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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KENNETH J. ELLIS et al., Plaintiffs and Appellants, v. GOLDEN SECURITY BANK et al., Defendants and Respondents.	B234992 (Los Angeles County Super. Ct. No. BC 409014)

APPEAL from judgments of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Affirmed.

Law Offices of Melinda G. Wilson and Melinda G. Wilson for Plaintiffs and Appellants.

Law Offices of Mary Jean Pedneau, Mary Jean Pedneau, William R. Larr and Susan S. Vignale for Defendant and Respondent Golden Security Bank.

Fidelity National Law Group, Thomas E. Dias and Amy J. Cooper for Defendant and Respondent Western Commercial Bank.

* * * * * * * * * *

Plaintiff and appellant Kenneth J. Ellis[1] appeals from judgments of dismissal entered in favor of defendants and respondents Golden Security Bank and Western Commercial Bank following the sustaining of demurrers without leave to amend to the two causes of action against these defendants in the verified fifth amended complaint. Plaintiff contends the trial court erred in ruling that both the quiet title and cancellation of deeds causes of action failed as a matter of law against both defendants, and also abused its discretion in refusing plaintiff a further opportunity to amend. It is clear from the pleadings that Mr. Ellis's wife took advantage of him and of the trust he placed in her, to his great loss. However, the facts alleged are insufficient to show the defendants share responsibility for the loss, and so we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because this appeal arises from judgments of dismissal following demurrer, we summarize the pertinent facts alleged in the operative fifth amended complaint.

Plaintiff and appellant Kenneth J. Ellis (Kenneth) was married to defendant Cindy L. Ellis a.k.a. Cinderella L. Ellis a.k.a. Cindy J. Ellis (Cindy).[2] Cindy is not a party to this appeal. Sometime in 1988, Ron Stanman, an individual with whom Kenneth had a long-term business relationship, became indebted to Kenneth and agreed to repay the debt by transferring to Kenneth title to five parcels of real property located at 10001, 10007, 10013, 10019 and 10023 South Figueroa Street in Los Angeles (Figueroa Street Properties). Sometime thereafter, Mr. Stanman passed away, leaving title to the Figueroa Street Properties in the name of the Stanman Family Trust

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[1] PST Holding, Inc., identified as an appellant in the opening brief, is not a plaintiff in the two causes of action at issue in this appeal and is not relevant to the disposition. We therefore will refer to Kenneth J. Ellis or plaintiff/appellant in the singular only and will not summarize facts related to the other properties alleged in the operative pleading or PST Holding, Inc.'s alleged claims which are not before us.

[2] Because of the common surname, we refer to the parties by their respective first names for the sake of clarity only and suggest no familiarity or disrespect by the informality.

(Stanman Trust) with instructions for the successor trustee, Perry L. Hirsch, to convey title to Kenneth as Mr. Stanman and Kenneth had agreed.

On July 11, 2001, Kenneth and the Stanman Trust executed a settlement agreement which provided, in relevant part, that title to the Figueroa Street Properties would be transferred to Kenneth through an escrow that would be opened pursuant to the settlement agreement. A "true and correct copy" of the settlement agreement is attached and incorporated by reference to the fifth amended complaint. Kenneth alleged that "[b]y reason" of the settlement agreement with the Stanman Trust, Kenneth "was the legal owner" of the Figueroa Street Properties. No further facts are alleged regarding the completion of the escrow referenced in the settlement agreement or any conveyance by deed to Kenneth in 2001.

Kenneth was incarcerated on May 15, 2002. At the time Kenneth was incarcerated, he alleged he held title to the Figueroa Street Properties "free and clear of liens and encumbrances." The Figueroa Street Properties had an estimated combined value of $1.3 million and produced monthly rental income of approximately $5500.

After Kenneth entered prison, Cindy represented to Kenneth that she, as his wife, would manage and maintain his properties, including the Figueroa Street Properties, duly collect the rents, and place any funds in excess of that needed for her living expenses into a savings account for Kenneth. Cindy represented that Kenneth would need to execute a power of attorney so that she could manage the properties in his absence. Kenneth, relying on and trusting his wife, executed, before a notary, a general power of attorney on January 8, 2003 (2003 Power of Attorney). Broad powers are granted to Cindy to act as Kenneth's attorney-in-fact, including the power to conduct "real estate transactions." All enumerated powers set forth in the 2003 Power of Attorney bear Kenneth's typewritten initials of "kje." The 2003 Power of Attorney was recorded on December 22, 2003 in the chain of title to the Figueroa Street Properties. A "true and correct" copy of the 2003 Power of Attorney is attached and incorporated by reference to the fifth amended complaint.

