Filed 8/14/13 Marriage of Moleyem CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of MARJANEH and HUSHANG MOLAYEM.	B244691 (Los Angeles County Super. Ct. No. BD 537582)
MAX ASTAN, Appellant, v. R & D DEVELOPMENT et al., Respondents.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Ralph C. Hofer, Judge. Reversed and remanded.

Kaplan, Kanegos & Kadin, Jerry Kaplan and David Scott Kadin for Appellant.

Etehad Law Firm, Simon P. Etehad and Rabin Saidian for Respondents.

* * * * * *

Max Astan successfully intervened in this marital dissolution action, which concerns the marriage of Marjaneh and Hushang Molayem.[1] His complaint-in-intervention (the complaint) alleges a cause of action for declaratory relief against the Molayems and other defendants. The court sustained without leave to amend the demurrers of Hushang and another defendant-in-intervention, R & D Development (R&D). Astan appeals from the judgment dismissing his complaint. We hold the demurrers should have been sustained with leave to amend and reverse and remand on that ground.

FACTS AND PROCEDURE

1. Allegations of the Complaint

Astan intervened in this action on the ground that he is a creditor of the Molayems pursuant to a promissory note secured by a deed of trust against the Molayems' residence. The defendants named in Astan's action for declaratory relief include the Molayems, R&D (another alleged creditor of the Molayems), Leo David (the principal of R&D), his wife Ruth David, and David Pasternak, the court appointed receiver for the Molayems' property. Astan's complaint, deemed filed on May 3, 2012, alleges as follows.

Astan gave certain antiques to the Molayems on consignment. The parties agreed the value of the merchandise was $805,000. The Molayems agreed to pay Astan for the merchandise when they sold it, or else they would return the merchandise to Astan. They executed a promissory note secured by a deed of trust in the principal sum of $805,500 as security for either the return of the merchandise or payment of the agreed-upon value if they did not return the merchandise. The deed of trust encumbered real property owned

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[1] When appropriate, we refer to Marjaneh and Hushang Molayem by their first names, as a convenience to the reader. The same is true with respect to another husband and wife involved in the proceedings, Leo and Ruth David. We do not intend this informality to reflect a lack of respect. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1.)

by the Molayems at 612 North Crescent Drive in Beverly Hills (Crescent property). It was dated July 13, 2009, and recorded on July 27, 2009. The Molayems failed to return the merchandise to Astan and failed to pay him $805,500, despite Astan's demand.

At some point in this action, the receiver sold the Crescent property free and clear of all liens except a Wells Fargo lien, which was paid through escrow. All other liens on the property attached to the proceeds of the sale. The receiver was holding in excess of $2.5 million in sale proceeds. Astan has a lien against the sale proceeds in the form of the deed of trust securing his promissory note with the Molayems. He is entitled to $805,500 plus interest at the rate of 7 percent per year and attorney fees, for a total of over $1 million. R&D claims to be the assignee of purported loans Leo made to the Molayems or business entities controlled by them. On this ground, R&D and Leo also claim liens against the sale proceeds. Astan contends the liens of R&D and Leo are invalid and his lien is superior to their purported liens. He seeks a judicial declaration of the rights and obligations of all the parties and an order for the receiver to pay him all money found owing to him.

2. R&D's and Hushang's Demurrers

R&D and Hushang demurred to Astan's complaint on the ground that his deed of trust on the Crescent property is no longer valid because Astan has reconveyed his interest back to the Molayems.[2] R&D and Hushang requested the court take judicial

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[2] Hushang's briefing stated he was demurring for failure to state a cause of action (Code Civ. Proc., § 430.10, subd. (e)) and lack of legal capacity to sue (Code Civ. Proc., § 430.10, subd. (b)). R&D's briefing stated it was demurring for lack of legal capacity to sue. Legal incapacity "is merely a legal disability, such as infancy or insanity, which deprives a party of the right to come into court." (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351.) "[T]he question of standing to sue is different from that of capacity." (*Ibid.*) Standing relates to the right to relief, which "goes to the existence of a cause of action." (*Ibid.*) The moving parties' arguments clearly went to Astan's right to relief and standing. (E.g., "As one whose interests in the Deed of Trust has been eliminated by a willingly-signed and recorded Reconveyance, Claimant simply has no standing to remain

notice of the recorded "Substitution of Trustee and Full Reconveyance" (the reconveyance), which states the promissory "[n]ote, together with all other indebtedness secured by said Deed of Trust, has been fully paid and satisfied, and as successor Trustee, the undersigned [Astan] does hereby RECONVEY WITHOUT WARRANTY, TO THE PERSON OR PERSONS LEGALLY ENTITLED THERETO, all of the estate now held by it under said Deed of Trust." The reconveyance was dated and notarized on August 5, 2010, and was recorded on March 6, 2012. R&D and Hushang also requested the court take judicial notice of an excerpt from Astan's deposition transcript in a related case brought by R&D against the Molayems. R&D argued Astan admitted to signing a reconveyance in this excerpt.

