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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GUL JAISINGHANI, Plaintiff and Appellant, v. U.S. BANK NATIONAL ASSOCIATION et al., Defendants and Respondents.	B283553 Los Angeles County Super. Ct. No. SC125165

APPEALS from a judgment and order of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed.

Gallet Dreyer & Berkey, David T. Azrin; George M. Halimi for Plaintiff and Appellant.

Locke Lord, Regina McClendon and James C. Magid for Defendant and Respondent U.S. Bank National Association.

Early Sullivan Wright Gizer & McRae, Eric P. Early and William A. Wright for Defendant and Respondent First American Title Insurance Company.

Baker Marquart, Christian A. Anstett; Bennett Tueller Johnson & Deere and Jeremy C. Reutzel for Defendant and Respondent National Title Agency, LLC.

Gul Jaisinghani appeals from the trial court's dismissal of his complaint and its order granting a motion to quash, following a dispute with his former partner over the development of real estate in Malibu and an eventual foreclosure on the property. Jaisinghani sued the bank that made the construction loan, the title insurance company, and the escrow and title agent. The trial court sustained demurrers to Jaisinghani's claims against the bank and the title insurance company, and granted the escrow and title agent's motion to quash. We affirm.

BACKGROUND

Jaisinghani's business partner Akil Sharma purchased undeveloped land in Malibu in 2008, and transferred the title to one of Sharma's companies, Malibu Knoll LLC (Malibu Knoll). In June 2009, Malibu Knoll grant deeded the property to a third party, Bagrat Ogannes. On June 15, Ogannes obtained a loan for $540,000 from California Bank and Trust (the California Bank loan) secured by a deed of trust Ogannes recorded on July 1, 2009. The day before, June 30, 2009, Ogannes had transferred the property to another company Sharma owned, Malibu Knoll Green Development, LLC (Malibu Knoll Green). On July 1, Ogannes obtained a loan for $723,500 from Malibu Knoll (the Malibu Knoll loan), secured by a short form deed of trust and

assignment of rents on the Malibu property, recorded on August 3, 2009.

In 2010, Sharma approached Jaisinghani about developing the property together, with Sharma as project manager. Jaisinghani alleged he paid off the California Bank loan in June 2010 to purchase the property outright. On November 8, 2010, Jaisinghani recorded a grant deed showing a transfer of the property on that date from Malibu Knoll Green to Jaisinghani. Jaisinghani alleged he was unaware of the Malibu Knoll loan, and believed the property was free of any encumbrances.

In March 2011, Jaisinghani obtained a construction loan of $1,888,510 from U.S. Bank (the U.S. Bank loan or the construction loan), secured by a deed of trust. U.S. Bank obtained a lender's title insurance policy issued by First American Title Insurance Corporation (First American). Jaisinghani alleged U.S. Bank and First American knew of the Malibu Knoll loan but did not inform him, and he first learned of the Malibu Knoll loan when Sharma and Malibu Knoll sued him in November 2014.

Malibu Knoll began nonjudicial foreclosure proceedings in November 2015, recording a notice of default stating that Ogannes owed $932,105.95 on the Malibu Knoll loan. Jaisinghani demanded that First American defend Jaisinghani's claim arising out of the foreclosure. First American denied coverage, explaining it had issued a lender's policy to U.S. Bank, not an owner's policy to Jaisinghani, whom it therefore had no duty to defend.

1. **The Sharma lawsuit**

In late 2014, Sharma, his wife, and his companies sued Jaisinghani (the Sharma lawsuit), alleging Jaisinghani violated

their joint venture agreement by claiming sole ownership of the property. Jaisinghani filed a complaint (later consolidated with Sharma's complaint), asserting he purchased the property in reliance on Sharma's assurances that the only lien on the title at that time was the California Bank loan (an allegation he repeats in his second and third amended complaints in this case). In February 2016, a jury found Jaisinghani breached a joint venture agreement with Malibu Knoll Green, under which Malibu Knoll Green and Jaisinghani agreed to share equally the profits and losses from development of the property. The jury awarded Malibu Knoll Green damages of $1 million and an additional $100,000 in damages for negligent misrepresentation, and in a supplemental verdict stated Malibu Knoll Green would not receive a half-share of the profits on the sale of the property. Jaisinghani appealed, and Division Five of this district affirmed the judgment. (*Sharma et al. v. Jaisinghani* (Jan. 12, 2018, B275607) [nonpub. opn.].)

