Brown argues that the trial court's act of cutting off his argument was evidence of the court's "hostility" to him and that the trial court's hostility "influenced the erroneous rulings it made in this case." Having reviewed the record in its entirety, we see no evidence of hostility. Moreover, in several instances, such as this one, Attorney Brown's discussion of the record is misleading.

a secured transaction." The trial court replied, "Of course it did." The trial court awarded Nishida $3,990 in sanctions.[29] At the request of Attorney Brown, sanctions were awarded against Attorney Brown only, rather than against Attorney Brown and Dumas.

9. *Judgment and Appeal*

Judgment was entered in favor of Nishida on June 8, 2011. Dumas and Attorney Brown filed a timely notice of appeal, from the judgment and sanctions order respectively.

CONTENTIONS ON APPEAL

On appeal, Dumas does not challenge the trial court's initial grant of judgment on the pleadings with respect to his breach of contract cause of action, on the basis of the anti-deficiency rule. Instead, Dumas argues that the trial court erred in denying: (1) his oral motion for leave to amend to restate his cause of action for breach of contract; and (2) his written motion for leave to amend to state a cause of action for unjust enrichment. Attorney Brown argues the trial court erred in awarding sanctions against him.

DISCUSSION

1. *Controlling Legal Principles*

Before we discuss the specific claims of error in this case, it is helpful to discuss the legal principles which will guide our analysis, and apply them to the facts in this

---

[29] The reporter's transcript indicates a sanctions award of $3,900. The notice of ruling indicates an award of $3,990. The parties do not argue this discrepancy.

case. We first discuss the relevant anti-deficiency statute; second, we turn to law governing which party is to bear the burden of an escrow-holder's error.

a. *Anti-Deficiency Statute*

We are concerned with Code of Civil Procedure section 580d, which provides, in pertinent part, that "[n]o judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property . . . hereinafter executed[[30]] in any case in which the real property . . . has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust." In other words, the statute prohibits a creditor from obtaining a deficiency judgment when the creditor has chosen to nonjudicially foreclose on real property securing the obligation. "The principal purpose of the anti-deficiency statutes [citations] is to discourage land sales which are unsound because the land is overvalued and, in the event of a depression in land values, to prevent the aggravation of the downturn that would result if defaulting purchasers not only lost the land but were also burdened with personal liability." (*Nevin v. Salk* (1975) 45 Cal.App.3d 331, 341.)

The anti-deficiency statute applies only to secured obligations. Parties to a contract may specifically "fractionalize" the total amount due into an obligation secured by an interest in real property and an unsecured obligation. If that occurs, a nonjudicial foreclosure on the security will not prevent a suit on the unsecured obligation. This can be done, however, only if the parties are clear about which

---

30 The statute dates to 1940.

obligation is represented by which note. (*Nevin v. Salk*, *supra*, 45 Cal.App.3d at pp. 341-342.)

In this case, it is undisputed that Dumas nonjudicially foreclosed his deed of trust on Nishida's house. It is also undisputed that this deed of trust provided security for Nishida's $600,000 note to Dumas. It is therefore clear that Dumas is barred from recovering any further judgment on the $600,000 note. It is also clear that Dumas is not barred from recovering on any other contractual obligation owed to him by Nishida.

We turn to the $600,000 note. It is undisputed that the consideration for the note was comprised of $300,000 attributable to the increased purchase price for the Temecula property, and another $300,000 attributable to the business loan Dumas agreed to make to Nishida and Wells. This case turns on the latter $300,000, for the business loan, and is made somewhat more confusing by Dumas's occasional assertions that he never funded the business loan at all. Let us be clear: if the business loan was unfunded, Dumas wrongfully foreclosed on Nishida's house. In order for there to have been consideration for the business loan, the loan must have been funded, as Attorney Brown expressly argued to the trial court, by part of the $474,000 which was paid to Houng out of escrow. As such, Dumas is barred from arguing that Nishida must repay him $300,000 of the $474,000. That $300,000 was the business loan to Nishida and Wells, which was secured by a deed of trust on Nishida's house. The anti-deficiency statute thus prevents Dumas from recovering *any* of that $300,000 from Nishida.

