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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

EILEL NAMVAR et al., Plaintiffs and Respondents, v. MANOUCHEHR TABIBZADEH, Defendant and Appellant.	B230451 (Los Angeles County Super. Ct. No. LC086188)

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis M. Meisinger, Judge. Affirmed.

Law Office of Alan S. Yockelson and Alan S. Yockelson for Defendant and Appellant.

Epport, Richman & Robbins, Steven C. Huskey and Sheri Guerami for Plaintiffs and Respondents.

* * * * *

The trial court granted the motion for judgment on the pleadings filed by plaintiffs and respondents Eilel Namvar, Nosrat Esmailzadeh and Hooshang "Sean" Namvar (sometime collectively Namvar) on the complaint against defendant and appellant Manouchehr Tabibzadeh and defendant Foreclosure Express. The complaint alleged multiple causes of action, primarily in an effort to stop foreclosure proceedings initiated by appellant. The trial court ruled that judgment on the pleadings was appropriate on the basis of deemed admissions resulting from appellant's failure to respond to requests for admission.

We affirm. The trial court properly entered judgment on the pleadings pursuant to Code of Civil Procedure section 438, as the complaint sufficiently stated a cause of action and appellant's deemed admissions overcame any denials in his answer.

FACTUAL AND PROCEDURAL BACKGROUND

Loan Transactions.

Husband and wife Eilel Namvar and Nosrat Esmailzadeh have resided at 12249 San Vicente Boulevard in Los Angeles (Property) for approximately 20 years. Together with their son Sean Namvar, in May 1991 they executed and recorded a deed of trust on the Property designating Namco Capital Group, Inc. (Namco) as the beneficiary (May 1991 Deed of Trust).

On May 15, 1992, appellant issued a loan to Namco in the amount of $159,558.29. On May 18, 1992, Eilel Namvar, as president of Namco, executed a $170,000 promissory note (Note) in favor of appellant. Namco expected the total loan amount to equal $170,000, but only approximately $159,000 was loaned. According to the Note, the principal amount would bear interest at a rate of 12 percent and was due and payable in one year. To secure the Note, in May 1992 Namco executed a deed of trust assigning its beneficial interest in the May 1991 deed of trust to appellant (Assignment), with Title Trust Deed Service Company as the trustee. The Assignment was first recorded on May 20, 1992 and again on July 16, 1992.

Throughout 1992 and into 1993, Namco issued a series of checks reflecting interest payments on the Note. On March 12, 1993, Namco issued a check to appellant in the amount of $159,558.29 that bears the handwritten notation "Paid in Full. Final Payment." In June 1993, Namco executed a substitution of trustee and full reconveyance, which effectively reconveyed the May 1991 Deed of Trust back to Namvar. Appellant, however, did not execute a reconveyance of the Assignment.

Thereafter, in June 1993, appellant made a new $149,000 loan to Namco as part of a $750,000 loan made by Namco Financial, Inc. to Namco and secured by real property located at 721 East Ninth Street in Los Angeles (Ninth Street Property).[1] The same month, Namco executed and recorded an assignment of deed of trust on the Ninth Street Property designating Namco Financial as the beneficiary, which was later re-recorded in September 1993 under a different instrument number. Also in June 1993, Namco Financial executed an assignment of deed of trust, which was later recorded and assigned to appellant the deed of trust recorded in June 1993.

The Ninth Street Property was sold in 2003 and Namco tendered $187,500 to escrow holder Fidelity National Title Company (Fidelity) as the amount due appellant from the June 1993 loan. Appellant disputed the amount, and in July 2005 Fidelity ultimately filed a complaint in interpleader against Namco, Namco Financial and appellant, Los Angeles County Superior Court case No. BC336340. After a 2008 bench trial in that action, the trial court ruled that, with the interpleaded amount, appellant had been fully paid, both principal and interest, and ordered that $134,000 be paid to appellant and the balance of the $187,000 be paid to Namco and Namco Financial. Also in 2008, Division One of this district affirmed an order sustaining Namco's demurrer without leave to amend to appellant's cross-complaint in that action, in which appellant

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[1] Namvar alleged that the second loan transaction also related to the Property, but those allegations are contradicted by several documents submitted by appellant of which we have taken judicial notice and which show the transaction involved the Ninth Street Property. (See *Smiley v. Citibank* (1995) 11 Cal.4th 138, 146 [in ruling on a motion for judgment on the pleadings, court "may extend its consideration to matters that are subject to judicial notice"].)

contended that Namco breached a promissory note and loan service agreement by not obtaining his consent to the sale of the Ninth Street Property and not tendering the correct amount due to him upon sale.

In December 2008, Namco was placed in Chapter 11 bankruptcy proceedings. Appellant initiated foreclosure proceedings against the Property in April 2009 and recorded a notice of default, asserting that $2,598,434.14 was owed from the unpaid principal balance of $170,000 on the Note, which became due on May 18, 1993.

Pleadings and Judgment.

