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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BANK OF AMERICA N.A., Plaintiff, Cross-defendant and Respondent, v. ROBERT HASMAN et al., Defendants, Cross-complainants and Appellants.	B242076 (Los Angeles Country Super. Ct. No. BC443795)

APPEAL from a judgment of the Superior Court of Los Angeles Country, Terry A. Green, Judge. Affirmed.

Goe & Forsythe, Marc C. Forsythe and Elizabeth A. LaRocque, for Defendants, Cross-complainants and Appellants.

Hemar, Rousso & Heald and Brenda Barton-LeMay, for Plaintiff, Cross-defendant and Respondent.

Robert Hasman and David Stubbs appeal from a judgment in favor of respondent Bank of America. The trial court sustained respondent's demurrer to appellants' cross-complaint alleging fraud and granted summary judgment for respondent on its complaint for breach of commercial guaranty agreements. Appellants argue reversal is required under *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169 (*Riverisland*), which extended the fraud exception to the parol evidence rule to fraudulent representations that conflict with the terms of a written agreement. We agree with respondent that, although parol evidence is now admissible, it does not change the outcome of this case. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Appellant Hasman is the sole member and manager of Resort Holdings 2, LLC (RH2). Appellant Stubbs is a member and manager of Transwestern Investment Corporation, LLC (TIC), along with Jeffrey A. Pori.[1] Appellants and Pori are Nevada residents, and RH2 and TIC are Nevada entities.

In April 2008, RH2 and TIC borrowed over $6 million from First Republic Bank (FRB), respondent's predecessor in interest. Appellants and Pori signed a promissory note for this loan in their capacity as managers of RH2 and TIC. The note was secured by a deed of trust on a commercial property located in Nevada, known as the Monterra Professional Plaza. Appellants and Pori each personally signed a continuing guaranty of the loan. The guaranties contain California venue and choice of law provisions and broad waivers of the guarantors' defenses, such as those based on subsequent modifications of the loan documents or on defenses of the borrowers. Above the signature line, the guaranties contain an acknowledgment that the guarantors read and understood them and had an opportunity to consult with independent counsel before signing them.

In March 2009, Hasman as manager of RH2, and Stubbs and Pori, as managers of TIC signed a modification agreement that provided for a 12-month reduction of the

[1] Pori has filed for bankruptcy and is no longer a party to this appeal.

interest rate on interest-only payments from 5.55 percent to 3 percent between February 1, 2009 and January 1, 2010. The 2.55 percent difference was to become due at the end of this period unless FRB approved a further six-month deferral period, up to July 1, 2010, at a rate of 4.5 percent. The deferral extension was conditioned on the absence of default during the original deferral period and the timely provision of monthly operating statements, rent rolls, and leasing activity reports on the property. The modification agreement was, by its terms, solely for the benefit of the lender, FRB, and the borrowers, RH2 and TIC. At the same time, appellants and Pori reaffirmed the continuing guaranties they had signed earlier.

Respondent acquired FRB in November 2009, as a result of its merger with Merrill Lynch Bank & Trust, FSB. That month, the borrowers attempted to obtain an extension of the modification agreement past its July 1, 2010 end date and asked that the interest rate on the loan not increase from 3 to 4.5 percent after the initial 12-month term. They were unsuccessful. In March 2010, Taylor Brooks, the loan officer with whom the modification agreement had been negotiated, told Hasman that there would be no further extension of that agreement. The borrowers then stopped making payments on the loan, and in April 2010, respondent recorded a notice of default. The borrowers unsuccessfully attempted to resolve the default. In May 2011, the property was sold to a third party for $1.6 million, leaving a deficiency of over $5.5 million.

