Filed 10/26/16 1865 Marcheeta Place v. Pacific Funding Grp CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

1865 MARCHEETA PLACE, LLC et al., Plaintiffs and Appellants, v. PACIFIC FUNDING GROUP, INC. et al., Defendants and Respondents.	B259553 (Los Angeles County Super. Ct. No. BC455063)

APPEAL from orders of the Superior Court of Los Angeles County, Robert Leslie Hess and Mitchell L. Beckloff, Judges. Affirmed.

Law Office of Gary Kurtz and Gary Kurtz for Plaintiffs and Appellants.

Glazer & Blinder, Mark S. Glazer and David M.S. Taam for Defendants and Respondents.

INTRODUCTION

Rahim Multani and 1865 Marcheeta Place, LLC (Marcheeta Place) appeal from a signed order of dismissal after the trial court granted a motion for judgment on the pleadings by Gary Pietruszka and Pacific Funding Group, Inc., and then denied a motion for reconsideration. The trial court ruled that the causes of action by Multani and Marcheeta Place for fraud and breach of contract were barred by the applicable statutes of limitation and denied leave to amend the complaint.

Multani and Marcheeta Place argue that Pietruszka and Pacific Funding Group are estopped from asserting the statute of limitations as an affirmative defense to their cause of action for fraud. In connection with their cause of action for breach of contract, they argue that the trial court erred by applying the two-year statute of limitations for breach of an oral agreement rather than the four-year statute of limitations for breach of a written agreement. They argue in connection with both causes of action that the trial court should have granted them leave to amend. We conclude that both causes of action are barred by the statutes of limitations and that the trial court did not abuse its discretion by denying leave to amend. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Loans and Deeds of Trust*[1]

Carey Wong purchased the property at 1865 Marcheeta Place (the Marcheeta property) in 2004 as an investment property. Wong signed several promissory notes secured by deeds of trust in connection with the planned development of the property, including (1) two March 2006 notes from Countrywide Home Loans, Inc., one for $2

---

[1] We assume for the purpose of reviewing the trial court's order granting judgment on the pleadings that the allegations in the operative second amended complaint are true. (See *People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777.)

million and one for $790,000; (2) a May 2006 note for $2 million from Western Pacific Diversified, LLC; and (3) a November 2006 note for $550,000 from Pacific Funding Group. In 2006 Wong created Marcheeta LLC, and in 2007 he transferred his interest in the Marcheeta property to Marcheeta LLC.

In March 2007 Wong sold Marcheeta LLC to Multani, the sole member of Marcheeta Place. In May 2007 Countrywide recorded a notice of default against the Marcheeta property. In June 2007 Pacific Funding Group began foreclosure proceedings after Wong failed to make his loan payments. Unbeknownst to Multani, Pietruszka, who was the director of Pacific Funding Group, bribed Wong to forge a subordination agreement, which gave Pacific Funding Group's deed of trust priority over the deed of trust held by Western Pacific Diversified.

In September 2007 Multani began negotiating with Pacific Funding Group and Countrywide in an effort to prevent foreclosure. The parties agreed that Pacific Funding Group would forgo its right to foreclose on the Marcheeta property if Marcheeta Place brought current the Countrywide loan and obtained an approval letter for a line of credit sufficient to refinance the Marcheeta property. On September 24, 2007 Marcheeta Place made a $40,000 payment to Countrywide, and Countrywide subsequently recorded a rescission of its notice of default. In October 2007 Marcheeta Place gave Pacific Funding Group and Pietruszka documentation showing its payment to Countrywide and a pre-approval letter for a loan in the amount of $5,650,000 from Washington Mutual. Nevertheless, on October 29, 2007, Pacific Funding Group foreclosed on the Marcheeta property.

Shortly after foreclosure, Pietruszka offered to unwind the foreclosure if Multani paid $600,000 to Pacific Funding Group and $150,000 to Pietruszka as a commission. Multani agreed to those terms on November 2, 2007, but Pietruszka told Multani the offer was contingent on the approval of other investors. On December 7, 2007 Pacific Funding Group recorded a trust deed on the property in the amount of $1.8 million. By April 2008 Multani and Marcheeta Place concluded that Pietruszka and Pacific Funding Group would not unwind the foreclosure on the terms they had offered.