In July 2009, Namvar filed a complaint against appellant and Foreclosure Express, alleging several causes of action in an effort to halt the foreclosure proceedings. Shortly after the complaint was filed, appellant prepared and recorded a notice of trustee's sale on the Property. At the end of July 2009, the trial court issued a temporary restraining order enjoining an August foreclosure sale and issued an order to show cause re: preliminary injunction. In August 2009, the trial court preliminarily enjoined the foreclosure sale.

Namvar filed a first amended complaint in October 2009, again seeking to stop appellant's "unfounded attempts to rely upon a stale, outdated promissory note issued by a non-party, Namco Capital Group, Inc. on May 18, 1992, on a $159,558.29 obligation . . . that was paid off in full by at least March 12, 1993 . . . ." Namvar sought "to halt Defendants' wrongful acts, including requesting the cancellation, rescission, and/or voiding the Note and subject Notice of Default and Election to Sell Under Deed of Trust, and [sought] damages as a result of Defendants' wrongful lien and wrongful foreclosure attempts." Appellant answered in March 2010, denying the allegations.

In September 2010, Sean Namvar moved for an order establishing the truth of certain requests for admission and for sanctions as a result of appellant's failure to respond to a set of requests for admission. According to the motion, Namvar's counsel had several times advised appellant of the need to respond to the requests for admission, and appellant in turn had contended that his health prevented him from responding to discovery, supported by a doctor's letter indicating that appellant's condition was not suitable for activity causing emotional stress. Following a hearing, the trial court granted

the motion, deeming admitted for all purposes all requests for admission contained in set one and imposing monetary sanctions. The admissions included that appellant "only lent a total of $159,558.92 pursuant to the $170,000 note"; that the loan amount was secured by the May 1991 Deed of Trust; that Namco and Namvar fulfilled their obligations and duties under the Note, the May 1991 Deed of Trust and the Assignment with the payment of a series of interest payments and repayment of $159,558.29 on the Note; that the Note was paid in full by March 12, 1993; and that Namvar was entitled to cancellation of the notice of default.

Thereafter, on the basis of the deemed admissions, Namvar moved for judgment on the pleadings. Appellant, then appearing in propria persona after his counsel had asked to be relieved, opposed the motion. He contended that the $170,000 Note was actually executed to secure a separate loan in the amount of $170,000 which had never been repaid. In support of his opposition, he submitted a complaint filed by the Chapter 11 trustee against Namvar and additional family members alleging that Namco was essentially nothing more than a scheme to defraud investors. Though the complaint contained specific allegations about a number of assertedly fraudulent real property transactions, it did not include any information about appellant's transactions with Namvar or Namco.

Following a November 30, 2010 hearing, the trial court granted the motion and rescinded and cancelled the May 1992 assignment of deed of trust as well as the notice of default and notice of trustee's sale. The trial court also permanently enjoined appellant from selling or attempting to sell the Property through a foreclosure proceeding or otherwise. The trial court declined to award Namvar damages on any of its causes of action, finding that the deemed admissions were inadequate to support a monetary award. Judgment was entered in favor of Namvar.

Appellant moved for reconsideration, asserting that he was in poor health and did not understand the effect of failing to respond to the requests for admission. Namvar opposed the motion on the ground it set forth no valid basis for reconsideration under

Code of Civil Procedure section 1008. The trial court denied the motion, finding it procedurally infirm and without legal or factual basis.

This appeal followed.

DISCUSSION

Appellant contends that the trial court erred in granting Namvar's motion for judgment on the pleadings because he showed—or at a minimum, should have been permitted to show—that Namvar's allegations were false. We find no merit to his contentions.

We review a motion for judgment on the pleadings the same as we would a general demurrer: "We treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein. We may also consider matters subject to judicial notice. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any theory. [Citation.]" (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.) We review the trial court's denial of leave to amend for an abuse of discretion. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.)

Code of Civil Procedure section 438 governs motions for judgment on the pleadings, providing that if the moving party is a plaintiff, the motion may be made and granted on the ground "that the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." (Code. Civ. Proc., § 438, subds. (c)(1)(A) & (c)(3)(A).) The statute further provides: "The grounds for motion provided for in this section shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. Where the motion is based on a matter of which the court may take judicial notice pursuant to Section 452 or 453 of the Evidence Code, the matter shall be specified in the notice of motion, or in the supporting points and

authorities, except as the court may otherwise permit." (Code Civ. Proc., § 438, subd. (d).)

Here, Namver served appellant with a set of requests for admission that effectively sought the admission of the truth of the complaint's allegations. Critical admissions included that appellant loaned a total amount of $159,558.29 pursuant to the Note and secured by the May 1991 Deed of Trust; that Namvar and Namco fulfilled their obligations under the Note, May 1991 Deed of Trust and Assignment; that appellant received timely interest payments and then payment in full on the Note in March 1993; that appellant wrongfully refused to reconvey the Assignment; and that appellant had no basis to commence foreclosure proceedings against the Property because any monetary obligation owing him was fully paid over 16 years ago. Appellant failed to respond. Consequently, Namvar moved for an order that the requests be deemed admitted pursuant to Code of Civil Procedure section 2033.280, subdivision (b), and the trial court granted the request.