b. *Escrow Holder's Error*

"As a general rule, a loss resulting from the default, peculation, or similar wrong of an escrow holder, must, as between the parties to the escrow transaction, be borne by the one who, at the time of its occurrence, was lawfully entitled to the escrowed item irrespective of which party selected the escrow agent." (28 Am.Jur.2d [2000] Escrow, § 31, fns. omitted.) If, however, "the act or negligence of one of the parties is the basic cause of the loss, or is a factor without which the loss would not have happened," the situation is governed by the rule that, "[w]here one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." (*Majors v. Butler* (1950) 99 Cal.App.2d 370, 374; Civ. Code, § 3543.)

In this case, it was alleged and argued that Premiere breached its duties as escrow holder by crediting Nishida with $500,000 when neither Nishida nor Dumas instructed Premiere to do so.[31] Assuming that the escrow holder did, in fact, breach its duties by doing so, the general rule provides that the party who was entitled to the funds at the time of the breach must bear the loss. There is no dispute that the escrow was fully

---

[31] In his brief on appeal, Dumas argues that the escrow instruction to wire Nishida's proceeds to Houng "was ineffective because Dumas did not sign [it]." While this may be so, it is of no concern to Dumas. As far as Dumas is concerned, Nishida could direct escrow to forward his proceeds to anyone; Dumas has no say in the matter. From Dumas's position, the problem did not arise because the escrow holder improperly believed it was to wire Nishida's proceeds to Houng; the problem arose because the escrow holder improperly believed Nishida was entitled to funds to which he was not, in fact, entitled.

funded by Nishida.[32] Thus, the loss occurred when escrow had closed and Premiere was obligated to direct the proceeds to the parties. Dumas takes the position that the entirety of the $474,000 was to be paid to him. If this is so, under the general rule, he must bear the loss of the entire sum. However, as we have discussed above, we must conclude that, even if the parties had not actually intended for the $300,000 business loan to be funded out of escrow, this was, in fact, what occurred. Thus, we conclude that, of the $474,000 which Premiere wired to Houng, Premiere should have disbursed $300,000 to Nishida or his assignee, and should have disbursed the remaining $174,000 to Dumas. As such, if the money did not reach its intended destination, each party would bear the burden of its portion of the loss. Specifically, Dumas bears the burden that the $174,000 which should have been disbursed to him was, in fact, wrongly wired by Premiere to Houng.

The above discussion assumes the general rule applies. If Dumas could and did allege that Nishida's negligence was, in fact, the cause of Premiere's misdirection of funds, Dumas could assert a claim for the $174,000 against Nishida.

2. *Oral Motion to Amend the Complaint*

A motion for judgment on the pleadings may be made on the ground, as for a general demurrer, that the pleading at issue fails to state facts sufficient to constitute a legally cognizable claim or defense. (*Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 411-412; *Sofias v. Bank of America* (1985)

---

[32] As noted above, the escrow was underfunded by $5000, but Dumas makes no argument regarding this.

172 Cal.App.3d 583, 586; Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) Our review is guided by the same rules governing the review of the sustaining of a general demurrer. "When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

When the trial court granted judgment on the pleadings with respect to Dumas's cause of action for breach of contract, Dumas orally moved for leave to amend his complaint to specifically allege a cause of action for breach of contract against Nishida for the $500,000 (or $474,000) which was paid out of escrow. Specifically, Dumas argued that the $500,000 obligation "was consideration that he was entitled to receive which had nothing to do with the $600,000 note."[33]

To the extent that Dumas argues that the $500,000 had nothing to do with the $600,000 note, he is simply mistaken. As we have explained above, $300,000 of that $500,000 constituted the business loan, and Dumas has no right to seek recovery of those funds after he nonjudicially foreclosed on the security for that loan. As Dumas fails to recognize this fact, he makes no argument that he could proceed on a breach of

---

[33] Dumas again pursues this argument on appeal, stating, "Dumas never funded the $300,000 [loan] because he never received the [$800,000] from the Escrow."

contract claim against Nishida for the allegedly improper distribution of the remaining $200,000 (which was, in actuality, $174,000).