Cindy's representations to Kenneth to induce him to execute the 2003 Power of Attorney were false. Cindy intended all along to transfer or encumber Kenneth's properties for her own benefit, and not to manage and maintain them for Kenneth during his period of incarceration. Kenneth alleged, on information and belief, that the 2003 Power of Attorney was defective because it identifies Cindy's name as "Cindy L. Ellis" instead of "Cindy J. Ellis" as reflected on her driver's license, and because the initials next to each enumerated power in the 2003 Power of Attorney were typewritten and not handwritten.

Shortly after recording the 2003 Power of Attorney, Cindy, acting without Kenneth's authorization, sought to obtain a $90,000 loan against another one of Kenneth's properties, located on West Manchester Boulevard. Cal Vista Home Loans, Inc. (Cal Vista), a "hard money lender," initially rejected the loan, apparently deeming the 2003 Power of Attorney inadequate.

During this same time, Cindy formed a personal relationship with defendant Corey Sims. Defendant Sims owned and operated several corporate entities as alter-ego entities, including defendants Neutral Ground Investments (NGI), Neutral Ground, Inc., and Neutral Ground. Sims and his corporate entities are not parties to this appeal.

Kenneth alleged, on information and belief, that Cindy and defendant Sims formed a plan to fraudulently use Cindy's power of attorney and Sims's entities to transfer and/or encumber Kenneth's properties, including the Figueroa Street Properties, without his knowledge or authority, and for their own financial gain. As part of their scheme, and in light of Cindy's inability to obtain the Cal Vista loan using the 2003 Power of Attorney, Cindy and Sims fabricated a second power of attorney form dated April 8, 2004 (2004 Power of Attorney), wholly without Kenneth's knowledge. Kenneth's signature on the 2004 Power of Attorney was forged. The 2004 Power of Attorney is substantially identical to the 2003 Power of Attorney in all material respects, except that Cindy is identified as "Cindy L. Ellis, AKA Cindy J. Ellis." The 2004 Power of Attorney was recorded April 14, 2004. A "true and correct copy" is attached and incorporated by reference to the fifth amended complaint.

Cindy then presented Cal Vista with the forged 2004 Power of Attorney and obtained the loan encumbering Kenneth's West Manchester Boulevard property. The Cal Vista deed of trust was recorded the same day as the 2004 Power of Attorney. Kenneth alleged, on information and belief, that the concurrent recording of the Cal Vista deed of trust and the 2004 Power of Attorney "establish[ed] a precedent relied upon by all subsequent encumbrancers."

In June 2004, Cindy falsely represented to Perry L. Hirsch that Kenneth wanted the Stanman Trust to transfer title to the Figueroa Street Properties to Kenneth and Cindy, husband and wife, as joint tenants, instead of as his sole and separate property as previously agreed. Pursuant to those instructions, Mr. Hirsch conveyed title to the Figueroa Street Properties to both Kenneth and Cindy, husband and wife, as joint tenants. The deed conveying title was executed by Mr. Hirsch on June 3, 2004, and recited that the transfer was a "bona fide gift" (Hirsch Deed). The Hirsch Deed was recorded on June 15, 2004.

Thereafter, Cindy, without Kenneth's knowledge or authority, executed a deed conveying title to the Figueroa Street Properties as a "bona fide gift" to defendant NGI, identified as a Nevada corporation (NGI Deed). Cindy executed the NGI Deed on her own behalf and as Kenneth's attorney-in-fact. The NGI Deed was recorded June 23, 2004. A subsequent deed was recorded transferring the Figueroa Street Properties to defendant Neutral Ground. That deed recited that the transfer reflected a name change only from NGI to Neutral Ground, the grantor and the grantee being the same party.

In 2007, defendants Cindy and Sims, acting through Neutral Ground, obtained a loan against the Figueroa Street Properties from defendant and respondent Golden Security Bank (Golden) in the amount of $650,000. Golden's deed of trust reflecting the debt was recorded in the chain of title on March 8, 2007.

A year later, Neutral Ground encumbered the Figueroa Street Properties again with a loan obtained from defendant and respondent Western Commercial Bank

(Western) in the amount of $562,500. Western's deed of trust was recorded on May 1, 2008.