Respondent sued the guarantors in August 2010 for breach of the guaranties, money lent, account stated, and unjust enrichment. The guarantors cross-complained for fraud, negligent and intentional misrepresentation, rescission, breach of the implied covenant of good faith and fair dealing, and declaratory relief. The cross-complaint alleges that during the negotiations of the modification agreement, the borrowers demanded a three-year interest reduction, and that Brooks convinced them to accept the 18-month term by representing that "it was the bank's policy to extend loan modifications for its clients" and that it "would definitely extend . . . a further modification" if the real estate market was still "in a state of distress," the borrowers were making efforts to increase occupancy, and the property was maintained in good

condition. Brooks allegedly promised to provide a side agreement memorializing these terms, but had not done so by the time Hasman picked up the signed modification agreement in April 2009. The cross-complaint also alleges that, when they signed the guaranties, the guarantors were not represented by counsel, were not allowed to negotiate their terms, and were unaware California was the chosen venue and California law was the governing law on the guaranties because all other loan documents were governed by Nevada law.

The fraud, fraudulent inducement, and negligent misrepresentation causes of action are based on the allegation that the promise of further modifications induced the guarantors to sign guaranties in relation to the modification agreement. The claim for rescission is based on the guarantors' alleged mistake of law and fact about the choice of law and venue provisions in the guaranties, which exposed them to a deficiency judgment. The claim of breach of the implied covenant of good faith is based on allegations that, at some point after the default, respondent indicated it could provide another loan modification if the loan was brought current, but refused to provide the guarantors with the necessary information to do so. The guarantors also seek declaratory relief regarding the parties' rights after the allegedly improper foreclosure sale of the Nevada property.

Respondent demurred on the ground that the allegations were insufficient to state a valid cause of action, partly because the parol evidence rule barred evidence of Brooks' alleged promise of further modifications, which varied from the terms of the written modification agreement. The court sustained the demurrer without leave to amend and dismissed the cross-complaint.

Respondent then filed a motion for summary adjudication of its cause of action for breach of the guaranties. The trial court overruled the guarantors' objections to respondent's evidence and sustained respondent's objections to the guarantors' evidence. Some of those objections were based on the parol evidence rule. The court granted the motion, and respondent dismissed the remaining causes of action. In April 2012, the

court entered judgment in respondent's favor for $4,656,614.84 in unpaid principal and $854,186.59 in accrued interest.

The guarantors timely appealed.

DISCUSSION

I

We independently review the dismissal of a complaint after an order sustaining a demurrer, in order to determine whether the factual allegations of the complaint adequately state a cause of action under any legal theory. (*Milligan v. Golden Gate Bridge Highway & Transportation Dist.* (2004) 120 Cal.App.4th 1, 5–6.) '"'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.]"' (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) "[W]e may affirm an order sustaining a demurrer on grounds presented by the record whether or not relied on by the trial court [citation], or on grounds first raised on appeal [citations]." (*Ortega v. Topa Ins. Co.* (2012) 206 Cal.App.4th 463, 472.)

A. Fraud and Misrepresentation

Appellants contend they have valid causes of action for fraud, fraudulent inducement, and negligent misrepresentation under *Riverisland*, *supra*, 55 Cal.4th 1169, because the parol evidence rule no longer bars evidence of the loan officer's allegedly false promise that the borrowers would be granted further extensions of the modification agreement. That is correct; however, even assuming such a promise was made, appellants cannot allege they relied on it when they signed the guaranties which respondent seeks to enforce against them.

'"[R]eliance is proved by showing that the defendant's misrepresentation or nondisclosure was "an immediate cause" of the plaintiff's injury-producing conduct. [Citation.] A plaintiff may establish that the defendant's misrepresentation is an "immediate cause" of the plaintiff's conduct by showing that in its absence the plaintiff

"in all reasonable probability" would not have engaged in the injury-producing conduct.' [Citation.]" (See *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 326.)