Astan opposed the demurrers on the basis that the reconveyance is invalid. He argued Hushang told him to reconvey the Crescent property, and in return, Hushang would pay the $805,500 owed under the note. Astan asserted he signed the reconveyance and gave it to Hushang on the condition that it would be recorded only if Hushang paid the money owing. Because Hushang never paid Astan, there was never any authorization to record the reconveyance. Astan objected to the court taking judicial notice of the excerpt from his deposition transcript on the ground that it was not a complete transcript, and the transcript as a whole was not signed by him nor certified by the court reporter.

At oral argument on the demurrers, Astan also alleged there was fraud. He indicated if the court were to sustain the demurrers, he would amend the complaint to allege (1) he gave the reconveyance on the specific condition that Hushang pay him, and (2) Hushang fraudulently induced him to sign the reconveyance.

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in this action.") Therefore, the demurrers were properly based on failure to state a cause of action, not lack of legal capacity.

The court sustained the demurrers of R&D and Hushang without leave to amend.[3] The court denied R&D's and Hushang's request to take judicial notice of Astan's partial deposition transcript. But the court took judicial notice of the recorded reconveyance and found it established Astan had reconveyed all interests he had in the Crescent property back to the Molayems such that he had no valid lien on the property. Moreover, the court held the parol evidence rule barred his efforts to show a contemporaneous agreement that the reconveyance would not be recorded until Hushang paid the money owing. It explained Astan's interpretation of the reconveyance as having a condition was not reasonable, and no ambiguity in the reconveyance allowed for the introduction of extrinsic evidence. The ruling did not mention Astan's fraud in the inducement theory.

The court entered a judgment in favor of all defendants and also dismissed Astan's complaint. Astan timely appealed.

CONTENTIONS

Astan advances several arguments on appeal. In the main, he asserts we should retroactively apply the recent California Supreme Court decision in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169 (*Riverisland*), which overruled *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258 (*Pendergrass*). *Pendergrass* concerned the fraud exception to the parol evidence rule. The *Pendergrass* court held "the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or

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3 Astan failed to designate for inclusion in the clerk's transcript the minute order setting forth the written ruling on the demurrers. R&D filed a motion to augment the record with the minute order; however, the copy attached to the motion is missing page three of the six-page minute order. We deny the motion to augment because it does not include a complete copy of the relevant minute order. Further, the complete minute order is part of the record in this case insofar as it is contained in the exhibits in support of the petition for writ of supersedeas filed by Astan. (We granted Astan's petition for writ of supersedeas.)

some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing." (*Pendergrass*, *supra*, at p. 263.) In reconsidering *Pendergrass*, the *Riverisland* court held "[t]he fraud exception has been part of the parol evidence rule since the earliest days of our jurisprudence, and the *Pendergrass* opinion did not justify the abridgment it imposed. For these reasons, we overrule [*Pendergrass*] and its progeny, and reaffirm the venerable maxim . . . : '[I]t was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.'" (*Riverisland*, *supra*, at p. 1182.) Astan contends we must reverse the judgment because, under *Riverisland*, he should be permitted to allege Hushang procured the reconveyance through fraud.

Notwithstanding *Riverisland*, Astan contends the trial court erred because (1) ambiguities in the reconveyance raise factual issues regarding its validity, and (2) the court sustained his objections to taking judicial notice of his partial deposition transcript yet used his testimony in support of its ruling.

R&D contends the court's ruling rests on the law regarding real estate deeds and related instruments, which was unaffected by *Riverisland*, and under that law, the reconveyance was valid and may not be challenged by evidence of an oral condition to the deed. Moreover, R&D contends (1) Astan cannot allege fraud in the procurement of the reconveyance because admissions in Astan's judicially noticeable deposition transcript demonstrate he did not actually or justifiably rely on any fraudulent promises, and (2) there were no material ambiguities in the reconveyance that would raise factual issues regarding its validity. Hushang joins in R&D's brief.