Moreover, Dumas faces an additional problem: Nishida had no contractual duty to pay him these additional funds.[34] Nishida's obligation was to fund the escrow; this obligation was satisfied.[35] It was Premiere which was contractually obligated to distribute the escrow proceeds to Dumas; it was Premiere which should be liable for breaching this contract. Dumas briefly argues that Nishida is liable for Premiere's breach of contract because Nishida conspired to have Premiere commit the breach. But Dumas ultimately dismissed his fraud cause of action because Attorney Brown's interview with the escrow officer convinced him that she disbursed the funds by mistake. In short, if anyone breached a contract with Dumas, it was Premiere. There is no basis on which Dumas could state a cause of action against Nishida for Premiere's breach of contract. The trial court therefore did not err in denying the oral motion to amend.

3. *Written Motion to Amend the Complaint*

Code of Civil Procedure section 473 provides the trial court may, "in its discretion, . . . allow, upon any terms as may be just, an amendment to any pleading." Ordinarily, trial courts should exercise liberality in permitting amendments. (*Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965; *Hulsey v. Koehler* (1990)

---

[34] Indeed, at argument on the sanctions motion, Attorney Brown represented, "There is no contract with Nishida."

[35] He also had an obligation to pay the note; this obligation was satisfied by the foreclosure on his house.

218 Cal.App.3d 1150, 1159.) " '[N]evertheless, whether such an amendment shall be allowed rests in the sound discretion of the trial court. [Citations.] And courts are much more critical of proposed amendments . . . when offered after long unexplained delay or on the eve of trial [citations], or where there is a lack of diligence, or there is prejudice to the other party (citations).' " (*Hulsey v. Koehler*, *supra*, 218 Cal.App.3d at p. 1159.) "In denying leave to amend, the trial court may properly consider whether the subject matter of the amendment is objectionable, the conduct of the moving party, and the belated presentation of the amendment."[36] (*Del Mar Beach Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 Cal.App.3d 898, 914; see also 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 1129, p. 543 [unwarranted delay in presentation may be a reason for denial].)

"As a general rule, a trial court's exercise of discretion with respect to amendment of pleadings should be upheld unless clearly abused. Furthermore, where

---

[36] In his reply brief on appeal, Dumas argues that "delay is not a ground to deny amendment when it is the [p]laintiff who seeks to amend." For this, he cites to *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852-1853. The cited authority sets forth the standard of review for a motion for judgment on the pleadings, and whether the motion should be granted without permitting the plaintiff leave to amend. (*Ibid.*) There are two reasons why this case does not support the argued proposition. First, the case says absolutely nothing about delay; indeed, the word "delay" appears nowhere in the opinion. Second, and more importantly, the issue of prejudicial delay did *not* arise in this case in the context of Dumas's oral motion for leave to amend, in connection with the trial court's grant of judgment on the pleadings. Instead, it arose in the context of Dumas's subsequent written motion, which was independent of the motion for judgment on the pleadings, was filed two weeks after the ruling on that motion, was allegedly based on new facts which had been discovered in the interim, and was based on Code of Civil Procedure section 473. Indeed, in the points and authorities in support of the motion for leave to amend, Dumas *conceded* that leave to amend could be denied for inexcusable prejudicial delay.

inexcusable delay and probable prejudice to the opposing party is indicated, the trial court's exercise of discretion in denying a proposed amendment should not be disturbed." (*Avedissian v. Manukian* (1983) 141 Cal.App.3d 379, 384.)

Dumas sought leave to amend his complaint to allege a cause of action for unjust enrichment.[37] In Dumas's proposed amended complaint, he alleged that: (1) the escrow officer mistakenly assumed Nishida was entitled to receive the $600,000 amount of the note upon close of escrow;[38] (2) in fact, the escrow officer should have disbursed only $300,000, the amount of the business loan to Wells; (3) the loan was to Wells alone; Nishida was never supposed to receive any amount of the business loan; (4) the $160,000, which Nishida admitted receiving, was an amount over and above the amount which fully funded the loan; and (5) Nishida was therefore unjustly enriched in the amount of $160,000.