2. **Jaisinghani's lawsuit**

In December 2015, Jaisinghani filed a complaint against U.S. Bank, First American, and National Title Agency, LLC (National Title), the escrow and title agency that closed the construction loan between Jaisinghani and U.S. Bank. A first amended complaint filed in February 2016 alleged that all three defendants aided and abetted Sharma's fraud and breach of fiduciary duty, and were negligent; First American had a duty to defend Jaisinghani in the Sharma lawsuit; U.S. Bank breached its duty of good faith and fair dealing when it approved the construction loan without discovering the Malibu Knoll loan and notifying Jaisinghani; and Jaisinghani was entitled to an award against all three defendants for restitution and unjust

enrichment. On August 8, 2016, Judge H. Jay Ford III granted National Title's motion to quash for lack of jurisdiction without prejudice, finding there was no evidence National Title (a Utah corporation) conducted or solicited business in California, or purposefully availed itself of the benefits of California. Judge Ford dismissed National Title without prejudice and ordered the clerk to give notice. Judge Ford also sustained First American's and U.S. Bank's demurrers with leave to amend.

Jaisinghani filed a second amended complaint against all three defendants in September 2016, alleging against U.S. Bank and First American, "Negligence in Undertaking Voluntarily Assumed Duty" (clearing the title of the lien created by the Malibu Knoll loan) and negligence in selecting National Title as the closing agent on the construction loan; against U.S. Bank, breach of the implied covenant of good faith and fair dealing; against First American, breach of title insurance policy (Third Party Beneficiary) and breach of agency agreement; and against "the defendants," an award for restitution and unjust enrichment. The second amended complaint requested damages, declaratory relief, punitive damages, and attorney fees.

On October 11, 2016, Jaisinghani filed a notice of motion and motion to reconsider the August 8, 2016 order granting National Title's motion to quash.

U.S. Bank and First American again filed demurrers. On February 22, 2017, Judge Lisa Hart Cole (hereinafter, Judge Cole or the trial court) sustained U.S. Bank's and First American's demurrers to the cause of action for negligence in undertaking a voluntary duty and the claim for restitution and unjust enrichment, all without leave to amend. The court sustained U.S. Bank's demurrer to the cause of action for breach of the

implied covenant of good faith and fair dealing without leave to amend, and also sustained without leave to amend First American's demurrer to the causes of action for breach of title insurance policy and breach of agency agreement. The trial court sustained U.S. Bank's and First American's demurrers to the cause of action for negligence in selecting an agent (National Title) with leave to amend. Judge Cole ordered Jaisinghani not to add any new causes of action, and to limit any amendment to his cause of action alleging negligence in selecting National Title as an agent.

Also on February 22, 2017, the trial court issued a tentative decision, declining to rule on Jaisinghani's motion to reconsider the order granting National Title's motion to quash. Judge Cole ruled the motion to reconsider must be heard by Judge Ford, who had issued the order and was available to hear the motion to reconsider two days later. Judge Cole also noted the motion was untimely. At the hearing that same date, counsel for Jaisinghani stated "we're not going to request a hearing," and agreed to taking the motion off calendar. The court declined Jaisinghani's suggestion that it treat the motion to reconsider as a response to a renewed motion to quash.

Jaisinghani filed a third amended complaint on March 6, 2017. The third amended complaint included a negligence cause of action against U.S. Bank and First American, alleging they negligently selected and supervised National Title; a negligence cause of action against National Title; and a claim against National Title for restitution and unjust enrichment.

U.S. Bank filed its third demurrer, arguing it had no duty of care to Jaisinghani, and a negligent hiring theory applied only in the employment context. First American also filed a third

demurrer, arguing that only an employer could be held liable for negligent hiring and supervision, and First American did not have an employment or agency relationship with National Title for escrow and closing services. National Title made a special appearance and filed a second motion to quash, arguing the August 2016 order was res judicata on the issue of personal jurisdiction over National Title in California.

At a hearing on May 2, 2017, the trial court found no California authority established a duty regarding negligent hiring and supervision in financial dealings, and sustained without leave to amend the demurrers of U.S. Bank and First American. At a hearing on May 19, 2017, the court adopted its tentative ruling that Judge Ford's August 8, 2016 order granting the motion to quash had direct estoppel effect and precluded Jaisinghani from relitigating the issue of personal jurisdiction over National Title. On June 28, 2017, Judge Cole dismissed the complaint with prejudice as to U.S. Bank and First American, and granted National Title's motion to quash.