STANDARD OF REVIEW

We review the complaint de novo to "determine whether [it] states facts sufficient to constitute a cause of action. [Citation.] And when [the demurrer] 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." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.)

"We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) We do not accept the allegations of the complaint as true if they are contradicted by matters that are judicially noticeable. (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 210.)

DISCUSSION

1. Propriety of Demurrer to Complaint for Declaratory Relief

Astan's sole cause of action is for declaratory relief. "Any person interested under a written instrument, . . . or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property . . . , may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties . . . , including a determination of any question of construction or validity arising under the instrument or contract." (Code Civ. Proc., § 1060.) "'The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject.'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.)

The court may sustain a demurrer to a declaratory relief complaint on the ground that it fails to allege an actual or present controversy. (*DeLaura v. Beckett* (2006) 137 Cal.App.4th 542, 545.) In that instance, the plaintiff has failed to state a cause of action for declaratory relief. On the other hand, when the plaintiff's allegations establish an actual controversy, a demurrer does not lie merely for the failure to establish a right to a favorable declaration. (*Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal.App.4th 187, 221 (*Lockheed*), disapproved on other grounds by *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1036, fn. 11.) "'It is the general rule that in an action for declaratory relief the complaint is sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a contract [or instrument] and requests that the rights and duties be

adjudged. . . . If these requirements are met, the court must declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to a favorable declaration.'" (*Lockheed*, *supra*, at p. 221, quoting *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 549-550.)

Thus, "[s]trictly speaking, a demurrer is a procedurally inappropriate method for disposing of a complaint for declaratory relief. As Witkin observes: '[A] demurrer would leave the parties where they were, with no binding determination of their rights, to await an actual breach and ensuing litigation. This would defeat a fundamental purpose of declaratory relief, to remove uncertainties as to legal rights and duties before breach and without the risks and delays that it involves. In brief, the object of declaratory "relief" is not necessarily a beneficial judgment; rather, it is a determination, favorable or unfavorable, that enables the plaintiff to act with safety. This theory has prevailed, and the rule is now established that the defendant cannot, on demurrer, attack the merits of the plaintiff's claim. The complaint is sufficient if it shows an actual controversy; it need not show that plaintiff is in the right.'" (*Lockheed, supra*, 134 Cal.App.4th at p. 221, quoting 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 831, p. 289.)

But we need not always reverse when the trial court has erroneously sustained a demurrer to a declaratory relief complaint. "If the appellate court's decision on the merits would necessarily result in a declaration unfavorable to the plaintiff, reversal would be an idle act. The appellate opinion is in effect a declaratory judgment. [Citation.] The proper procedure is to modify the judgment to make that declaration and affirm the judgment as modified." (*Lockheed*, *supra*, 134 Cal.App.4th at pp. 221-222.)

Here, there is an actual and present controversy between the parties as to the claimed liens and their rights to the Crescent property sales proceeds. Astan claims he has a valid lien by virtue of the deed of trust and claims the reconveyance is not valid. R&D and Hushang claim he has no lien because the reconveyance is valid. Astan seeks a declaration of the parties' rights and obligations. This is sufficient to state a claim for declaratory relief.

In the following part, we determine whether we should nevertheless modify and affirm the judgment because our "decision on the merits would necessarily result in a declaration unfavorable to" Astan, rendering reversal an idle act. (*Lockheed, supra*, 134 Cal.App.4th at p. 221.)

2. Determination on the Merits

A deed of trust is security "for the performance of an act" and constitutes a lien on real property. (Civ. Code, § 2920, subd. (a);[4] see *Monterey S.P. Partnership v. W. L. Bangham, Inc.* (1989) 49 Cal.3d 454, 460; *Dieckmeyer v. Redevelopment Agency of Huntington Beach* (2005) 127 Cal.App.4th 248, 258.) A deed of trust often secures the obligation to pay on a note, as was the case here with the deed of trust by the Molayems in favor of Astan. "A reconveyance is the instrument that clears title to property subject to a recorded deed of trust." (*Ricketts v. McCormack* (2009) 177 Cal.App.4th 1324, 1327, fn. 1.)