B. *The Two Actions*

1. *The April 2008 Action*

On April 7, 2008 Multani and Marcheeta Place sued Pacific Funding Group, Wong, and Pietruszka, asserting five causes of action, including fraud and breach of contract. (*Western Pacific Diversified, LLC, et al. v. Pacific Funding Group, Inc. et al.* (Super. Ct. L.A. County, 2008, No. BC388587).) In connection with their cause of action for fraud, Multani and Marcheeta Place alleged:

"34. In mid September 2007, [Pietruszka] verbally represented to Multani in a telephone discussion that if Multani would obtain a delay in a foreclosure process initiated by Countrywide and could obtain a pre-qualification letter of commitment evidencing lender willingness to extend Multani credit to refinance the Marcheeta Property, [Pacific Funding Group] would [forgo] its right to foreclose on the Marcheeta Property on November 1, 2007 and would continue to [forgo] its right to foreclose on the Marcheeta Property until the loan to refinance the Marcheeta Property, and thus payoff [Pacific Funding Group], closed.

"35. The statements were false and fraudulent when they were made. In fact, [Pietruszka] never intended to wait as long as promised but, instead, wanted Multani to make payments on underlying obligations, thus saving [Pacific Funding Group] from the responsibility to do so and/or coerce Multani into pay[ing] an outrageous amount, including a $150,000 payment to [Pietruszka] personally, to satisfy [Pacific Funding Group's] loan."

Multani and Marcheeta Place alleged that Multani reasonably relied on Pietruszka's representations in various ways, including by making the $40,000 payment to Countrywide and by obtaining a commitment letter from Washington Mutual. The complaint alleged that Pacific Funding Group nevertheless foreclosed on the Marcheeta property in violation of its agreement to the contrary and caused Multani damages.

In connection with the cause of action for breach of contract, Multani and Marcheeta Place alleged, "In mid September 2007, [Pietruszka] and [Pacific Funding Group] entered into an oral agreement with Multani. [¶] [¶] [¶] . . . In violation of its agreement to the contrary, and notwithstanding Multani's good faith acts in reliance thereon, [Pacific Funding Group] breached its contract and foreclosed on the Marcheeta Property on October 29, 2007."

In January 2010 Multani and Marcheeta Place voluntarily dismissed the April 2008 action without prejudice. In December 2010, Multani became the successor in interest to Western Pacific Diversified.

2. *The February 2011 Action (This Action)*

On February 14, 2011 Multani and Marcheeta Place filed this action against Pietruszka and Pacific Funding Group, as well as a number of other individuals and entities involved in the loans for, and the development of, the Marcheeta property. Like the complaint in the April 2008 action, the operative second amended complaint in this action included causes of action for fraud and breach of contract, as well as other causes of action not at issue here.[2] In connection with the cause of action for fraud, Multani and

---

[2] Those causes of action include quiet title, declaratory relief, cancellation of deed, judicial foreclosure, promissory estoppel, and negligent misrepresentation. Multani and Marcheeta Place argue that their cause of action for cancellation, which the trial court's order rendered moot, will not be moot if we reverse the trial court's order. Cancellation of trustee's deed, however, is a remedy, not a cause of action. (See *Solomon v. Aurora Loan Services LLC* (E.D. Cal. July 3, 2012) 2012 WL 2577559, at p. 10; *Plastino v. Wells Fargo Bank* (N.D. Cal. 2012) 873 F.Supp.2d 1179, 1189; *Yazdanpanah v. Sacramento Valley Mortgage Group* (N.D. Cal. Dec. 1, 2009) 2009 WL 4573381, at p. 6 ["[a] request to cancel the trustee's deed is 'dependent upon a substantive basis for liability, [and it has] no separate viability'"], quoting *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1023, fn. 3.) Thus, Multani and Marcheeta Place are essentially arguing that, if they have a cause of action after this appeal, then they will be entitled to seek cancellation as a remedy for that cause of action. Because we affirm the trial court's order, Multani and Marcheeta Place do not have a basis for seeking cancellation.

Marcheeta Place alleged facts virtually identical to those alleged in paragraphs 34 and 35 of the complaint in the April 2008 action, as well as facts relating to reliance and damages.