Jaisinghani filed timely notices of appeal.

DISCUSSION

We review questions of law de novo, including the trial court's application of collateral estoppel or issue preclusion. (*Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1507.) We also review independently an order sustaining a demurrer, determining de novo whether the complaint alleges sufficient facts to state a cause of action or discloses a complete defense. (*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 190.) We review for an abuse of discretion the denial of leave to amend; Jaisinghani bears the burden of establishing that he could have amended the complaint to cure

its defects. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1163.)

1. **The trial court correctly granted the second motion to quash**

National Title argues Judge Cole correctly declined to rule on Jaisinghani's motion to reconsider Judge Ford's order quashing service of the complaint for lack of jurisdiction, and that Judge Ford's order estopped the court from considering Jaisinghani's second motion to quash. We agree.

a. **The motion to reconsider Judge Ford's order was untimely and filed before the wrong judge**

A motion to reconsider must be filed "within 10 days after service upon the party of written notice of entry of the order," and the party seeking reconsideration must "make application to the same judge or court that made the order." (Code Civ. Proc., § 1008, subd. (a).)[1] "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders . . . . No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." (§ 1008, subd. (e).) The 10-day time limit is not jurisdictional: "Trial courts have inherent authority to reconsider interim rulings until final judgment." (*Board of Medical Quality Assurance v. Superior Court* (1988) 203 Cal.App.3d 691, 701, fn. 4.)

Jaisinghani filed his motion to reconsider more than two months after Judge Ford entered the order granting National

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[1] All subsequent statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Title's motion to quash, with notice to the parties. The motion was untimely, and under section 1008 the court could properly deny the motion on that ground alone. (*In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468.)

"A trial court's discretion to reconsider another judge's prior ruling is necessarily narrow and usually only appropriate when the prior judge is unavailable. . . . [¶] . . . [¶] Generally, one trial court judge may not reconsider and overrule an interim ruling of another trial judge." (*In re Marriage of Oliverez* (2015) 238 Cal.App.4th 1242, 1247-1248.) Allowing a party to apply to a different judge for reconsideration " ' "would lead directly to forum shopping, since if one judge should deny relief, defendants would try another and another judge until finally they found one who would grant what they were seeking. Such a procedure would instantly breed lack of confidence in the integrity of the courts." ' " (*Id.* at p. 1248.)

Under "narrow exceptions to this general rule . . . 'a different judge *may* entertain the reconsideration motion.' " (*In re Marriage of Oliverez, supra,* 238 Cal.App.4th at p. 1248, italics added.) None of the exceptions to this general rule applies. Jaisinghani concedes that Judge Ford was not unavailable, Jaisinghani did not show the facts had changed or submit new evidence or authority with his motion to reconsider, and nothing in the record shows the ruling was based on inadvertence, mistake, or fraud. (*Id.* at pp. 1248-1249.) And, in any event, Judge Cole still had discretion whether to entertain the motion to reconsider, even if an exception did apply.

What Jaisinghani argues were "new evidence and facts" were instead facts Jaisinghani could have provided earlier when he opposed the motion to quash and did not have to rely on

subsequent discovery to obtain. This includes agreements bearing his signature and predating the motion to quash, public court records from Utah, the trial testimony of one of National Title's agents, Lisa Smith, in the Sharma litigation, and additional emails confirming she acted as an escrow agent, which Judge Ford's order considered, and rejected, as evidence of minimum contacts. "Under Code of Civil Procedure section 1108, a party seeking reconsideration of a prior ruling upon an alleged different set of facts must 'provide both newly discovered evidence and an explanation for the failure to have produced such evidence earlier.' " (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1168.)

b. **Collateral estoppel precluded Jaisinghani from relitigating personal jurisdiction over National Title in opposing its subsequent motions to quash**

Collateral estoppel precludes a party from relitigating an issue argued and decided in prior proceedings, if all of these requirements are met: the issue sought to be precluded is identical; the issue was actually litigated in the former proceeding; the issue was necessarily decided in the former proceeding; the decision in the former proceeding is final and on the merits; and the party to be precluded is the same, or in privity with, a party to the former proceeding. (*Johnson v. GlaxoSmithKline, Inc.*, *supra*, 166 Cal.App.4th at pp. 1507-1508.) The court also must balance the rights of the party who will be estopped against the need for estoppel in the case, to promote judicial economy, minimize repetitive litigation, and prevent inconsistent judgments or vexatious litigation. (*Id.* at p. 1508.)