On its face, the notarized and recorded reconveyance clears title to the Crescent property and extinguishes the lien Astan had on the property under the deed of trust. The reconveyance therefore directly contradicts the allegation of Astan's complaint that he has a valid lien on the sales proceeds. Moreover, the court properly took judicial notice of the reconveyance. A court may take judicial notice of a recorded deed or similar document when the authenticity of the document is not challenged. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117; *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549.) Astan does not challenge the existence and authenticity of the recorded reconveyance, just the manner in which it was procured, as we discuss below.[5]

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[4] Further undesignated statutory references are to the Civil Code.

[5] Although Astan also suggests there were "significant issues as to the validity" of the reconveyance because of "ambiguities" in its language, these issues do not affect

Looking solely at the complaint and the judicially noticed reconveyance, Astan could not obtain a favorable declaration from the court. The next question is whether he could amend the complaint such that a favorable declaration would be possible, in which case we should not simply modify and affirm the judgment.

Astan contended below he would amend to allege he gave the reconveyance on the specific condition that he receive $805,500 for it. The trial court denied leave to amend because it held the parol evidence rule barred evidence of a contemporaneous agreement that Hushang could not record the reconveyance until he paid Astan the money. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 344 [parol evidence rule "necessarily bars consideration of extrinsic evidence of prior or contemporaneous negotiations or agreements at variance with the written agreement"].) We agree with the trial court regarding parol evidence of a contemporaneous oral agreement or condition. In the context of deeds, our Supreme Court explained in *Lavely v. Nonemaker* (1931) 212 Cal. 380, 384-385 (*Lavely*): "'[W]hether a deed, when delivered, shall take effect absolutely, or upon the performance of some condition not expressed therein, cannot be determined by parol evidence. Any condition qualifying the delivery must be inserted in the deed itself, or else the deed must not be delivered to the grantee.'" (See also § 1056 ["A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."].) The remedy for failure to satisfy an unexpressed condition is not rescission of the deed, but an action for damages for breach

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judicial notice or have any other legal effect. The purported "ambiguities" are that the reconveyance stated the deed of trust was dated July 2, 2010, and recorded on July 2, 2009, when the accurate dates are July 13, 2009, and July 27, 2009, respectively. These are not so much ambiguities as they are typographical errors, and they are immaterial when one looks at the reconveyance as a whole. The reconveyance identifies the deed of trust by the document number assigned to the deed when it was recorded. The face of the deed is clearly stamped with that document number. Regardless of the erroneous dates in the reconveyance, there can be no doubt to which deed of trust the reconveyance refers.

of the grantee's personal covenant. (*Lavely, supra*, at pp. 384-385.) We may not void a deed even when the condition at issue is the payment of consideration. (*Wooster v. Department of Fish & Game* (2012) 211 Cal.App.4th 1020, 1030 [a deed is not void for any failure of consideration].) The fact that we are dealing with a reconveyance as opposed to a grant deed makes no difference; the same rules apply. (*Schiavon v. Arnaudo Brothers* (2000) 84 Cal.App.4th 374, 378.)

Under these rules, when Astan delivered the reconveyance to Hushang, it was effective immediately and free of the condition he claims. The reconveyance contains no conditions regarding payment of the money or prohibiting recordation until the money is paid. In fact, it states the underlying debt has been paid and satisfied. An amendment to allege the reconveyance was invalid because an unexpressed agreement or condition had not been satisfied would be futile. If this were all Astan would allege, we might agree leave to amend was properly denied. He also asserted, however, he would allege he was fraudulently induced into giving the reconveyance. This allegation would fare much better in invalidating the reconveyance.

It is well established a "deed secured by fraud is invalid and is subject to cancellation." (*Steiner v. Steiner* (1958) 160 Cal.App.2d 665, 668-669; see *Cox v. Klatte* (1938) 29 Cal.App.2d 150, 160; 4 Miller & Starr, Cal. Real Estate (3d ed. 2011, Supp. 2003) § 10:116, p. 356 ["A reconveyance that has been obtained fraudulently or by forgery can be set aside by a court of equity"]; see *Lavely, supra*, 212 Cal. at p. 383 [a failure of consideration for a deed or breach of a personal covenant not expressed in the deed will not void the deed *if* "there was no fraud or false representation"]; *Wooster v. Department of Fish & Game, supra*, 211 Cal.App.4th at p. 1030 ["'a deed *without fraud in its inception* . . . is not void for *any* failure of consideration" (first italics added, second italics added by *Wooster*)].) Alleging fraud in the procurement is different than alleging the instrument was delivered but an unexpressed condition was not met, or consideration was not paid. The issue is not one of conditional delivery, but of no delivery at all. (*Cox v. Schnerr* (1916) 172 Cal. 371, 376.) When a deed is fraudulently procured, the manual transfer of it is not in the legal sense a "delivery." (*Steiner v. Steiner, supra*, at p. 669.)

