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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

HOME SERVICES NETWORK, INC.,

Cross-complainant and Appellant,

v.

ITZHAK GERMAN,

Cross-defendant and Respondent.

B228973

(Los Angeles County
Super. Ct. No. LC080046)

APPEAL from a judgment of the Superior Court of Los Angeles County, James A. Kaddo, Judge. Affirmed in part and reversed in part.

Roger A.S. Manlin for Appellant.

Bases & Bases, Jeffrey M. Bases; Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Respondent.

Home Services Network, Inc. (HSN) appeals judgment after the trial court sustained Itzhak German's (German) demurrer to HSN's first amended cross-complaint without leave to amend. German acquired a note and trust deed on properties in which HSN had a joint venture interest, and HSN asserted that German defrauded it in connection with German's acquisition of that loan. The trial court sustained HSN's demurrer to the cross-complaint primarily on the ground that it failed to plead fraud against German with sufficient particularity. We reverse the trial court's ruling on four causes of action (for conversion, constructive trust, conspiracy to defraud, and aiding and abetting), and otherwise affirm the demurrer to HSN's remaining eleven causes of action.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY¹

A. Factual Background

1. Formation of the Joint Venture, Origination of the German Loan

This case arises out of a joint venture to develop two parcels of real property, and three different trust deeds given to fund that joint venture.

In February 2004, Lea Cimbalist (Cimbalist) orally proposed a joint venture with Elli Dolgin (Dolgin), with whom she had a romantic relationship, that they purchase and improve residential property located at 5325 and 5311 Elvira Road in Woodland Hills. The joint venture planned to remodel and repair a residence on the property, and construct a second residence to be occupied by Cimbalist. Dolgin agreed to provide consulting and construction coordination services relating to the repair of existing improvements on the property and construction of the new residence. Dolgin's sole compensation for his services was to be his 50 percent joint venture interest. Upon the sale of the property, the proceeds of sale would be equally divided among the two original joint venturers, Cimbalist and Dolgin.

In early 2004, German, who was Cimbalist's brother, advanced \$200,000 to Cimbalist as initial financing for the joint venture (German loan). As security for the

¹ We accept the facts pleaded in the cross-complaint as true for purposes of demurrer.

German loan, German demanded that Dolgin provide German with a trust deed on unrelated property owned by Dolgin's wife Ana Dolgin. Cimbalist told Dolgin that this \$200,000 would be considered Dolgin's capital contribution to the joint venture. Cimbalist and German also told Dolgin that the \$200,000 German loan would be repaid to German from the first proceeds of the initial refinancing or new construction loan which would be secured by the Elvira Road properties. In reliance thereon, Dolgin delivered to German notes and deeds of trust upon Ana Dolgin's property securing the \$200,000 German loan. The first amended unverified cross-complaint (FAC) alleged that Cimbalist diverted the proceeds of the German loan for her own use and benefit.

Cimbalist acquired the property in April 2004 in her name on behalf of the joint venture.

In early July 2004, Cimbalist obtained a construction loan in an unspecified amount secured by a first deed of trust on 5325 Elvira Road from National City Mortgage Co., dba Accubanc Mortgage (National City loan). Cimbalist completed construction of the residence on the property in late 2004, and assumed residency.

2. HSN Acquires a Joint Venture Interest

From April 2004 through March 2005, at the request of Cimbalist and Dolgin, HSN advanced funds to Dolgin in the approximate amount of \$280,000. In August 2004, Cimbalist obtained an additional \$30,000 from HSN to cover costs of the joint venture.

In April 2005, Dolgin and HSN entered into a written option agreement (Option Agreement) whereby HSN became a 25 percent joint venturer with Cimbalist and Dolgin.² The parties agreed HSN's capital contribution consisted of HSN's prior \$280,000 advance. Pursuant to the Option Agreement, HSN was entitled to receive return of its \$280,000 contribution prior to the distribution of any other joint venture proceeds. In addition, the Option Agreement gave HSN the irrevocable option to

² The Option Agreement does not specify the resulting percentage joint venture interests held by Cimbalist and Dolgin.

purchase Dolgin's joint venture interest. The option was exercisable at any time after July 1, 2007.