Multani and Marcheeta Place also alleged in this action:

"47. When [Marcheeta Place] discovered that the [foreclosure] sale had taken place, it contacted [Pacific Funding Group's] president, Defendant Pietruszka, who initially denied that any sale had taken place. After consulting with his counsel, Defendant Shalom [Rubanowitz], Defendant Pietruszka confirmed that the sale had gone through in violation of the agreement between [Marcheeta Place] and [Pacific Funding Group].

"48. Notwithstanding Defendant Pietruszka's confirmation, Defendant Pietruszka also confirmed that the Agreement was still in place, that [Marcheeta Place's] loan was still available and that they would accomplish the transaction by an offer to purchase the Subject Property and all existing encumbrances. For its part, Defendant Pietruszka stated that [Pacific Funding Group] would want approximately $750,000, from which [Pacific Funding Group] would take the $600,000 to satisfy its outstanding balance and $150,000 as a commission for Defendant Pietruszka.

"49. On or about November 2, 2007, [Marcheeta Place] made an offer to purchase the Subject Property. The offer included payment of $600,000 to [Pacific Funding Group] and $150,000 to Pietruszka. [Pacific Funding Group] never responded to the offer.

"50. When [Pacific Funding Group] and Pietruszka failed to timely respond to [Marcheeta Place's] offer, [Multani] called Defendant Pietruszka to find out what was causing the delay. At this point, Defendant Pietruszka advised [Marcheeta Place], by and through its president, Multani, that approval of the offer was contingent on getting investor approval and that he had been unable to receive such approval, but that he expected full approval shortly thereafter.

"51. The truth of [the] matter was that [Pacific Funding Group] had received full assignments from all its investors on the note covering the Subject Property as of the end of July, 2007 and no investor approval was necessary.

"52. [Marcheeta Place] retained [an attorney] to resolve this dispute with [Pacific Funding Group]. In so doing, [the attorney] spoke with Defendant Pietruszka to determine the amount needed to redeem the property . . . . Defendants Pietruszka, [Pacific Funding Group] [and others] acted unreasonably and in bad faith by demanding $1,500,000, although the underlying loan was only for $555,000 and was secured by two other properties.

"53. [Pacific Funding Group] recorded title of the Subject Property on or about November 2, 2007, showing a transfer value of $700,000. Defendants [Pacific Funding Group], Pietruszka, [and others] quickly recorded a bogus Trust Deed in the amount of $1,800,000 on December 7, 2007 . . . showing [Pacific Funding Group] as the Trustor, Defendant Rubanowitz as the Trustee, and [another individual defendant] as the Beneficiary.

"54. On or about April 7, 2008, Plaintiffs Western [Pacific Diversified] and [Marcheeta Place] filed suit in California Superior Court for the County of Los Angeles . . . ."

In connection with the claim for breach of contract, Multani and Marcheeta Place alleged, "In or about September of 2007, Multani on behalf of [Marcheeta Place], began negotiating with [Pacific Funding Group] and Defendant Countrywide in order to prevent the foreclosure sale of the Subject Property. [Marcheeta Place] then entered into an agreement with [Pacific Funding Group], the terms of which were memorialized through telephone calls and emails." Multani and Marcheeta Place did not attach any of the referenced emails to the second amended complaint. Multani and Marcheeta Place also alleged, in language identical to the language in the complaint in the April 2008 action and the two prior complaints in this action: "In mid September 2007, [Pietruszka] and [Pacific Funding Group] entered into an oral agreement with Multani." Like the prior complaints, the second amended complaint by Multani and Marcheeta Place alleged that

Pietruszka and Pacific Funding Group breached that agreement by foreclosing on the Marcheeta property on October 29, 2007.

C. *The Motion for Judgment on the Pleadings*

On July 16, 2012 Pietruszka and Pacific Funding Group moved for judgment on the pleadings on the causes of action for fraud and breach of contract, arguing that both were time-barred. Pietruszka and Pacific Funding Group contended that both causes of action accrued on October 29, 2007, the date of foreclosure, and Multani and Marcheeta Place did not file this action until February 2011, after the expiration of the three-year statute of limitations for fraud and the two-year statute of limitations for breach of an oral contract.