Execution and delivery of a deed or similar instrument "depend upon more than the mechanical acts of signing it and passing it to another person." (*Ibid.*) They also depend upon consent, and "[a]pparent consent is not real or free when obtained through fraud." (*Ibid.*)

The parol evidence rule does not bar evidence of promissory fraud in the procurement of an instrument. Code of Civil Procedure section 1856, subdivisions (f) and (g), establishes an exception to the parol evidence rule for evidence relevant to the validity of an agreement and specifically for evidence of fraud. (*Riverisland*, *supra*, 55 Cal.4th at p. 1175.) As *Riverisland* teaches, the fraud exception is broad and applies even when the plaintiff alleges a fraudulent promise "'directly at variance with the promise of the writing.'" (*Id.* at pp. 1175, 1182.) "When fraud is proven, it cannot be maintained that the parties freely entered into an agreement reflecting a meeting of the minds." (*Id.* at p. 1182.)

The fraud exception existed well before *Riverisland*, though *Riverisland* clarified the scope of it. Whether *Riverisland* should apply "retroactively" to Astan's case, as he asserts, is not truly disputed here. R&D does not dispute the application of *Riverisland* and in fact recognizes the rule that "fraud in the inception or inducement permits extrinsic evidence on the issue of whether there was actual delivery" of a deed. Instead, R&D contends "sworn admissions preclude [Astan] from stating a cause of action for fraud." The admissions to which R&D refers are contained in Astan's deposition from the related case between R&D and the Molayems. R&D argues this deposition testimony is judicially noticeable. We turn lastly to this material and whether it is judicially noticeable.

R&D and Hushang requested judicial notice of one portion of Astan's deposition, which the court denied. In response to their request for judicial notice, Astan filed both an objection to their request and his own separate request for judicial notice of a different portion of his deposition. The record is unclear on whether the court granted or denied

Astan's separate request for judicial notice.[6] In any event, the relevant excerpt from Astan's deposition comes from the portion he sought to judicially notice. It reads as follows:

> "Q Okay. Why -- and since you did not get the $805,000 back, why did you sign a reconveyance document?
>
> "A Okay. That was the time Harry Molayem[7] -- he was not in his house. He always told me, 'They kicked me out. I don't have a place.' I give him place to my house to stay there.
>
> "And I was involved all this story they have for divorce together. And he came and said, eventually, 'If you can help me, if you can give me reconveyance, money is ready.'
>
> "I said, 'What's happened?'
>
> "He said, 'There is the' -- I don't know. Maybe Mandy knows. 'It's a lot of people, family members. They already have a gathering. They are together. They want to pay this money to you and just give me reconveyance.' [¶] . . . [¶]
>
> "And I said, 'Okay. If it's going to help you, I am going to give it to you. And bring me the check.'
>
> "And he went, and he came back. He said, 'We couldn't settle.' And after two days, I remember I got the reconveyance back. I had a witness too. [¶] . . . [¶]
>
> "Q Okay. And I'm trying to understand.
>
> "Why did you -- what was the reason that you decided to sign a reconveyance even though your money hadn't been paid?

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6 There is no express ruling on his request for judicial notice, and the court's ruling does not discuss the material he requested the court judicially notice. The court's ruling stated the court "granted" Astan's "objection" to R&D's and Hushang's requests. The court most likely meant it was simply sustaining his objection. But its use of the term "grant" introduces some ambiguity. It could have meant to both sustain Astan's objections and grant his separate request for judicial notice.

7 Hushang and Marjaneh use the English names "Harry" and "Mandy," respectively.

"A Because at that time, you know, he was in my house. We were together. I was trying to help his marriage. If I can help, he is going to bring the check for me. I knew he was not going to give my check. This reconveyance doesn't worth penny.

"Q Okay. Why was --

"A But he promise --

"Q Why was the reconveyance not worth a penny?

"A Because he never filed this reconveyance. You know, now he come with the reconveyance. You know, he got the reconveyance year and a half ago.

"Q But how did you know he wasn't going to file the reconveyance?