Jaisinghani argues Judge Ford's August 8, 2016 order was not final for estoppel purposes, because the order states, "National Title [is] dismissed from this action *without prejudice* under Code of Civil Procedure section 581(h)." (Italics added.) He asserts the words "without prejudice" allow him to reassert his claims against National Title in the same case by amending his complaint, despite the dismissal of National Title for lack of personal jurisdiction. Jaisinghani is wrong.

Section 581, subdivision (h) states when the trial court grants a motion to quash and dismisses an action for lack of personal jurisdiction, "The court may dismiss without prejudice the complaint in whole, or as to that defendant, when dismissal is made pursuant to Section 418.10." (§ 581, subd. (h).) Such a dismissal on jurisdictional grounds is without prejudice as to the merits of the substantive claims (such as the fraud, breach of fiduciary duty, and negligence causes of action against National Title in Jaisinghani's first amended complaint, none of which Judge Ford ruled upon). (*MIB, Inc. v. Superior Court* (1980) 106 Cal.App.3d 228, 232.) " '[T]he plaintiff is not thereby precluded from thereafter maintaining an action on the original cause of action and the judgment is conclusive only as to what is actually decided.' " (*Ibid.*) What Judge Ford actually decided was that National Title did not have sufficient contacts with California for personal jurisdiction. The ruling was on the merits of personal jurisdiction only. Jaisinghani is thus barred from relitigating personal jurisdiction in California, " 'the very question which was litigated in the prior action.' " (*Ibid.*) Further, Jaisinghani "cannot escape the bar of the prior decisions by asserting that those decisions were wrong, or that [he has]

other evidence which was not introduced in the earlier proceedings." (*Id.* at p. 235.)

Sabek, Inc. v. Engelhard Corp. (1998) 65 Cal.App.4th 992 (*Sabek*) is very similar. The trial court granted the defendant's motion to quash Sabek's third amended complaint, finding Sabek had not met its burden to show the defendant had minimum contacts with California. (*Id.* at p. 995.) Sabek promptly re-served the defendant, who filed a second motion to quash. The court granted the second motion, as the minimum contacts issue had already been decided. Sabek persisted, filed a fifth amended complaint, and again attempted service. The defendant filed yet another motion to quash, which a different judge granted. Construing the proceedings as a motion to reconsider that should have been brought before the judge who ruled on the first two motions to quash, the trial court concluded that Sabek had failed to make a timely motion to reconsider and had not appealed the previous order, and therefore could not pursue the issue further. The court granted the third motion to quash, and awarded sanctions. (*Id.* at p. 996.) The Court of Appeal affirmed, concluding direct estoppel barred Sabek from reasserting the existence of minimum contacts, as that issue had been decided against Sabek. (*Id.* at p. 997.)

Sabek explicitly rejected the same argument Jaisinghani advances, that issue preclusion does not apply because judgment was not on the merits. "This argument is untenable. The reason there was no judgment on the merits is that the court had no jurisdiction over the defendant; the lawsuit obviously could not proceed to judgment. The quashing of service ended the litigation as to [the defendant] in a final, appealable order." (*Sabek, supra*, 65 Cal.App.4th at p. 998.) As a result, "even when

the underlying cause of action itself is not barred, the rules of issue preclusion may nevertheless apply to a final order in which personal jurisdiction is found to be absent. In such a case, the order 'is on the merits to the extent that it will bar the plaintiff from maintaining a further action in that State, [though] it is not on the merits so far as actions in other States are concerned.' " (*Id.* at pp. 998-999.)

Sabek also ably distinguishes cases Jaisinghani relies upon. *GMS Properties, Inc. v. Superior Court* (1963) 219 Cal.App.2d 407 does not discuss direct estoppel; *Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222 involved the grant of a motion to quash because service had been ineffective, which did not bar a second motion on the basis of minimum contacts. (*Sabek*, *supra*, 65 Cal.App.4th at pp. 999-1000.) "Here the matter of personal jurisdiction was completely resolved by the finding that no minimum contacts existed between [National Title] and this state. After the previous orders quashing service on this ground, it was incumbent upon [Jaisinghani] to seek reconsideration or appellate review." (*Id.* at p. 1000.) Jaisinghani's motion to reconsider was not timely, Judge Ford was available to hear the motion, and Jaisinghani failed to seek appellate review. Collateral estoppel barred Jaisinghani from reasserting the existence of minimum contacts.