In their opposition, Multani and Marcheeta Place argued with respect to the fraud cause of action that the "estoppel doctrine (which differs from equitable tolling)" precluded Pietruszka and Pacific Funding Group from asserting the statute of limitations. In particular, they argued that Pietruszka and Pacific Funding Group were estopped because they "engaged in a fraud scheme from September 2007 until April 2008," after the date of foreclosure, by representing that Marcheeta Place could "buy the subject property and moot the foreclosure." Multani and Marcheeta Place argued that negotiations continued until April 2008, when Multani and Marcheeta Place filed the first action. Thus, they argued that the cause of action for fraud did not accrue until April 2008.

With respect to the breach of contract cause of action, Multani and Marcheeta Place argued that the applicable statute of limitations was the four-year limitations period for breach of written contract, not the two-year limitations period for breach of oral contract. (See Code Civ. Proc., §§ 337, subd. (1); 339, subd. (1).)[3] They argued that, even though paragraph 104 of the second amended complaint alleged the contract was

---

[3] Undesignated statutory references are to the Code of Civil Procedure.

oral, paragraph 38 alleged that the terms of the contract were memorialized in emails. In the alternative, Multani and Marcheeta Place requested leave to amend "to plead and/or attach the emails" to evidence the material terms of the contract.

At the hearing, the trial court questioned the estoppel argument by Multani and Marcheeta Place: "Your client suffered the injury and knew it had suffered injury on or about October 29, 2007. And there was no impediment to your filing a timely complaint. Indeed, you filed a timely complaint alleging . . . these problems in April of 2008. . . . There is nothing that the defendants did that prevented you from filing a complaint within the statute of limitations. Indeed, you did. And then after you voluntarily dismissed the first one, they did nothing to prevent you from filing—a new complaint within the remaining period of the . . . statute of limitations."

Counsel for Multani and Marcheeta Place replied, "What I'm arguing is delayed inception of the statue of limitations, based on equitable tolling, equitable estoppel because of the fraud that was going on with the defendant saying, don't worry; we will remedy that. That takes us from that October 29th date until on or about April—the April filing of the other—of the first lawsuit."

With regard to the breach of contract cause of action, Pietruszka and Pacific Funding Group argued that Multani and Marcheeta Place had alleged an oral contract in three prior verified pleadings, and they could not now allege breach of a written agreement. Multani and Marcheeta Place argued in response that there was no inconsistency with the prior filings because the contract as alleged could be interpreted as either written or oral. The trial court disagreed and expressed skepticism that Multani and Marcheeta Place could amend to allege a written contract, in part because counsel for Multani and Marcheeta Place did not provide, and could not at the hearing remember the substance of, the emails allegedly memorializing the agreement.

The trial court granted the motion for judgment on the pleadings on the fraud and breach of contract claims. The court ruled, "The injury for the allegedly false representations occurred on October [29], 2007 when foreclosure occurred. . . . The argument that equitable estoppel applies is without foundation. Plaintiff had actual

contemporaneous knowledge of the foreclosure when it occurred. Plaintiff actually sued on this very fraud in April 2008 . . . . [Following voluntary dismissal,] Plaintiff did not refile prior to the expiration of the three year statute of limitations at the end of October [2010]. Under these facts, neither equitable estoppel (nor equitable tolling, which plaintiff did not argue) applies."

On the breach of contract claim, the trial court found the argument by Multani and Marcheeta Place that the contract was written contradicted the specific allegation in the second amended complaint that the contract was oral. The court also found that the complaint's reference to memorializing emails failed to sufficiently plead a written agreement. "The Court concludes that, in the face of more [than] four years of specific averments that the contract[ ] [was] oral, the indefiniteness of [the] references to emails is insufficient to provide a basis for leave to amend . . . when the true facts have been known to plaintiffs throughout this suit and plaintiff has consistently taken the position the agreement was oral."

Multani and Marcheeta Place filed a motion for reconsideration arguing that the trial court misconstrued the law of equitable estoppel and attaching the emails they contended memorialized the terms of the oral agreement. The trial court denied the motion for reconsideration.

On August 26, 2014, after issuing an order to show cause, the trial court dismissed all remaining defendants from the action, including Pacific Funding Group and Pietruszka, who gave notice of the dismissal on September 4, 2014. Multani and Marcheeta Place timely appealed.