Cindy and Sims failed to maintain the Figueroa Street Properties, failed to pay the indebtedness they had wrongfully incurred on the properties, failed to pay property taxes, and instead, used the loan proceeds and the rental income to support a "lavish lifestyle." Golden subsequently gave notice of default and foreclosed on the Figueroa Street Properties, as did Western.

Kenneth first learned of the wrongful disposition of his properties upon release from prison in December 2008. On March 5, 2009, Kenneth filed this action against defendants Cindy, Sims, Golden and Western, among others, alleging causes of action for fraud, quiet title, cancellation of deeds, conversion and related theories. Several rounds of demurrers occurred, with Kenneth granted numerous opportunities to amend to clarify his allegations.

On April 4, 2011, Kenneth filed his verified fifth amended complaint containing 21 causes of action. Golden and Western were named as defendants in only two causes of action: the fifth cause of action for quiet title and the sixth cause of action for cancellation of deeds. Golden and Western once again filed demurrers. At the hearing on defendants' demurrers, the court granted all requests for judicial notice, including as to the Hirsch Deed, the NGI Deed, and Golden's and Western's deeds of trust. After entertaining extensive argument, the court sustained Golden's and Western's demurrers to the fifth amended complaint without further leave to amend. Judgments of dismissal in favor of Golden and Western were entered accordingly. This appeal followed.

DISCUSSION

Kenneth contends the trial court erred in sustaining Golden's and Western's demurrers to the quite title and cancellation of deeds causes of action, and that denial of leave to amend was an abuse of discretion. "On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole

and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865 (*City of Dinuba*).)

Kenneth's appeal rests on two main arguments. First, he contends the allegations of the fifth amended complaint show the only relevant power of attorney is the forged 2004 Power of Attorney, which was recorded after the defective 2003 Power of Attorney. If so, both defendants' subsequent interests in the properties are a nullity and properly set aside because they stem from the void 2004 Power of Attorney. Second, Kenneth contends that even assuming the powers of attorney and unauthorized deeds are merely voidable, and not void *ab initio*, the fifth amended complaint states sufficient facts showing Golden and Western were not good faith bona fide encumbrancers, and the court's resolution of that factual issue on demurrer was improper. We reject both contentions.

1. The Powers of Attorney

a. General law regarding powers of attorney

In 1994, the Legislature enacted the Power of Attorney Law, reorganizing the statutes pertaining to powers of attorney as a new Division 4.5 of the Probate Code, section 4000 et seq. (Stats. 1994, ch. 307, § 16). Section 4121 sets forth the general execution formalities for a power of attorney: "A power of attorney is legally sufficient if all of the following requirements are satisfied: [¶] (a) The power of attorney contains the date of its execution. [¶] (b) The power of attorney is signed either (1) by the principal or (2) in the principal's name by another adult in the principal's presence and at the principal's direction. [¶] (c) The power of attorney is either (1) acknowledged before a notary public or (2) signed by at least two witnesses

who satisfy the requirements of Section 4122." "The Law Revision Commission comment to section 4121 states in part: '. . . A power of attorney that complies with this section is legally sufficient as a grant of authority to an attorney-in-fact.' " (*Kaneko v. Yager* (2004) 120 Cal.App.4th 970, 978.)

Part 3 of Division 4.5 of the Probate Code is the Uniform Statutory Form Power of Attorney Act, which sets forth the *separate* requirements for creation of a *statutory* form power of attorney. (See, e.g., Prob. Code, § 4402 ["statutory form power of attorney under this part is legally sufficient if all of the following requirements are satisfied: [¶] (a) The wording of the form complies substantially with Section 4401. . . . [¶] (b) The form is properly completed. [¶] (c) The signature of the principal is acknowledged."].) Probate Code section 4401 sets forth a standardized form power of attorney.

The statutory scheme expressly provides that a statutory form power of attorney is just *one method* for creating a legal power of attorney. "Nothing in this part affects or limits the use of any other form for a power of attorney. A form that complies with the requirements of any law other than the provisions of this part may be used instead of the form set forth in Section 4401, and none of the provisions of this part apply if the other form is used." (Prob. Code, § 4408.) The statutory form power of attorney set forth at Probate Code section 4401 "was created as a 'handy' form with 'ready-made statutory language for the creation of a power of attorney[,]" (*Torres v. Torres* (2006) 135 Cal.App.4th 870, 875 (*Torres*)) but was not intended to be the exclusive means for creating a power of attorney under California law. (*Id*. at pp. 875-876.)

b. The execution of the 2003 Power of Attorney

In his verified fifth amended complaint, Kenneth admits he executed the 2003 Power of Attorney. The verified pleading also admits the 2003 Power of Attorney was recorded on December 22, 2003. A "true and correct copy" of the 2003 Power of Attorney, bearing its date of recording, is attached and incorporated by reference to the fifth amended complaint. It includes the date of execution by Kenneth, the principal,

on January 8, 2003, and contains a certification by a notary. On its face, the 2003 Power of Attorney satisfies the execution requirements of Probate Code section 4121.