Cimbalist further represented to HSN that HSN's capital contribution of \$280,000 would have priority over any other distributions of the proceeds of refinancing or sale of the property. Cimbalist gave HSN a promissory note and deed of trust in the amount of \$200,000 to partially secure the monies it had advanced to her; the deed of trust was recorded in approximately August 2005 (HSN trust deed).

In January 2007, Cimbalist, without the knowledge of the other joint venturers, including HSN, obtained first and second trust deed loans on 5311 Elvira Road.

On November 1, 2007, because its joint venture share had not been paid, HSN exercised its option to acquire Dolgin's share of the joint venture. Around that time, in late October 2007, Cimbalist approached HSN's President Danny Simon and told him that she had opened an escrow for the refinance of the property.³ Cimbalist agreed to purchase HSN's joint venture interest by paying HSN \$250,000 out of the refinancing in progress, but later told HSN she could only pay it \$195,000. HSN refused to accept less than the full amount it was owed. Cimbalist told HSN that she would not proceed with the refinancing, but instead would arrange for a foreclosure of the property that would wipe out HSN's joint venture interest as evidenced by the HSN trust deed. To that end, HSN asserted Cimbalist fraudulently filled out a blank beneficiary form that HSN had previously provided to her, and used that falsified beneficiary demand to represent to the lender that HSN's interest on the property had been paid in full. As a result, HSN's joint venture interest as evidenced by the HSN trust deed was wiped out.

3. Acquisition of the National City Loan

HSN further alleges that Cimbalist conspired with German to obtain the trust deed held by National City Mortgage Co., and that German obtained the National City loan. Thereafter, in February 2008, Cimbalist and German arranged for a default of the

³ The FAC does not specify whether the refinance was of 5311 Elvira Road or 5325 Elvira Road.

National City deed of trust that they now held in order to commence foreclosure proceedings against the property. The FAC alleged that a notice of default was recorded in January 2009 by defendant Reliable Trust Deed Services (Reliable), but does not allege a trustee's sale took place.

B. Procedural History

Cimbalist commenced this action in December 2007 with the filing of her complaint. Her operative fourth amended complaint filed February 13, 2009 against HSN, Danny Simon, Pacific First Bancorp Mortgage Corporation, and Dolgin stated claims for (1) rescission of oral contract; (2) negligence; (3) declaratory relief; (4) rescission of note and deed of trust; (5) cancellation of instruments; (6) quiet title; (7) violation of Civil Code section 2943; and (8) declaratory relief.

On May 4, 2009, HSN filed a verified cross-complaint against Cimbalist, German, Reliable, and Lynn Wolcott (president of Reliable). On August 10, 2009, German demurred to those causes of action alleging claims against him, arguing the fraud claims were not stated with sufficient particularity, and demurred to the remaining claims on the basis they depended upon the fraud allegations for their existence.

On November 10, 2009, the trial court sustained the demurrer with leave to amend, finding the fraud claims were not pleaded with sufficient particularity, and the other claims failed because they depended upon the fraud causes of action for their vitality.

HSN filed its FAC alleging claims for (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) negligent misrepresentation, (4) fraud by concealment and by false promise, (5) fraud and deceit, (6) fraudulent conveyance, (7) conversion, (8) breach of fiduciary duty, (9) conspiracy to defraud, (10) aiding and abetting, (11) constructive fraud, (12) constructive trust, (13) accounting, (14) declaration of rights, and (15) money had and received, and omitted an injunctive relief claim that had been stated in the original cross-complaint.

German demurred to the FAC's causes of action against him (the third, fourth, fifth, sixth, seventh, nine, tenth, twelfth, thirteenth, and fifteenth), asserting that the fraud claims had not been stated with sufficient particularity and he had lawfully purchased the National City loan.