"A Because some way I was trust -- he couldn't -- first of all, I'm in real estate. I know. If you get the reconveyance, you go to the title company. If you want to file it, you cannot go through escrow. You're supposed to go and file it. You cannot go file like that. I'm in the real estate business. I understand that.

"Q So what was missing for him to file it -- be able to file it?

"A A lot of paper is there for the reconveyance. It's not just one page, you go to a notary and give it to someone.

"Q Okay. So what I -- I guess what I'm wondering is: Did Harry basically suggest to you that he needed to get a reconveyance in order to get the money to pay you off?

"A Yeah.

"Q And I guess he indicated the people that were going to give him money wanted to see a reconveyance before they would give it to him to pay you?

"A That was a group of family members. Yeah.

"Q Okay."

R&D contends this testimony negates the actual reliance element of fraud. It argues the testimony demonstrates Astan only provided the reconveyance out of humanitarian motives ("I was trying to help his marriage"), and he put virtually no stock in any promises Hushang made to him ("I knew he was not going to give my check").

In ruling on a demurrer, the court may take judicial notice of the plaintiff's discovery admissions when they cannot reasonably be controverted. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485.) When the so-called admissions are not clear, however, judicial notice is not appropriate. In *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374 (*Joslin*), the court explained: "Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. [Citation.] On a demurrer a court's function is limited to testing the legal sufficiency of the complaint. [Citation.] 'A demurrer is simply not the appropriate procedure for determining the truth of disputed facts.' [Citation.] The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. [Citation.]" Accordingly, in *Joslin*, the court held the trial court could not consider certain deposition testimony to establish a disputed fact because the testimony was subject to different interpretations. (*Id.* at pp. 375-376.)

As in *Joslin*, Astan's deposition testimony is not the proper subject of judicial notice because it is subject to different interpretations and does not contain a clear admission. R&D focuses on his statement, "I knew he was not going to give my check" in isolation. But reading the whole passage, Astan explained Hushang needed the reconveyance first, and Hushang would come back with the money from his family members after he showed them the reconveyance. Directly before Astan utters the statement on which R&D relies, he states, "If I can help, *he is going to bring the check for me*." (Italics added.) Astan's statement that he knew Hushang was not going to give him the check could mean nothing more than Hushang was not going to give him the check right away, when Astan delivered the reconveyance. The statement was not necessarily inconsistent with a belief that Hushang would deliver a check at a later date. A demurrer is not the appropriate procedure for determining whether this or R&D's competing interpretation is the right one. Indeed, the trial court denied judicial notice of the other deposition excerpt offered by R&D and Hushang for precisely this reason --

"there [was] no agreement by the parties as to the meaning of the actual testimony of Max Astan."

R&D also maintains the testimony negates the justifiable reliance element of fraud because a reconveyance in exchange for a bare promise to pay a debt already in default is "irrational and inexplicable by any reasonable standard," especially when the parties do not agree on a deadline to pay or payment plan. We do not agree the testimony can be judicially noticed for this proposition either. Assuming arguendo reliance on a bare promise to pay was "irrational and inexplicable," Astan's statements did not indisputably say there was no deadline to pay, no payment plan, or no other conditions on the payment process. The questioner in this excerpt did not focus on the particulars of any promise Hushang made. He or she did not put the relevant questions to Astan, and we will not hold him to "admissions" on these issues when he did not actually admit anything. We cannot determine from this short excerpt that Astan's reliance was indisputably unjustified. In short, judicial notice of Astan's deposition testimony is not appropriate. The testimony does not therefore defeat Astan's proposed allegations of fraud in the inducement.

* * *

To conclude, a demurrer was not, strictly speaking, the appropriate method for disposing of the complaint for declaratory relief when an actual controversy existed between the parties regarding their claimed liens. Nevertheless, we have considered the merits of the parties' positions to determine whether reversal would be idle because Astan could not obtain a favorable declaration. We hold it is not out of the question Astan could obtain a favorable declaration, given a chance to amend the complaint with allegations of fraud in the inducement. Thus, we cannot merely modify the judgment to declare the parties' rights and affirm the modified judgment. The demurrers should have been sustained with leave to amend. (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 441 ["'It is axiomatic that if there is a reasonable possibility that a defect in the complaint can be cured by amendment or that the pleading liberally construed can state a cause of action, a demurrer should not be sustained without leave to amend.'"].)

DISPOSITION

The judgment is reversed and the cause remanded to permit the filing of an amended complaint. Astan shall have costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.