The trial court denied the motion for leave to amend, on the bases that it was simply a restatement of Dumas's attempted breach of contract cause of action, and that allowing amendment would be prejudicial to Nishida. While we disagree with the first basis for the trial court's ruling, we agree with the second, and the result.

---

[37] There is a split in California law whether such a cause of action exists. (Compare *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1665 [concluding a cause of action for unjust enrichment could be asserted in that case] with *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793 [there is no cause of action for unjust enrichment in California].) We need not resolve the dispute here, and presume, for the sake of the discussion, that such a cause of action could proceed, if appropriately stated.

[38] At no point did the motion for leave to amend offer an explanation for why the credit was $500,000 if the escrow officer believed Nishida was entitled to the entire $600,000.

Taking the second ground first, we conclude the trial court did not abuse its discretion in denying the motion due to prejudicial delay. The original complaint was filed on August 4, 2009, and had proceeded through a hotly-contested and lengthy motion for judgment on the pleadings, during which time Dumas pursued a theory of intentional wrongdoing against Nishida. Some 17 months later, on the verge of trial, Dumas sought to amend his complaint to pursue a theory of unjust enrichment based on Nishida's allegedly accidental benefit from the escrow officer's mistake. This is a complete change in the theory of liability against Nishida. Nishida represented that he would be prejudiced by the amendment, and we agree. Dumas argues that there would be no prejudice on the basis that the amendment "would not have required Nishida to carryout [*sic*] additional discovery or impose burdens upon him because all the facts alleged in the [unjust enrichment cause of action] were within the knowledge and control of Nishida and his partners, Wells and Houng." Dumas's argument rings hollow in light of Attorney Brown's representation that he did not move to amend the complaint until he had interviewed the escrow officer, a key figure in the transaction. The escrow officer had not yet been deposed, and it is clear that Nishida could not have proceeded to trial on the unjust enrichment cause of action without conducting her deposition.[39] Moreover, Dumas had dismissed Houng from the action because Attorney Brown's predecessor had been unable to serve him. There is no evidence that Houng

---

[39] Attorney Brown's declaration stated, "I still do not have a home address for [the escrow officer], but [she] has agreed to accept a Subpoena to Appear at Trial in this matter." He did not declare that she would make herself available for a deposition, or even an interview by opposing counsel.

was a "partner" of Nishida and, in any event, even if Houng and Nishida at one point had a business relationship, there is no evidence that Nishida possessed the means of contacting Houng and obtaining testimony from him. Thus, a year and a half after the complaint was filed, and less than two months prior to trial, Nishida would have to defend a completely new cause of action, which was based almost entirely on the conduct of two individuals who could not be easily contacted for pretrial discovery.

Moreover, there is no evidence that Dumas's delay in bringing his motion for leave to amend was reasonable. The case was pending since August 2009; Attorney Brown's only explanation for not earlier interviewing the escrow officer is that he noticed her deposition for October 18, 2010, but was unable to serve the subpoena because she had been evicted; he subsequently reached her "through her daughter." There is no explanation for the delay in noticing her deposition,[40] or why it took four months to contact the escrow officer through her daughter. Thus, the trial court did not abuse its discretion in finding unreasonable delay which would cause prejudice. The motion for leave to amend was properly denied.