On March 5, 2010, the trial court sustained German's demurrer without leave to amend, finding that HSN had failed to add facts which would have supported fraud, and compounded the error by filing an unverified complaint, which the court construed as an admission the allegations were not well meant. The court stated that "[t]he court gave Cross[-]Complainant leave to amend to add more facts that would support its claims of fraud in the Verified Cross-Complaint. Cross-Complainant has failed to add facts that would support fraud, and compounded that error by filing an Unverified First Amended Complaint. The Court construes this as an admission that the amended allegations are not well meant, and that the Cross-Complainant is unable or unwilling to comply with the Court's previous ruling and guidance." At the hearing, the trial court denied HSN's offer to amend the FAC to add a verification.

Thereafter, HSN dismissed its claims against the remaining cross-defendants without prejudice. Cimbalist's complaint was dismissed without prejudice on September 20, 2010.

DISCUSSION

I. STANDARD OF REVIEW

On appeal from a judgment of dismissal following an order sustaining a demurrer, "we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose." (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that can be reasonably inferred from those pleaded, and facts of which judicial notice can be taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We review the trial court's denial of leave to amend for an abuse of discretion. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th

1492, 1497.) “When a demurrer is sustained without leave to amend, we determine whether there is a reasonable probability that the defect can be cured by amendment. [Citation.]” (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 506.)

II. HSN’S CLAIMS

A. Fraud Claims (Third, Fourth and Fifth Causes of Action)

Fraud claims are subject to a stricter pleading standard than other claims because they involve an attack on the defendant’s character. Thus, fraud claims must be pleaded with particularity so that the trial court can eliminate nonmeritorious actions. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 183.) Every element of the fraud cause of action must be pleaded specifically, and the policy of liberal construction of the pleadings will not sustain a defective pleading. (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331.) Thus, the plaintiff must plead the ““how, when, where, to whom, and by what means”” the representations were made. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 (*Lazar*).) Plaintiff must also plead the injury or damage suffered and its causal connection to plaintiff’s reliance on the defendant’s misrepresentations. (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818.)

“The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” (*Lazar, supra*, 12 Cal.4th at p. 638.) In contrast, a claim for negligent misrepresentation does not require knowledge of falsity; rather, the plaintiff must show “(1) the misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damages.” (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.)

HSN contends the fraud claims arise from misrepresentations German made to Dolgin relating to the \$200,000 German loan, and that its FAC specifically sets forth the (1) misrepresentations German made to Dolgin during February, March and April 2004 that German had delivered \$200,000 to Cimbalist, (2) that German demanded a note from Ana Dolgin, (3) that German represented to Dolgin the \$200,000 would be considered Dolgin's capital contribution to the joint venture, (4) that the German loan would be repaid from the first proceeds of the initial refinancing or construction loan, and (5) that the German loan would thereupon be cancelled and the property reconveyed to the joint venture.

Here, these allegations of the FAC do not allege German made any misrepresentations to HSN, that German concealed any facts or had a duty to disclose any facts to HSN, or that German had a fiduciary duty to HSN as a joint venturer. Rather, the FAC details German's misrepresentations to Dolgin, and Cimbalist's misrepresentations to Dolgin and HSN. The only allegations concerning German vis-à-vis HSN concern German's role in a conspiracy to unfairly foreclose on the acquired National City encumbrance on the property in order to effectively wipe out HSN's joint venture interest. As a consequence, although its allegations relating to Cimbalist are specifically pleaded, HSN has not sufficiently pleaded any direct fraud perpetrated by German on HSN. Therefore, the trial court did not err in sustaining German's demurrer to this cause of action without leave to amend.