Kenneth nonetheless argues the 2003 Power of Attorney is defective and of no legal effect because (1) it misstates Cindy's middle initial, (2) Kenneth did not handwrite his initials in the blank space next to each enumerated power, and (3) it was "stale" and effectively superseded by the 2004 Power of Attorney. He also argues, for the first time on appeal, that the crossing out of the provision referencing the attorney-in-fact's fiduciary obligations renders the power ineffective. We find the arguments to be without merit.

Kenneth cites no authority for the proposition that the existence of a typographical error in the middle initial of an attorney-in-fact renders an entire power of attorney inoperable. Kenneth unequivocally alleged that he intended his wife Cindy to be the attorney-in-fact designated in the 2003 Power of Attorney, "entrusting" her to manage his properties while he was incarcerated. We are not persuaded the typographical error in her name is determinative of the efficacy of the document as a matter of law.

We are also not convinced that because the initials next to each enumerated power are typewritten, the power of attorney is defective as a matter of law. The fifth amended complaint alleged that Kenneth did not handwrite his initials in the spaces next to each enumerated power, but it also deleted the allegation, contained in previous versions of his complaint, that the power of attorney had been presented to him blank. The operative allegations, at most, imply that Kenneth did not *handwrite* his initials on the form, but that his *typewritten* initials were on the form at the time he executed the power of attorney, reflecting his tacit approval of the powers granted, since none of the powers are crossed out.

Kenneth repeatedly refers to the 2003 Power of Attorney as a "statutory form" power of attorney and relies on *Torres* to argue the failure to handwrite his initials is determinative of its validity. *Torres* involved a statutory form power of attorney pursuant to Probate Code section 4401 which expressly directs the principal to "initial"

each enumerated power. (*Torres*, *supra*, 135 Cal.App.4th at p. 874). The principal there simply wrote an "X" next to the enumerated powers she intended to grant to her attorney-in-fact. (*Id*. at p. 875). The court in *Torres* concluded that such a mark could not be held to be proper completion of the statutory form power of attorney under Probate Code section 4402, explaining that "[i]f the Legislature had intended some indication other than initials to be satisfactory it easily could have said so." (*Torres*, at p. 874.)

However, the 2003 Power of Attorney is *not* the statutory form set forth at Probate Code section 4401. There is no requirement that the 2003 Power of Attorney comply with the requirements for creation of a statutory form power of attorney in order to be operable. As clearly set forth in the statutory scheme, and as explained in *Torres*, a power of attorney may validly be created in accordance with other applicable law, such as Probate Code section 4121. (Prob. Code, § 4408; *Torres*, *supra*, 135 Cal.App.4th at pp. 875-876.)

Torres does not hold that a power of attorney under Probate Code section 4121 cannot contain typewritten additions by the principal. The 2003 Power of Attorney directs the principal to "write his or her initials" in the blank space next to each enumerated power and to cross out any powers to be withheld. The language does not specify that the initials must be handwritten, it only states "write." The common definition of "write" includes "to produce (symbols or words) *by machine*." (Webster's 3d New Internat. Dict. (2002) p. 2640, italics added.) The language used in the 2003 Power of Attorney is arguably ambiguous, but it is nonetheless reasonably inclusive of the principal using a typewriter to fill in the requested information. On its face, the 2003 Power of Attorney does not violate the letter or spirit of the execution requirements set forth at section 4121.

Moreover, Kenneth's argument the 2003 Power of Attorney was "stale" and therefore somehow inoperable is without merit. Neither power of attorney contains any language stating a termination date, nor does the record reflect that Kenneth ever sought to revoke Cindy's status as his attorney-in-fact arising from the 2003 Power of

Attorney. "Unless a power of attorney states a time of termination, the authority of the attorney-in-fact is *exercisable notwithstanding any lapse of time since execution* of the power of attorney." (Prob. Code, § 4127, italics added; see also Civ. Code, § 1216 [revocation of recorded power of attorney to convey or execute instruments affecting real property must likewise be recorded to be effective].)