2. **The trial court properly sustained the demurrers to the second amended complaint**

Jaisinghani argues the trial court erred in sustaining the demurrers to his causes of action, the rulings "reflect an improper predisposition or bias against Jaisinghani's claims," and remand should be to a different judge. The trial court was correct to sustain the demurrers.

We first reject Jaisinghani's entirely unsupported claim that the trial court was predisposed against him or acted with bias. He points to nothing in the record to support a claim of bias, other than the court's rulings against him. "A party must allege concrete facts that demonstrate the challenged judicial officer is contaminated with bias or prejudice. 'Bias and prejudice are never implied and must be established by clear averments.' [Citation.] Indeed, a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792.)

a. **Negligence in undertaking a voluntarily assumed duty (First American and U.S. Bank)**

Judge Cole sustained the demurrers to this first cause of action in the second amended complaint without leave to amend, on February 22, 2017.

Jaisinghani alleged U.S. Bank and First American knew of the $723,500 trust deed both before and after the construction loan closed. U.S. Bank and First American "voluntarily undertook responsibility for clearing the lien created by the $723,500 Deed of Trust," when after the loan closed, they asked Sharma repeatedly to provide a reconveyance and extinguish the lien. Although notes in the loan file stated that disbursements should not be paid out to Jaisinghani unless the lien was extinguished, U.S. Bank continued to pay out all disbursements. After the final disbursement in March 2014, U.S. Bank wrote First American requesting it issue the final title insurance policy reflecting no prior liens, and never informed Jaisinghani of the

situation. U.S. Bank and First American voluntarily assumed the duty to Jaisinghani to clear the lien, failed to exercise due care, and were negligent.

Jaisinghani did not allege that U.S. Bank owed him a fiduciary duty, or a duty of care that U.S. Bank did not voluntarily assume. The existence of a duty of care is a matter of law. (*Rossetta v. CitiMortgage, Inc.* (2017) 18 Cal.App.5th 628, 637.) We note "[a]s a 'general rule,' lenders do not owe borrowers a duty of care unless their involvement in a transaction goes beyond their 'conventional role as a mere lender of money.' " (*Ibid.*; *Daniels v. Select Portfolio Servicing, Inc.*, *supra*, 246 Cal.App.4th at p. 1180.) Jaisinghani did not allege and does not argue that his conventional lender-borrower relationship on the construction loan with U.S. Bank somehow changed to justify an exception to this general rule. (Compare *Rossetta v. CitiMortgage*, *Inc.*, *supra*, 18 Cal.App.5th at p. 640 [in voluntary loan modification, borrower and lender enter new phase in which lender has greater bargaining power and less incentive to exercise care].) On the facts as alleged, when U.S. Bank attempted to clear the lien, it was "acting in its conventional role as a lender of money to ascertain the sufficiency of the collateral as security for the loan" (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1097), and was protecting its own security interest.

Instead, Jaisinghani alleged that U.S. Bank negligently performed a duty it voluntarily undertook (and which therefore was not inherent in their relationship): the duty to clear the lien. The essence of a claim for negligent undertaking is that the defendant "undertook, gratuitously or for consideration, to render services to another." (*O'Malley v. Hospitality Staffing Solutions*

(2018) 20 Cal.App.5th 21, 27.) Yet Jaisinghani's second amended complaint does not allege that U.S. Bank undertook to clear the lien in an effort to benefit *him*, rather than in U.S. Bank's own interest. And even if Jaisinghani had alleged facts supporting a claim of negligent undertaking, "the negligent undertaking theory of liability permits damages for personal injury or property damage, not economic losses." (*State Ready Mix, Inc. v. Moffatt & Nichol* (2015) 232 Cal.App.4th 1227, 1235; *Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 456-457.)

Jaisinghani cites *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 864, where the bank making a construction loan owed a duty to the eventual purchasers of the tract houses after the bank "became much more than a lender content to lend money at interest on the security of real property," and became an active participant in the development of the land and the marketing of the houses. Similarly, in *Walnut Creek Aggregates Co. v. Testing Engineers Inc.* (1967) 248 Cal.App.2d 690, 694-695, the defendant who sold aggregate did not contract to participate in mixing the concrete, but "gratuitously assumed the task of actively participating in the mixing of the concrete batches," so that public policy mandated finding a duty of care to the plaintiff. Jaisinghani alleged no such expanded role for U.S. Bank in this case.