In connection with the motion for judgment on the pleadings, the trial court took judicial notice of the deemed admissions. While the presentation of extrinsic evidence is not generally proper on a motion for judgment on the pleadings (see *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999), the court may take judicial notice of matters that cannot be reasonably controverted, including "admissions and concessions." (*Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549 [affirming judgment on the pleadings where court took judicial notice of the truth of the matters evidenced by a recorded trust deed]; accord, *Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 989–990 [on a motion for judgment on the pleadings, "[i]n addition to the facts pleaded, we may consider matters that may be judicially noticed, including a party's admissions or concessions which can not reasonably be controverted"].) The admissions here established that Namvar alleged facts sufficient to state a cause of action, and that appellant had no defense to Namvar's allegations. As a result, judgment on the pleadings in favor of Namvar was proper.

We reject appellant's efforts to demonstrate that judgment was unwarranted. First, he contends that the trial court should not have granted judgment on the pleadings without first permitting him leave to amend his answer. (See generally *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852 [in connection with a demurrer or judgment on the pleadings, leave to amend should be granted where there is a reasonable possibility amendment would cure defect].) Preliminarily, we note that appellant never sought leave to amend below. We infer that he did not do so because his answer already contained the allegations that he now seeks to add—specifically, that the Note reflected a separate $170,000 obligation that was not satisfied by the $159,558.29 payment. In any event, appellant has offered no basis for leave to amend, as any denial of the complaint's allegations would conflict with his deemed admissions. (See *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604, 605 [when considering a demurrer, court may take judicial notice of admissions "where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court"].) For the same reason, we must reject appellant's second and related contention that his answer stated facts sufficient to constitute a defense. (*Evans v. California Trailer Court, Inc., supra*, 28 Cal.App.4th at p. 549 ["On a motion for judgment on the pleadings, a court may take judicial notice of something that cannot reasonably be controverted, even if it negates an express allegation of the pleading"].)

We likewise find no merit to appellant's next contention that he should have been permitted to withdraw his admissions. According to Code of Civil Procedure section 2033.300, subdivision (a), "[a] party may withdraw or amend an admission made in response to a request for admission only on leave of court granted after notice to all parties." But appellant never sought leave to withdraw his admissions in the trial court, despite the trial court's expressly admonishing him to attempt to do so. At the conclusion of the hearing on Namvar's motion seeking deemed admissions as a result of appellant's failure to respond, the trial court stated: "I am going to deem the request for admissions admitted as a result of a failure on the part of Mr. Tabibzadeh to answer them at all. And if you want to be relieved from that order, sir, you are going to have to seek relief from

the order, and I would strongly urge you, if you can, to find yourself some counsel because you are mismatched against Mr. Huskey and you could benefit from legal representation." The trial court added: "So there are certain remedies available to you having to do with getting relief from this order, but I am not in a position to give you legal advice." Here, as in *Joyce v. Ford Motor Co.* (2011) 198 Cal.App.4th 1478, 1489, appellant "did not move the trial court to allow the withdrawal or amendment of [the] admission[s]. Accordingly, the matter is conclusively established against [appellant]."

Finally, we find no support for appellant's contention that the judgment was obtained by extrinsic fraud. Appellant argues that Namvar improperly relied on the litigation concerning the loan secured by the Ninth Street Property to show that it repaid the loan on the Property. While the allegations that appellant's second loan was secured by the Property are contradicted by documents of which we have taken judicial notice, the judgment related entirely to the initial $159,558.29 loan and cancelled the Assignment which involved the May 1991 Deed of Trust. The second transaction involving the Ninth Street Property was neither a part of nor had any effect on the judgment.

Nor do we find any merit to appellant's contention that judgment was improperly entered because of appellant's advanced age, health problems, language barrier or propria persona status. Appellant has never maintained that his age or health has rendered him incapable of litigating or prevented him from understanding the nature of the proceedings against him. Moreover, Namvar wrote to appellant on multiple occasions, specifically reminding him of the need to respond to discovery and extending him a short extension of time to respond. With respect to any language barrier, even though appellant was able to write a letter to Namvar in English, he was provided with an interpreter at every hearing. Finally, after appellant's counsel was relieved due to irreconcilable differences, appellant appeared in propria persona. In *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, at pages 984 to 985, the Court "ma[d]e clear that mere self-representation is not a ground for exceptionally lenient treatment. . . . A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in

the trial courts, and would be unfair to the other parties to litigation." Here, without providing exceptional treatment, the trial court did everything it could to ensure that appellant was adequately defended. It admonished appellant to retain counsel. It acknowledged that appellant perhaps had obtained some assistance, complimenting him on the papers he filed in opposition to the motion for judgment on the pleadings. And it explained that it had taken appellant's age and language ability into account when it determined that his failure to respond to discovery warranted deemed admissions. Under these circumstances, nothing about appellant's personal characteristics warrants reversal of the judgment.

DISPOSITION

The judgment is affirmed. Namvar is entitled to costs on appeal.

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_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