Further, Kenneth cites no authority that the mere recording of a second power of attorney, materially identical to the first, impliedly revokes an earlier recorded power of attorney or automatically renders the earlier power a nullity. The Probate Code provides that "[i]f a principal grants *inconsistent* authority to one or more attorneys in fact in two or more powers of attorney, the authority granted last controls *to the extent of the inconsistency*." (Prob. Code, § 4130, subd. (a), italics added.) However, the 2003 Power of Attorney and the 2004 Power of Attorney are *not* inconsistent. Both the 2003 Power of Attorney and the 2004 Power of Attorney granted the same authority to the same person. On its face, the 2004 Power of Attorney appears to have simply clarified that the attorney-in-fact, identified only as Cindy L. Ellis in the 2003 Power of Attorney, was also known as Cindy J. Ellis. To a third party reviewing the recorded chain of title, the two powers appear to be essentially duplicative. There is no basis warranting application of section 4130 and Kenneth cites no other authority mandating that the later-recorded power of attorney must be deemed the sole operative document in the chain of title, with the 2003 Power of Attorney having no legal effect at all.

Finally, the crossing out of the one-sentence fiduciary duty and ratification provision is not dispositive of the legal effectiveness of the 2003 Power of Attorney. Respondents argue this issue was waived by failure to raise it below. However, the argument may be raised in connection with Kenneth's request for leave to amend. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746 ["issue of leave to amend is always open on appeal, even if not raised" below].) And, in any event, even considered on the merits it does not aid Kenneth's position. Kenneth fails to cite any

authority that the lining out of this language on a *nonstatutory* power of attorney pursuant to Probate Code section 4121 renders it legally invalid.

Moreover, the import of the crossing out of such language to third parties intending to rely on the 2003 Power of Attorney is undercut by the fact the provision immediately following, and directly above Kenneth's signature block, was not crossed out or altered in any way. That provision, stated in capitalized, bold-faced print provides: "To induce any third party to act hereunder, I hereby agree that any third party receiving a duly executed copy or facsimile of this instrument may act hereunder, and that revocation or termination hereof shall be ineffective as to such third party unless and until notice or knowledge of such revocation or termination shall have been received by such third party, and I for myself and for my heirs, executors, legal representatives and assignees, hereby agree to indemnify and hold harmless any such third party from and against any and all claims that may arise against such third party by reasons of such third party having relied on the provisions of this instrument." (Boldface and caps omitted.) Kenneth failed to establish the legal invalidity of the 2003 Power of Attorney or state any basis for it being deemed anything other than voidable, but not void.

c. The forged 2004 Power of Attorney

The fifth amended complaint expressly alleges the 2004 Power of Attorney was fabricated without Kenneth's authority and that his signature on that document is a forgery. A "true and correct copy" of the 2004 Power of Attorney, bearing its date of recording, is attached and incorporated by reference to the fifth amended complaint. The allegations are sufficient to establish, for pleading purposes, that the 2004 Power of Attorney is a forgery and void *ab initio*.

d. Analysis

Kenneth seeks to establish the primacy of the forged 2004 Power of Attorney because a void instrument cannot convey good title and interests based thereon may be set aside even as against a bona fide purchaser or encumbrancer. "It has been uniformly established that a forged document is void *ab initio* and constitutes a nullity;

as such it cannot provide the basis for a superior title as against the original grantor." (*Wutzke v. Bill Reid Painting Service, Inc*. (1984) 151 Cal.App.3d 36, 43 (*Wutzke*).) "Instruments which are wholly void cannot ordinarily provide the foundation for good title even in the hands of an innocent purchaser." (*Firato v. Tuttle* (1957) 48 Cal.2d 136, 139 (*Firato*).)

However, Kenneth's allegations that Golden and Western "relied" only on the 2004 Power of Attorney and that the concurrent recording of the Cal Vista deed of trust and the 2004 Power of Attorney "establish[ed] a precedent relied upon by all subsequent encumbrancers" are mere conclusions which are not accepted as true in ruling on demurrer. (*City of Dinuba*, *supra*, 41 Cal.4th at p. 865.) Moreover, they are contradicted by express allegations regarding recordation of the 2003 Power of Attorney, and the facts gleaned from the instruments incorporated into the fifth amended complaint, as well as those the court judicially noticed. Those specific facts control. (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995; see also *Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 399 [allegations constituting conclusions of law or contrary to matters subject to judicial notice not deemed true for purposes of demurrer].)