First American also had no general duty to Jaisinghani to identify, verify, or disclose matters that affected the title to the property. (Ins. Code, §§ 12340.10, 12340.11.) The title company issuing a preliminary report represents that the title insurance policy will insure the title in the condition described in the preliminary report, to induce the insured (here, U.S. Bank) to purchase the policy under the risk reflected in the report. (*Lee v.*

Fidelity National Title Ins. Co (2010) 188 Cal.App.4th 583, 596.) " ' "[A] title insurer prepares a preliminary report to limit its own risk . . . and not on behalf of any party to a real estate transaction. A party who does not purchase the title insurance may not rely on the title insurer to protect his or her interests or to disclose all detrimental information contained in the recorded files. Parties who desire protection against the possibility that negative information exists that was not revealed in the title insurer's search of the records must obtain title insurance. . . ." ' " (*Ibid.*) Further, "a title insurer cannot be held liable for negligence in connection with a preliminary report." (*Ibid.*) "A title insurer who has not undertaken to perform as an abstractor owes no duty to disclose recorded liens or other clouds on title. The reason derives from the difference between an abstract of title prepared by an abstractor and a preliminary title report prepared by a title insurer prior to issuing a title insurance policy." (*Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1189-1190.)

Moreover, as is true for U.S. Bank, the negligent undertaking cause of action cannot create a duty on First American's part. The second amended complaint does not allege that First American undertook to clear the lien in an effort to benefit Jaisinghani, rather than to benefit its own interests or the interests of the insured, U.S. Bank. And as we explained above, a negligent undertaking claim permits damages only for personal injury or property damage, neither of which Jaisinghani alleged in this case.

Judge Cole properly sustained the demurrers without leave to amend to the negligent undertaking cause of action in Jaisinghani's second amended complaint.

b. **Breach of implied covenant of good faith and fair dealing (U.S. Bank)**

Judge Cole sustained the demurrer to this third cause of action in the second amended complaint without leave to amend on February 22, 2017.

Jaisinghani alleged that under the terms of the construction loan agreement, the deed of trust, and the closing instructions from U.S. Bank to National Title, U.S. Bank promised the bank's "mortgage loan" would be in first position and the property would be unencumbered. Jaisinghani also alleged U.S. Bank had "discretionary" authority to ensure there were no encumbrances, and failed to act in good faith and deal fairly when it did not clear the $723,500 deed of trust, notify Jaisinghani before and after the closing, or defend him against the enforcement of the lien, thus depriving him of the benefits of the agreement.

The covenant of good faith and fair dealing does not exist independently of a contract between the parties, but instead is " 'limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create obligations not contemplated by the contract.' " (*Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094.) "The actual terms of the Written Agreement control [the appellant's] attempts to characterize the agreement." (*Ibid.*) The implied covenant therefore cannot impose a substantive duty on the contracting parties unless the duty is incorporated in the specific terms of their agreement. (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 806.) "Depending on the circumstances, that duty may go no farther than to act in a commercially reasonable

manner." (*Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1552.)

Jaisinghani identifies no specific terms promising U.S. Bank will ensure its own construction loan was in first position in the agreements he relies upon (attached as exhibit C to Jaisinghani's second amended complaint). The specific terms are to the contrary.

The loan agreement requires that *Jaisinghani* furnish U.S. Bank with a title insurance policy "insuring that the Security Instrument is a valid first lien."

The deed of trust (the security instrument) states: "BORROWER COVENANTS . . . that the Property is unencumbered," and will defend the title against all claims. Jaisinghani "shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument." The agreement also states that if U.S. Bank "determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above." The loan agreement obligated Jaisinghani to satisfy the

preexisting $723,500 deed of trust, contest it or defend U.S. Bank against it, or secure its subordination.

Finally, the closing instructions from U.S. Bank to National Title require that U.S. Bank "receive a clear final title policy without exceptions and have valid first lien position." Those closing instructions make no promise to Jaisinghani.

These documents show Jaisinghani was obligated to defend U.S. Bank against the $723,500 deed of trust (or secure its satisfaction or subordination). They do not show any obligation by U.S. Bank to clear the lien or defend Jaisinghani against its enforcement.