On the merits, we conclude that the proposed cause of action for unjust enrichment fails to state a cause of action. On appeal, Dumas argues that he can state a cause of action for unjust enrichment in the amount of $160,000 because Nishida was to receive nothing from the escrow, and he admitted receiving $160,000. Yet the

---

[40] Attorney Brown implies, without any explicit argument, that some of the fault may have been of prior counsel, as Attorney Brown did not substitute in as counsel for Dumas until August 21, 2010. However, he attached no declaration from prior counsel indicating what, if anything, he did to contact the escrow agent.

premise that Nishida was to receive nothing from the escrow is mistaken. Indeed, it is based on Nishida's purported deposition testimony that, at the time he executed the note and deeds of trust, he did not know the purpose of the documents, and did not expect to receive any proceeds from the note. That Nishida might not have known he was to receive any proceeds from the note does not establish that Nishida was not, in fact, entitled to do so. Indeed, after the motion for leave to amend, Dumas testified, at the default prove-up hearing against Premiere, that the $300,000 business loan was to be made for the benefit of a company owned by both Nishida and Wells. Thus, the idea that Nishida was to receive nothing from the escrow is nonsense; he and Wells were to receive $300,000. Dumas can only succeed on this cause of action if he can legitimately argue that the $160,000 which Nishida received was over and above the $300,000 business loan, rather than part of it. This he cannot do. Indeed, he does not even attempt to do so.[41] While Dumas argues that Wells and Nishida never claimed the business loan was unfunded, he makes no argument that the $160,000, which Nishida claimed to have received as part of the business loan, was, in fact, in excess of it.

In any event, the essence of Dumas's argument in support of the unjust enrichment cause of action is that, as the result of the escrow officer's mistaken assumption that Nishida was entitled to a $500,000 credit, Houng received funds which should have been paid to Dumas. As we discussed above, the general rule is that, when

---

[41] The argument was dropped by the time Attorney Brown and Dumas argued in opposition to the motion for sanctions. Rather than argue that the $160,000 was in addition to the business loan, they argued that the *entirety* of the $474,000 paid to Houng was unrelated to the $300,000 business loan.

an escrow officer makes a mistake, the loss is suffered by the person who was owed the money, in this case, Dumas. Dumas seeks to rely on the rule's exception, that where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer. Dumas argues that it was Nishida's negligence which allowed Premiere to pay an excessive amount to Houng; specifically, he argues that: (1) Nishida and Wells were close friends and business associates; (2) Wells "controlled the escrow"; and (3) Nishida's allegedly forged signature appears on the amended instruction directing payment to be made to Houng. Yet there is no negligence in being friends or associates with Wells, and no legal basis for the implication that Nishida was negligent in being the victim of a forgery. Our review of the proposed amended complaint points to one inevitable conclusion: the $500,000 was credited to Nishida's account because the escrow officer, being unaware that the note evidenced a $300,000 increase in consideration and an additional $300,000 business loan, mistakenly assumed that Nishida was entitled to the entire $600,000 proceeds of the loan. If anyone's negligence allowed *this* mistake to happen, it was the joint negligence of the parties, who instructed the escrow officer to record the deeds of trust securing the loan, but did not properly instruct the escrow officer as to the full terms of their transaction. Thus, neither party is more responsible for the escrow officer's negligence in this regard, and the cause of action for unjust enrichment fails.

4. *Sanctions*

The trial court awarded sanctions against Attorney Brown on the basis that the written motion for leave to amend was essentially an improper attempt to seek

reconsideration of the denial of his oral motion for leave to amend. Attorney Brown argues that this is incorrect. We agree. We are satisfied that Attorney Brown pursued, on behalf of Dumas, a new theory in his motion for leave to amend the complaint.

However, this does not necessarily mean that sanctions were not appropriate. Sanctions are justified if the claims in the proposed amended complaint were not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." (Code Civ. Proc., § 128.7, subd. (b)(2).) Similarly, sanctions are justified if the allegations in the proposed amended complaint do not "have evidentiary support or, if specifically so identified, are [not] likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." (Code Civ. Proc., § 128.7, subd. (b)(3).) Both of these circumstances could apply in this case. We therefore remand the matter to the trial court to consider, in the first instance, whether to exercise its discretion to impose sanctions.

DISPOSITION

The judgment is affirmed. The order awarding sanctions is reversed, and the matter remanded to the trial court for further proceedings consistent with this opinion. As to Dumas's appeal, Nishida shall recover his costs on appeal from Dumas. As to Attorney Brown's appeal, the parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.