B. Fraudulent Conveyance Claim (Sixth Cause of Action)

California has adopted the Uniform Fraudulent Transfer Act (Civ. Code §§ 3439–3439.12). The purpose of the Act is “to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach” (*Chichester v. Mason* (1941) 43 Cal.App.2d 577, 584.) Civil Code section 3439.04 provides two methods of establishing a fraudulent transfer. “Actual fraud,” as defined in subdivision (a), is a transfer made with “actual intent to hinder, delay or defraud any creditor of the debtor.” “Constructive fraud,” as defined in subdivision (b),

requires a showing that the debtor did not receive “reasonably equivalent value” for the transfer, and the transfer was made when the debtor (i) “was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;” or (ii) the debtor “[i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.” Section 3439.04 is construed to mean a transfer is fraudulent if the provisions of either subdivision (a) or subdivision (b) are satisfied. (*Monastra v. Konica Business Machines U.S.A., Inc.* (1996) 43 Cal.App.4th 1628, 1635; *Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1020 [proof of actual fraud alone is sufficient to establish a fraudulent transfer].)

Civil Code section 3439.04 sets forth the “badges of fraud” to determine whether a conveyance is fraudulent and states, “(b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following: [¶] (1) Whether the transfer or obligation was to an insider. [¶] (2) Whether the debtor retained possession or control of the property transferred after the transfer. [¶] (3) Whether the transfer or obligation was disclosed or concealed. [¶] (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit. [¶] (5) Whether the transfer was of substantially all the debtor’s assets. [¶] (6) Whether the debtor absconded. [¶] (7) Whether the debtor removed or concealed assets. [¶] (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred. [¶] (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. [¶] (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred. [¶] (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.”

Here, HSN argues its FAC alleged that the diversion of the National City loan proceeds and German’s purchase of that note and trust deed constituted a fraudulent

transfer because the transfer was made without the knowledge of HSN or Dolgin; German and Cimbalist are related and insiders; the foreclosure (presumably of the National City loan)⁴ was made to wipe out HSN's joint venture's interest in the property, and Cimbalist and the joint venture will be rendered insolvent by foreclosure of the property by German.

These facts do not add up to a fraudulent conveyance. First, German is not an "insider" merely because he is the brother of Cimbalist; German was not a joint venturer because he never obtained a joint venture interest, but remained a creditor of the joint venture by virtue of the German loan and his later acquisition of the National City loan. Second, the mere transfer of the National City mortgage to German did not render the joint venture insolvent; the FAC does not allege a trustee's sale has taken place on the National City loan. Indeed, the only allegations of sequestration of assets or intent to hinder and delay creditors pertain to Cimbalist's conduct in using the German loan proceeds for her own benefit rather than that of the partnership and German's intention to conduct a foreclosure sale that the pleaded facts indicate he has every right to conduct. Therefore, the trial court did not err in sustaining German's demurrer to this cause of action without leave to amend.

C. Conversion (Seventh Cause of Action)

The tort of conversion is an "act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." (*Oakes v. Sue Lynn Corp.* (1972) 24 Cal.App.3d 271, 278; *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.) To establish conversion, the plaintiff must allege the plaintiff's right of ownership to the personal property, defendant's control of the property in a manner inconsistent with the plaintiff's rights, and damages. (*Fremont*, at p. 119.) "The tort of conversion applies to personal property not real property." (*Salma v. Capon*

⁴ The FAC alleges, "The refinancing of the property and assignment to German of the [National City loan] and the adverse lien and claim against the joint venture property and joint venturers, and foreclosure of the deed of trust, was conduct constituting actual fraud and a fraudulent conveyance pursuant to Civil Code § 3439 et seq."

(2008) 161 Cal.App.4th 1275, 1295) “Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment. [Citation.]” (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1491.)

Here, HSN asserts that German converted interests in the property and proceeds of financing of the property, as well as the property secured by the German loan and deed of trust. HSN alleges Cimbalist refinanced the property without its knowledge and concealed the fact from the joint venturers; Cimbalist diverted the proceeds of the German loan to her own use with German’s knowledge and consent, and returned the funds to German without benefitting the joint venture; Cimbalist did not obtain cancellation of the German notes and deeds of trust; German had not delivered the \$200,000 proceeds to Cimbalist, and had no intention of cancelling the German deeds of trust; and that Cimbalist and German diverted to their own use, at the expense and detriment of the joint venture, property and profits of the joint venture.