DISCUSSION

"'A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action.'" (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777; see § 438, subd. (c)(3)(B)(ii).) "'A motion for judgment on the pleadings is equivalent to a demurrer and

is governed by the same de novo standard of review.'" (*People ex rel. Harris v. Pac Anchor Transportation, Inc.*, at p. 777; see *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1162 ["[t]he same de novo standard of review applies to motions for judgment on the pleadings and to general demurrers"].) "'All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law. [Citation] Courts may consider judicially noticeable matters in the motion as well.'" (*People ex rel. Harris v. Pac Anchor Transportation, Inc.*, at p. 777; see *PegaStaff v. Pacific Gas & Electric Co.* (2015) 239 Cal.App.4th 1303, 1313.)

A. *The Fraud Cause of Action Is Barred by the Statute of Limitations*

1. *Pacific Funding Group and Pietruszka Are Not Estopped from Asserting the Statute of Limitations*

Multani and Marcheeta Place argue that, because the misleading statements by Pacific Funding Group and Pietruszka after the foreclosure on the Marcheeta property delayed the accrual of the cause of action for fraud until April 2008, Multani and Marcheeta Place timely filed their claim in February 2011. We conclude that the cause of action accrued no later than November 2, 2007, when Multani and Marcheeta Place had actual knowledge of the facts underlying their claim for fraud.

Section 338, subdivision (d), requires a plaintiff to file an action for fraud within three years after the plaintiff discovers the facts constituting the fraud. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 14; *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1122-1123.) Multani and Marcheeta Place allege that Pacific Funding Group defrauded them by representing that the foreclosure would be delayed under certain conditions and then, when Multani and Marcheeta Place fulfilled those conditions, foreclosing anyway. Multani and Marcheeta Place learned of the foreclosure no later than November 2, 2007 in connection with their discussions to unwind the foreclosure, when Marcheeta Place made an offer to buy the property back from Pacific Funding

Group. Thus, Multani and Marcheeta Place had until November 2, 2010 to file the fraud claim in this action, but did not do so until February 14, 2011.

As Multani and Marcheeta Place argue, however, "'"[o]ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought."'" (See *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383 (*Lantzy*); *Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 404-405.) The doctrine of equitable estoppel "looks to 'the defendant's representations or other conduct that prevents the plaintiff from suing before the statute of limitations has run. When the [trial court] is satisfied that this has occurred, the defendant will be estopped from pleading a statute of limitations defense.'" (*Sagehorn v. Engle* (2006) 141 Cal.App.4th 452, 460, fn. 6.)

"'"Estoppel must be pleaded and proved as an affirmative bar to a defense of statute of limitations."'" (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1337.) "To create an equitable estoppel, 'it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.'" (*Lantzy*, *supra*, 31 Cal.4th at p. 384.) "'Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. [Citations.]' [Citation.] The detrimental reliance must be reasonable." (*May v. City of Milpitas*, *supra*, at p. 1338; see *Lantzy*, *supra*, 31 Cal.4th at p. 384.) Moreover, "'[t]he defendant's statement or conduct must amount to a misrepresentation bearing on the *necessity* of bringing a timely suit.'" (*May v. City of Milpitas*, *supra*, at p. 1338; see *Lantzy*, *supra*, at p. 384, fn. 18.)

In *Lantzy*, homeowners sued the developer and others for latent defects in the construction of their homes. (*Lantzy*, *supra*, 31 Cal.4th at p. 366.) The homeowners failed to bring suit within the time prescribed by the statute of limitations, but argued that the developer was equitably estopped from asserting the statute of limitations because the developer had repeatedly promised to repair damage to the homes. (*Id.* at p. 385.) The Supreme Court held that such allegations were insufficient to estop the developer from asserting the statute of limitations as a defense because the complaint was "devoid of any indication that defendants' conduct actually and reasonably induced plaintiffs to forbear suing within the [applicable statute of limitations]." (*Id.* at p. 385, italics omitted.) Moreover, the Supreme Court observed, the conduct the homeowners complained about occurred "well before the statute of limitations ran out," and "there is no claim that the inadequacy of these repairs, or the falsity of defendants' alleged . . . representations, remained hidden until after the limitations period had passed. Hence, plaintiffs have pled no facts indicating that defendants' conduct directly prevented them from filing their suit on time." (*Ibid.*, fn. omitted.)