Appellants proceed on the incorrect assumption that they signed guaranties in connection with the modification agreement. But respondent's breach of guaranty claim is based on the guaranties executed at the time of the original note, before the alleged misrepresentations were made. The fact that the guarantors reaffirmed the guaranties at the time of the modification agreement is not determinative. "[A] modification of the underlying obligation generally does not revoke a continuing guaranty . . . ." (*Central Building., LLC v. Cooper* (2005) 127 Cal.App.4th 1053, 1061.) By their own terms, the guaranties are continuing and irrevocable as to this particular loan transaction. They expressly provide that a modification of the loan documents does not affect the guarantors' liability, and they include broad waivers of defenses based on changes to the loan documents. Since the validity of the continuing guaranties does not depend on their reaffirmation or on the modification of the underlying obligation, whether the reaffirmation and modification were fraudulently induced is irrelevant. Because the signing of the continuing guaranties preceded the alleged false promise, appellants cannot show that the guaranties were induced or caused by that promise.

Appellants also argue they were fraudulently induced to enter into the loan modification rather than proceed to foreclosure at a time when the property was appraised at over $8 million, a value higher than the loan. As respondent correctly points out, appellants were not parties to the underlying loan or modification agreements. Appellants' argument conflates their individual capacity as personal guarantors on the loan with their representative capacity as agents for the borrowers. (See *Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 838 [agent signing contract for disclosed principal not party to contract]; *First Security Bank of Cal. v. Paquet* (2002) 98 Cal.App.4th 468, 474–475 [claims brought in individual and representative capacity enforce rights of different parties].)

The cross-complaint was brought by appellants solely in their individual capacity as personal guarantors on the loan. It identifies RH2 and TIC as the "Borrowers" and

alleges that the "Borrowers" negotiated the loan modification, and the loan officer made promises to "the Borrowers." The loan modification itself recites that it was made between RH2 and TIC, the borrowers, and FRB, the lender, and that it is solely for their benefit. Like the original loan, the modification was signed by appellants in their representative capacity as the borrowers' managers or managing members. Because appellants in their individual capacity are not parties to the loan or loan modification, there is no factual basis for the legal conclusions advanced in the cross-complaint and on appeal that appellants, as "Cross-Complainants" or guarantors on the loan, were fraudulently induced to enter into the loan modification. (See *Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126 [demurrer does not admit legal conclusions].)

The guaranties expressly waive appellants' right to require the lender to proceed against the borrowers or the collateral before proceeding against the guarantors. As guarantors, appellants cannot show they would have been able to avoid a judgment on the guaranties had the borrowers chosen to default on the loan rather than enter into the loan modification agreement. Thus, whether appellants were fraudulently induced to forego the option of an earlier default and foreclosure on behalf of the borrowers is irrelevant to the issue of appellants' individual liability under the guaranties.

B. Mistake of Law

Appellants argue they have sufficiently pled mistake of fact or law justifying rescission of the guaranties' choice of venue and law provisions, which they admittedly read and "misinterpreted."

A subjective misinterpretation of a contract is a mistake of law. (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1421 & fn. 9 (*Hedging*) [mistake of law exists "when a person knows the facts as they really are, but has a mistaken belief as to the legal consequences of those facts"].) A unilateral mistake, whether of fact or law, supports rescission only when it "'is known to the other contracting party and is encouraged or fostered by that party.' [Citation.]" (*Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1673–1674.) Parties dealing at arm's length have no duty to explain to each other the express and plain terms of a written

contract. (*Ibid*.) Reliance on a unilateral mistake "is not reasonable when [a party] could have ascertained the truth through the exercise of reasonable diligence. [Citation.]" (*Ibid*.)

Appellants claim that FRB must have known the California choice of law provision in the guaranties would cause confusion because all other loan documents were governed by Nevada law. But the discrepancy in the choice of law provisions was admittedly evident from the documents themselves. Appellants allege they were not represented by independent counsel and could not negotiate the terms of the guaranties, but they do not allege that they had no opportunity to consult with an attorney or that they were prevented by the bank from seeking clarification. "[T]o declare rescission based upon mistaken undisclosed subjective interpretation would conflict with the objective theory of enforceable contracts. If this were the law, the objective theory of contracts would give with one hand, while the subjective misunderstanding theory of rescission would take away with the other. This is not the law." (*Hedging*, *supra*, 41 Cal.App.4th at pp. 1421–1422.)