Judge Cole properly sustained without leave to amend U.S. Bank's demurrer to the implied warranty of good faith and fair dealing cause of action in Jaisinghani's second amended complaint.

c. **Breach of title insurance policy (third party beneficiary) (First American)**

Judge Cole sustained First American's demurrer to this fourth cause of action in the second amended complaint without leave to amend on February 22, 2017.

Jaisinghani alleged that First American's title insurance policy issued to U.S. Bank was intended to benefit him, as shown in the indemnity agreement between Jaisinghani and First American and in the closing instructions, and First American breached its obligation to him by failing to ensure that he had marketable title and refusing to defend him against the enforcement of the $723,500 lien.

"A contract, made *expressly* for the benefit of a third person, may be enforced by him . . . ." (Civ. Code, § 1559, italics added.) " ' "[T]he contracting parties must have intended to benefit that

individual, an intent which must appear in the terms of the agreement." ' " (*Stockton Mortgage, Inc. v. Tope*, *supra*, 233 Cal.App.4th at pp. 451-452.)

The title insurance policy is between First American and the insured, U.S. Bank. The policy insures only "the insured" against loss incurred by reason of any encumbrance on the title, and obligates First American to "provide for the defense of an insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured." The policy states it "is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant . . . ." Nowhere does the policy state First American intended to benefit Jaisinghani. His payment of the policy premium does not make the policy a third party beneficiary contract for his benefit. (*Kenny v. Safeco Title Ins. Co.* (1980) 113 Cal.App.3d 557.) "[O]ne who is only an incidental beneficiary of the policy of title insurance . . . has no grounds for recovery on the contract against the title insurer." (*Stagen v. Stewart-West Coast Title Co.* (1983) 149 Cal.App.3d 114, 119.) He did not purchase title insurance for himself, and "[p]arties who desire protection against the possibility that negative information exists that was not revealed in the title insurer's search of the records must obtain title insurance." (*Siegel v. Fidelity Nat. Title Ins. Co.*, *supra*, 46 Cal.App.4th at p. 1193.) Jaisinghani was only an incidental beneficiary of the lender's title insurance policy, whose terms show no intent to benefit him as a third party.

The trial court was correct to sustain without leave to amend First American's demurrer to the third party beneficiary cause of action in the second amended complaint.

d. **Breach of agency agreement (third party beneficiary) (First American)**

Jaisinghani added this fifth cause of action to his second amended complaint after Judge Ford sustained with leave to amend First American's demurrer to his first amended complaint, which did not contain a cause of action for breach of agency agreement under a third party beneficiary theory. "[T]he scope of the grant of leave is ordinarily a limited one. It gives the pleader an opportunity to cure the defects in the particular causes of action to which the demurrer was sustained, but that is all. [Citation.] 'The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend.' " (*Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1329.) Jaisinghani did not ask for permission to add this new cause of action. In any event, the trial court was correct to sustain First American's demurrer without leave to amend.

Jaisinghani alleged First American entered into an agency agreement with National Title (which no longer was a defendant after Judge Ford granted the motion to quash), to act as the underwriting and disbursing agent. Jaisinghani alleged the agreement between First American and National Title was intended to benefit him, and First American breached the agreement by failing to give National Title instructions and to ensure that National Title held the funds pending clearance of the lien on the title.

First American and National Title signed an "Agency Agreement" on March 31, 2009, while Sharma's company Malibu

Knoll still owned the property and over a year before Jaisinghani bought it. Of course, the agreement does not mention the property or Jaisinghani (or any other individual or property). Instead, it was for the mutual benefit of First American and its agent National Title. The agreement states National Title will comply with all of First American's title underwriting requirements, and National Title's authority "is expressly limited to the issuance of Policies and the collection of Premiums." Nowhere does the agency agreement indicate any intent to benefit any third party. Even if Jaisinghani might have benefited from First American's and National Title's full performance of the agreement, that is not enough to show that they entered into the agency agreement *expressly for his benefit*, as required for him to be a third party beneficiary. (*Markowitz v. Fidelity Nat. Title Co.* (2006) 142 Cal.App.4th 508, 527.)

e. **Restitution and unjust enrichment**

Several divisions of this court have held unjust enrichment or restitution is not a separate cause of action. (See, e.g., *Everett v. Mountains Recreation & Conservancy Authority* (2015) 239 Cal.App.4th 541, 553; *Munoz v. MacMillan* (2011) 195 Cal.App.4th 648, 661; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370; *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793.) "Rather, unjust enrichment is a basis for obtaining restitution based on quasi-contract or imposition of a constructive trust." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1490.) "Unjust enrichment is not a cause of action, just a restitution claim. [Citations.] There being no actionable wrong, there is no basis for the relief." (*Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1307.)