Multani and Marcheeta Place argue that Pacific Funding Group and Pietruszka are equitably estopped from asserting the statute of limitations as a defense to the fraud claim in this action because, after the foreclosure on the Marcheeta property, Pacific Funding Group and Pietruszka prevented Multani and Marcheeta Place "from ascertaining the false nature of Pietruszka's representations" to unwind the foreclosure. They also argue that they relied on Pietruszka's representations by "refrain[ing] from filing suit between October 2007 and until April 2008."

As in *Lantzy*, however, Multani and Marcheeta Place did not allege any conduct on the part of Pacific Funding Group and Pietruszka that "actually and reasonably induced [them] to forbear suing within" the three-year limitations period. (*Lantzy*, *supra*, 31 Cal.4th at p. 385; see *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 687 [no equitable estoppel where plaintiffs failed to explain how defendants actually and reasonably "induced the [plaintiffs] to delay filing suit"]; see also *May v. City of Milpitas*, *supra*, 217 Cal.App.4th at p. 1338.) They argue

in their brief that Pacific Funding Group and Pietruszka "spent five months of active conduct of false negotiations and false promises of unwinding the sale to induce Appellants to refrain from filing suit," but the second amended complaint included no such allegations. Multani and Marcheeta Place alleged only that Pacific Funding Group and Pietruszka engaged in negotiations to unwind the foreclosure without following through on their representations to do so. Multani and Marcheeta Place did not allege any facts suggesting that Pacific Funding Group and Pietruszka did anything to prevent them from filing, or even to make it more difficult for them to file, this action within three years of November 2007. The absence of any impediments to filing their fraud claim during the limitations period is confirmed by the fact that Multani and Marcheeta Place were able to and actually did timely file the same fraud claim in April 2008. While Multani and Marcheeta Place alleged in this action some nefarious dealings in connection with the negotiations to unwind the foreclosure, they did not allege that any conduct by Pietruszka and Pacific Funding Group prevented them from filing a claim based on that conduct before the limitations period expired.

In sum, Multani and Marcheeta Place failed to assert a timely cause of action and did not allege a sufficient excuse for that delay. Therefore, they cannot invoke the doctrine of equitable estoppel. (See *Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 746 [equitable estoppel does not apply where, although the defendants initially concealed their identities, plaintiff learned their identities in time to assert a timely cause of action and offered no excuse for failing to do so]; see also *Utterkar v. Ebix, Inc.* (N.D. Cal. Mar. 18, 2015) 2015 WL 1254768 at p. 4 [allegations that the plaintiff intended to bring suit but refrained from doing so based on general assurances by the defendant and the existence of settlement discussions were insufficient to show that the defendant reasonably induced the plaintiff's forbearance until the statute of limitations had run].)[4]

---

[4] Multani and Marcheeta Place also argue on appeal that equitable tolling, a doctrine distinct from equitable estoppel (*Lantzy v. Centex Homes*, *supra*, 31 Cal.4th at p. 383),

2. *The Trial Court Did Not Err in Denying Leave To Amend To Plead Equitable Estoppel*

Multani and Marcheeta Place argue that the trial court erred in denying them leave to amend the second amended complaint in this action to allege facts supporting their claim that Pacific Funding Group and Pietruszka are equitably estopped from asserting the statute of limitations. We review that ruling for abuse of discretion. (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1468; *May v. City of Milpitas*, *supra*, 217 Cal.App.4th at p. 1339.) "The trial court abuses its discretion if there is a reasonable possibility that the plaintiff could cure the defect by amendment. [Citation.] The plaintiff has the burden of proving that amendment would cure the legal defect, and may meet this burden on appeal." (*Cansino v. Bank of America*, *supra*, at p. 1468.)