The joint venture’s primary asset, the realty on Elvira, cannot be the subject of a conversion action because it is real, not personal, property. (*Salma v. Capon, supra*, 161 Cal.App.4th 1275 at p. 1295.) Further, where money is at issue without more, simple allegations of the conversion of generalized sums of money do not support a claim. California cases permitting a claim for conversion require assertion that the tortfeasor has wrongfully misappropriate, commingled, or misapplied specific funds held for the benefit of others. (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 396; see, e.g., *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599 [attorney’s claim for fee from proceeds of settlement subject to lien]; *Fischer v. Machado* (1996) 50 Cal.App.4th 1069, 1072–1074 [sales agent liable for conversion of proceeds from consignment sale of farm products]; *Frazier Nuts, Inc. v. American Ag Credit* (2006) 141 Cal.App.4th 1263, 1282 [conversation claim for proceeds may be stated where a creditor with a superior claim to the collateral may state against another creditor who has possession of the collateral]; *Sehremelis v. Farmers & Merchants Bank*

(1992) 6 Cal.App.4th 767, 776 [Civil Code section 3419, subd. (1)(c) provides for conversion claim where an instrument is paid on a forged endorsement].)

Here, HSN asserts Cimbalist's and German's diversion of the specifically identifiable \$200,000 German loan proceeds for purposes other than to constitute Dolgin's capital contribution to the joint venture. This claim for this alleged conversion, which took place in early 2004, prior to HSN acquiring a joint venture interest, belonged to the joint venture, and more specifically, Dolgin, who was the only party with any potential conversion claim in 2004. To the extent HSN, as Dolgin's successor in interest acquired the conversion claim with his purchase of Dolgin's joint venture share in October 2007, any statute of limitations on such claim may have expired. Conversion claims are subject to the three-year statute of limitations found in Code of Civil Procedure section 338, subdivision (c)(1) (*First National Bk. v. Thompson* (1943) 60 Cal.App.2d 79, 81–82), which begins to run when “the aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion.” (*Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 561.) We cannot determine from the conversion claim as currently pleaded in the cross-complaint whether the statute of limitations has or has not run. On remand, HSN should be permitted to amend its cross-complaint to state a claim for conversion of the German loan proceeds and, to the extent supported by the facts that the statute of limitations on such claim has not expired.

D. Conspiracy to Defraud (Ninth Cause of Action); Aiding and Abetting (Tenth Cause of Action)

There is no separate tort of civil conspiracy and no action for conspiracy to commit a tort unless the underlying tort is committed and damage results therefrom. (*Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 631.) The significance of a conspiracy theory of liability is that each member may be held jointly liable as a tortfeasor, even though he or she may not have participated directly in the underlying tort. (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 574.) “The elements of an action for civil conspiracy are (1) formation and operation of the conspiracy and (2) damage resulting to the plaintiff (3) from a wrongful act done in

furtherance of the common design.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1062.) Where fraud is alleged to be the object of the conspiracy, the claim must be pleaded with particularity. (*Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 211.)

Closely related to conspiracy is aiding and abetting. “‘Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person’s own conduct, separately considered, constitutes a breach of duty to the third person.’” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325–1326.) Aiding and abetting differs from conspiracy because it requires proof the defendant knowingly gave substantial assistance to someone who performed wrongful conduct, in addition to (as in a conspiracy) merely agreeing to join the wrongful conduct. (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823, fn. 10.) Further, aiding and abetting liability does not depend upon an independent duty of care or a fiduciary duty. (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145–1146, fn. 2.)