We affirm the trial court's grant without leave to amend of the demurrers to Jaisinghani's causes of action in his second amended complaint. He has no basis for relief, and therefore no claim for unjust enrichment or restitution.

3. **The trial court properly sustained the demurrers to the third amended complaint**

On June 28, 2017, Judge Cole sustained without leave to amend U.S. Bank's and First American's demurrers to Jaisinghani's remaining cause of action against them in the third amended complaint, for negligence in hiring and supervision. The remaining causes of action in the third amended complaint were against National Title only, and Judge Cole granted the motion to quash "on the ground of lack of jurisdiction of the Court over National Title" on the same date (which we have affirmed above).

Jaisinghani's remaining cause of action alleged U.S. Bank and First American negligently selected and supervised National Title to act as "the closing agent, the settlement agent, the underwriting agent, and the disbursing agent, with responsibility for every aspect of Mr. Jaisinghani's California loan transaction, including but not limited to responsibility for clearing any and all title issues, preparing and obtaining the loan documentation, underwriting the loan and title, conducting and coordinating physical inspections of the property, coordinating with the contractor, deciding whether to payout any further disbursements, and other aspects of the loan," although they knew "National Title was being operated in an incompetent manner" and was not capable of handling a California residential construction loan transaction. The factual allegations describe First American's relationship with National Title as "incestuous,"

and focus on the actions of National Title and its employees in "voluntarily undertaking" to remove the lien created by the $723,500 deed of trust, and mishandling and failing at the task.

" 'An *employer* may be liable to a third person for the *employer's* negligence in hiring or retaining an employee who is incompetent or unfit.' " (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139, italics added.) This tort developed in factual settings where the plaintiff's injury occurred in the workplace, or the employment relationship generated the contact between the plaintiff and the employee. (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339.) Neither U.S. Bank nor First American "employed" National Title. As we described above, the agency agreement between First American and National Title limited National Title to issuing policies and collecting premiums, and specifically states National Title is not First American's agent "for purposes of performing escrows, settlements, [or] closings . . . of any kind whatsoever, and First American expressly denies liability for [National Title's] conduct and performance in any such business, as these forms of business are not within the scope of this AGREEMENT or the Agency relationship created hereunder."

Jaisinghani cites section 7.05 of the Restatement Third of Agency, which provides that a principal who conducts an activity through an agent is subject to liability for harm the agent causes to a third party, if the harm was caused by the principal's negligence in selecting and supervising the agent. (Rest.3d Agency (2006) § 7.05, p. 177.) But if a defendant does not already owe a duty of care to the plaintiff, the defendant's negligence in hiring or retaining the agent does not subject the defendant to liability. (*Id.* at com. c, p. 180.) " '[L]iability under this rule is

limited by basic principles of tort law, including requirements of causation and duty.' " (*Phillips v. TLC Plumbing*, *supra*, 172 Cal.App.4th at p. 1140.) We have already concluded that under the facts alleged by Jaisinghani, U.S. Bank and First American did not owe Jaisinghani the duty of care required for a finding of negligence. In the absence of a duty, the actions of an agent cannot be the basis for any negligence claim against either defendant.

As U.S. Bank points out in briefing, section 411 of the Restatement Second of Torts ("Negligence in Selection of Contractor") is closer to Jaisinghani's negligence theory, but that section provides that an employer is liable only for physical harm to third persons caused by the employer's failure to employ a competent contractor to do work involving a risk of physical harm, or "to perform any duty which the employer owes to third persons." (Rest. 2d Torts (1965) § 411, p. 376.) Again, no duty to Jaisinghani exists in this case.

4. **No abuse of discretion to deny leave to amend**

Jaisinghani failed to show how he would amend the amended complaints to cure their deficiencies. Judge Cole did not abuse her discretion in denying him leave to amend. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.)

DISPOSITION

The judgment and order are are affirmed. Costs on appeal are awarded to respondents U.S. Bank National Association, First American Title Insurance Company, and National Title Agency, LLC.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

KALRA, J.*

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