Multani and Marcheeta Place have not shown there is a reasonable possibility they can amend the second amended complaint to allege Pacific Funding Group and Pietruszka are estopped from arguing that the statute of limitations bars the fraud claim. (See *Lantzy*, *supra*, 31 Cal.4th at p. 386 ["the particular history of this case persuades us there is no reasonable possibility plaintiffs can state credible facts to support an equitable estoppel"].) The allegations of fraudulent conduct in the second amended complaint in this action are the same as those in the 2008 action, which Multani and Marcheeta Place filed within the statute of limitations. The damages resulting from that fraud occurred on October 29, 2007, and Multani and Marcheeta Place had knowledge of those damages at

---

applied to extend the statute of limitations on their fraud claim. Multani and Marcheeta Place forfeited this argument by not raising it in the trial court. (See *In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1346 ["[a] claim of error is forfeited on appeal if it is not raised in the trial court"]; *Kern County Dept. of Child Support Services v. Camacho* (2012) 209 Cal.App.4th 1028, 1038 ["arguments not raised in the trial court are forfeited on appeal"]; *In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 912 [because "[t]he issue of equitable tolling was never invoked before the trial court," it was forfeited].) Even if Multani and Marcheeta Place had not forfeited the argument, the allegations in the second amended complaint do not support tolling beyond December 7, 2007, which is still more than three years before they filed this action. Counsel for Multani and Marcheeta Place conceded at oral argument that they could not allege any additional facts regarding equitable tolling.

that time or shortly thereafter. They cannot now allege that they did not have knowledge of the facts underlying their cause of action until April 2008 or that Pacific Funding Group and Pietruszka prevented them from filing suit before the limitations period expired (because they did file suit in April 2008). (See *Vaca v. Wachovia Mortgage Corp.*, *supra,* 198 Cal.App.4th at p. 746 [“‘“[a] plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false”’”]; accord, *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1491.) The trial court did not abuse its discretion in granting the motion by Pacific Funding Group and Pietruszka for judgment on the pleadings without leave to amend the fraud claim.

B. *The Breach of Contract Cause of Action Is Barred by the Statute of Limitations*

Multani and Marcheeta Place do not dispute that the two-year statute of limitations bars their cause of action for breach of an oral agreement. The breach allegedly occurred on October 29, 2007, when Pacific Funding Group foreclosed on the Marcheeta property. (See § 339, subd. (1).) They contend, however, that the oral agreement between Marcheeta Place and Pacific Funding Group, “when combined with certain [emails], constitute[s] a written contract,” and that the trial court should have given Multani and Marcheeta Place leave to amend to allege breach of a written contract. If Multani and Marcheeta Place were entitled to amend their complaint to state a cause of action for breach of a written contract, such a claim would be timely under the four-year statute of limitations governing causes of action for breach of a written contract. (See § 337, subd. (1).) But the trial court did not abuse its discretion in ruling that they were not entitled to leave to amend, for at least two reasons.

First, the allegations in the prior complaints filed by Multani and Marcheeta Place precluded them from alleging breach of a written contract. When a complaint contains allegations that are fatal to a cause of action, such as allegations supporting a facial challenge under the statute of limitations, a plaintiff cannot cure that defect simply by

filing an amended complaint that omits the problematic facts or pleads facts inconsistent with those alleged previously. (*Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044.) "Absent an explanation for the inconsistency, a court will read the original defect into the amended complaint, rendering it vulnerable to demurrer again." (*Ibid*.; see *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751 ["allegations in an original pleading that rendered it vulnerable to demurrer or other attack cannot simply be omitted without explanation"]; *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425 ["plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers"].)

Multani and Marcheeta Place propose to amend the second amended complaint to "drop the time barred oral contract claim and replace it with a cause of action for breach of written contract based on email communications." The verified second amended complaint, the two prior verified complaints in this action, and the complaint in the April 2008 action, all alleged an oral agreement between Marcheeta Place and Pacific Funding Group (or their respective representatives). That's a lot of allegations of an oral agreement, most of which were under oath. Multani and Marcheeta Place offered no explanation for failing to allege that the agreement was written or for failing to allege breach of a written agreement. Nor did they identify any facts showing that the omission from the prior pleadings was a mistake, or that they discovered a factual basis for alleging breach of a written agreement only after filing the second amended complaint in this action. (See *Hendy v. Losse* (1991) 54 Cal.3d 723, 743 [plaintiff did not demonstrate that a prior inconsistent or "destructive" allegation "was the result of inadvertence or mistake, or that he has since discovered a factual basis" for making the subsequent allegation]; *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 343 ["'any inconsistencies with prior pleadings must be explained; if the pleader fails to do so, the court may disregard the inconsistent allegations'"]; *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 749 [trial court did not abuse its discretion in denying leave to amend where the plaintiff did not "apprise[] the court of any new information that would contribute to meaningful amendments"].) Indeed, Multani and Marcheeta