C. Breach of the Implied Covenant of Good Faith and Fair Dealing

Appellants claim respondent breached the implied covenant of good faith and fair dealing when it refused to grant further extension of the modification agreement. "[T]he duty of good faith and fair dealing derives from and exists solely because of the contractual relationship between the parties. [Citations.]" (*Austero v. National Cas. Co.* (1976) 62 Cal.App.3d 511, 515.) As we have explained, appellants in their capacity as guarantors were not parties to the underlying loan or modification agreements, as they signed those documents on behalf of the borrowers. In addition, the loan documents expressly deny any third party beneficiary status. Whether or not respondent breached the implied covenant as to the borrowers is irrelevant because, in the guaranties, appellants waived their right to assert the borrowers' defenses.

D. Declaratory Relief

Appellants claim the trial court failed to consider the merits of their request for

declaratory relief, in which they purported to seek a declaration about respondent's right to collect against them in light of a pending challenge to the foreclosure sale in a Nevada state court. They suggest that had the court considered the merits of their request, it would have found the foreclosure sale improper. As a rule, an action is prosecuted in the name of the real party in interest, or in other words by '"the person possessing the right sued upon by reason of the substantive law. [Citation.]' [Citation.]" (*Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1172.) As we explained, appellants are not parties to or beneficiaries of the underlying loan documents; nor do they allege any personal ownership interest in the property that was sold at the foreclosure sale. Thus, they have no standing to seek a declaration about the propriety of that sale in this action.

Because appellants, as guarantors, cannot state a cause of action against respondent, the court did not err in sustaining the demurrer to the cross-complaint without leave to amend.

II

Appellants separately challenge the court's granting of respondent's motion for summary adjudication of its breach of guaranties cause of action. We review its ruling de novo. (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 950–951 [summary adjudication subject to same standard of review as summary judgment].) We consider all of the evidence offered by the parties in connection with the motion, except that which the court properly excluded. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) "[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850–851, fns. omitted.)

In their opening brief, appellants argue in a conclusory fashion that "[s]everal key material facts" in respondent's case were objected to and not supported by evidence. By way of example, they claim broadly that the notes and guaranties were not properly authenticated and that not all damages were supported by admissible evidence. The trial court overruled all of appellants' evidentiary objections to the declaration of respondent's vice president in its Special Assets Group, who testified based on his personal review of the bank's business records regarding the matter over which he had custody and control.

Not challenging the court's evidentiary rulings on appeal or challenging them in a perfunctory fashion, without a sustained argument or citation to authority, forfeits any claim of error. (See *Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114.) Respondent states as much in its brief. In reply, appellants omit any discussion of this issue. "'Issues do not have a life of their own: if they are not . . . supported by argument or citation to authority," we may consider them abandoned or forfeited. (See *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316, fn. 7].) We do so here, noting only that challenges to the authenticity of loan documents for lack of personal knowledge about their creation have been rejected. (See *LPP Mortgage, Ltd. v. Bizar* (2005) 126 Cal.App.4th 773, 776–777 [testimony of manager of loan service agent for assignee sufficient to authenticate loan documents under manager's custody and control].)

Appellants also contend that respondent did not establish there was no valid defense to the guaranties, and that appellants raised a triable issue of fact that the guaranties were invalid because they were induced by false misrepresentations. They cite to portions of Hasman's declaration, which do not substantially differ from the allegations in the cross-complaint. The argument fails for the reasons stated in our discussion of the demurrer.

Summary adjudication was proper.

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

EDMON, J. *

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