Here, although there are no specific allegations of fraud on German’s part with respect to HSN, there are sufficient allegations to support a conspiracy or aiding and abetting liability based upon the numerous, specific allegations of Cimbalist’s fraudulent conduct, and German’s vicarious liability based upon his participation, acquiescence, or assistance offered to Cimbalist in her fraudulent conduct for the purpose of diverting joint venture funds and otherwise wrongfully impairing HSN’s interest in the property. The FAC alleges that Cimbalist and German obtained the German loan and diverted the proceeds, had no intention of canceling the trust deed on the property securing the German loan and that they conspired to obtain the National City mortgage in order to divest HSN of its joint venture interest in the property; the FAC further alleges that Cimbalist obtained loans from HSN based upon misrepresentations, and fraudulently

used HSN's beneficiary statement to eliminate HSN's deed of trust. Therefore, the trial court erred in sustaining German's demurrer to these two causes of action.

E. Constructive Trust (12th Cause of Action)

"A constructive trust is a remedial device primarily created to prevent unjust enrichment." The rationale is that "equity [must] compel the restoration to another of property to which the holder thereof is not justly entitled, and a constructive trust is imposed not because of the intention of the parties, but because the person holding the property would profit by his wrong." (*Clark v. Pullins* (1959) 171 Cal.App.2d 703, 708.) A constructive trust may only be imposed when three conditions are met: the existence of a res, the plaintiff's right to the res, and the defendant's acquisition of the res by some wrongful act. (*Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 920, italics omitted.)

Here, HSN alleges that German, in concert with Cimbalist, misappropriated the German loan proceeds. If HSN succeeds in establishing this fact at trial, HSN would be entitled to a constructive trust imposed on the proceeds of the German loan.

F. Accounting (13th Cause of Action)

An accounting is an equitable proceeding which is proper where there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debits and credits on the books to determine what is due and owing. (*St. James Church v. Superior Court* (1955) 135 Cal.App.2d 352, 359; *Peoples Finance etc. Co. v. Bowman* (1943) 58 Cal.App.2d 729, 734.) Equitable principles govern, and the plaintiff must show the legal remedy is inadequate. Thus, where the books and records are so complicated that an action demanding a fixed sum is impracticable, an accounting is appropriate. (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 14.) If an ascertainable sum is owed, an action for an accounting is not proper. (*St. James Church*, at p. 359.) Generally, an underlying fiduciary relationship, such as a partnership will support an accounting, but the action does not lie merely because the books and records are complex. (*San Pedro Lumber Co. v. Reynolds* (1896)

111 Cal. 588, 596–597; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 594.) Some underlying misconduct on the part of the defendant must be shown to invoke the right to this equitable remedy. (*Union Bank*, at pp. 593–594.)

Here, German, who was not a joint venturer, did not owe a fiduciary duty to HSN. Furthermore, the amount owed is not unliquidated or unascertained such that the amount German allegedly diverted cannot be ascertained without an examination of the books and records of the joint venture. Rather, the loan at issue, the \$200,000 German loan, as well as HSN’s capital contribution of \$280,000, are definite. Therefore, the trial court did not err in sustaining German’s demurrer to this cause of action without leave to amend.

G. Money Had and Received (15th Cause of Action)

A claim is stated for money had and received where “the defendant is indebted to the plaintiff in a certain sum ‘for money had and received by the defendant for the use of plaintiff.’” (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623.) The claim requires that there be a total failure of consideration for an executory contract. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 282.)

The FAC does not allege that German wrongfully received monies from HSN that he has not returned, or that there was an agreement between German and HSN that German has completely failed to perform such that HSN would be entitled to restitution of any money. The trial court did not err in sustaining German’s demurrer without leave to amend.⁵

⁵ HSN takes exception with the trial court’s rationalization that demurrer was proper because the FAC was not verified, although the original complaint was verified, and with German’s assertions that key allegations were changed from the original complaint to the FAC. As we resolve the issue of the sufficiency of HSN’s allegations solely with reference to the FAC, we need not address these contentions relating to verification and inconsistent pleading.

DISPOSITION

The judgment of the superior court is reversed with respect to Home Services Network, Inc.'s claims for conversion (seventh cause of action), conspiracy to defraud (ninth cause of action), aiding and abetting (tenth cause of action), and constructive trust (twelfth cause of action). In all other respects, the judgment is affirmed. Appellant is to recover its costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.