Place knew the facts surrounding the formation of the alleged agreement when they filed the first action in April 2008 and when they filed this action in February 2011. The trial court did not abuse its discretion by denying Multani and Marcheeta Place leave to amend their complaint yet again. (See *Banis Restaurant Design, Inc. v. Serrano, supra,* 134 Cal.App.4th at p. 1047 [no abuse of discretion where the plaintiff did not meet its burden of proof to demonstrate how its complaint might be amended without the taint of earlier, conflicting allegations]; *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877-878 ["[w]hen the plaintiff pleads inconsistently *in separate actions*, the plaintiff's complaint is nothing more than a sham that seeks to avoid the effect of a demurrer"].)

Second, the factual allegations proposed by Multani and Marcheeta Place do not state a claim for breach of written contract.[5] Section 337, subdivision (1), provides a four-year statute of limitations for actions based on a contract, obligation, or liability "founded upon an instrument in writing." For a contract to be "founded on a writing," the writing must contain the relevant terms of the agreement and the defendant must have accepted the writing, either orally or in writing. (See *Pietrobon v. Libarle* (2006) 137 Cal.App.4th 992, 997 [section 337, subdivision (1), requires that a writing contain all the terms of the alleged agreement and that the party to be charged has accepted those terms]; accord, *Amen v. Merced County Title Co.* (1962) 58 Cal.2d 528, 532; *Martini E Ricci Iamino S.P.A.—Consortile Societa Agricola v. Trinity Fruit Sales Co., Inc.* (E.D. Cal. 2014) 30 F.Supp.3d 954, 973.)

---

[5] "The application of a statute of limitations based on facts alleged in the complaint is a legal question subject to de novo review." (*Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336, 1340; see *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.)

The emails that Multani and Marcheeta Place claim memorialized an oral agreement do not satisfy these requirements. The emails contain neither the relevant terms of the agreement nor evidence Pietruszka or Pacific Funding Group accepted those terms. Only two of the emails refer to any (but not all) of the terms of the alleged agreement, and one of those is a communication between Multani and his real estate agent. The other is from Rubanowitz, counsel for Pacific Funding Group, to Pacific Funding Group. It is not from or to Multani or another representative of Marcheeta Place, and it does not evidence acceptance by Pacific Funding Group of any terms of the alleged agreement. Indeed, the email states that, "in [Rubanowitz's] opinion, no monies should be accepted until . . . [a]n agreement is executed by all the interested parties." Multani and Marcheeta Place did not allege that ever occurred.

Multani and Marcheeta Place argue that "preliminary writings" such as the email from Rubanowitz may form a binding written agreement "if all material terms are understood by the parties, even if a contemplated formal writing is never completed." Even assuming that is the law, the emails supplied by Multani and Marcheeta Place do not contain "all material terms." The email from Rubanowitz, for example, refers to neither the requirement that Multani and Marcheeta Place bring current the Countrywide loan nor the requirement that they obtain a loan commitment letter. The email between Multani and his real estate agent refers to the loan commitment letter, but not to the Countrywide loan.[6] Therefore, the emails do not constitute a binding written agreement.

---

[6] Multani and Marcheeta Place cite *Schwartz v. Shapiro* (1964) 229 Cal.App.2d 238 for the proposition that "preliminary writings" may form a binding written agreement. That case holds only that an enforceable agreement, either oral or written, may exist where the parties signed a preliminary writing intending to secure a formal contract at a later date, so long as the parties intended their promises to be binding. (*Id*. at pp. 247-248.) Here, the parties did not sign a preliminary written agreement.

DISPOSITION

The orders granting the motion by Pietruszka and Pacific Funding Group for judgment on the pleadings and denying the motion by Multani and Marcheeta Place for reconsideration are affirmed. Pietruszka and Pacific Funding Group are to recover their costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

GARNETT, J.*

---

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