Kenneth cannot plead around the legal effect of his admissions regarding the recorded 2003 Power of Attorney. " 'The act of recording creates a conclusive presumption that a subsequent purchaser has constructive notice of the contents of the previously recorded document.' [Citation.]" (*612 South LLC v. Laconic Limited Partnership* (2010) 184 Cal.App.4th 1270, 1278; see also Civ. Code, § 1213.) Based on Kenneth's allegations of fraudulent inducement, the 2003 Power of Attorney may be voidable as between Kenneth and Cindy, but by law it nonetheless imparts constructive notice to third parties, like Golden and Western, of the facts contained therein.

In contrast, Kenneth's admission the 2004 Power of Attorney was forged and therefore void *ab initio* establishes that the 2004 Power of Attorney imparts no notice at all, despite its recording. "An instrument that is void *ab initio* is comparable to a

blank piece of paper and so necessarily derives no validity from the mere fact that it is recorded. [Citation.] *As a consequence the record thereof is not constructive notice of its contents or of the fact that it is actually recorded*." (*City of Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, 733, italics added; accord, *Taormina Theosophical Community, Inc. v. Silver* (1983) 140 Cal.App.3d 964, 971.)

In summary, record title to the Figueroa Street Properties contains the 2003 Power of Attorney which, on its face, gives Cindy the authority to convey and encumber the properties on Kenneth's behalf as his attorney-in-fact. No amount of further amendment can change that fact because of the rule barring sham pleading. Kenneth's allegations of Cindy's fraudulent acts which induced him to execute the 2003 Power of Attorney render the power of attorney *voidable*, but not void. (*Schiavon v. Arnaudo Brothers* (2000) 84 Cal.App.4th 374, 378-379 (*Schiavon*) [forged instruments are void, but voidable instruments arise when party executing instrument knows what he or she is executing but has been induced to so act by false representations].)

And, despite Kenneth's repeated references to the subsequent deeds (Hirsch Deed, NGI Deed) as also void, those instruments, which flow from the 2003 Power of Attorney, are merely voidable as well. For instance, the Hirsch Deed was executed by the authorized trustee and was procured by Cindy's fraudulent representations as to how title should be transferred. It was not a forgery and is therefore voidable but not void. (*Schiavon, supra*, 84 Cal.App.4th at pp. 381-382; see also *Firato, supra*, 48 Cal.2d at p. 139.)

Ordinarily, a bona fide purchaser or encumbrancer may rely on and enforce voidable instruments. (See *Fallon v. Triangle Management Services, Inc*. (1985) 169 Cal.App.3d 1103, 1106; accord, *Schiavon, supra*, 84 Cal.App.4th at p. 378; see also *Wutzke, supra*, 151 Cal.App.3d at pp. 42-43 [innocent encumbrancer entitled to same protections as innocent purchaser].) The ability of Kenneth to state a claim against Golden and Western therefore depends on whether he can state facts showing that each

entity is not properly deemed a bona fide good faith encumbrancer for value. (*Firato*, *supra*, 48 Cal.2d at p. 140.)

2. Bona Fide Encumbrancers in Good Faith

Kenneth contends he pled sufficient facts showing that Golden and Western are not good faith encumbrancers, thus raising a factual question that could not properly be resolved on demurrer. Despite multiple opportunities to amend, Kenneth did not plead legally sufficient facts challenging Golden's and Western's status as good faith encumbrancers for value. The trial court properly sustained the demurrers without further leave to amend, and Kenneth has not proposed to add any facts that would change this conclusion.

" '[A] bona fide purchaser for value who acquires his interest in real property without notice of another's asserted rights in the property takes the property free of such unknown rights. [Citations.]' [Citations.] ' "The elements of bona fide purchase are payment of value, in good faith, and *without actual or constructive notice of another's rights*. [Citation.]" [Citation.]' [Citation.] The same elements exist to determine whether a party who takes or purchases a lien is a bona fide encumbrancer." (*Melendrez v. D & I Investment, Inc*. (2005) 127 Cal.App.4th 1238, 1251; see also *Brock v. First South Savings Assn.* (1992) 8 Cal.App.4th 661, 667 [" '*good faith*' encumbrancer is one who acts *without knowledge or notice* of competing liens on the subject property"].) "[I]n the absence of conflicting knowledge, a good faith encumbrancer is entitled to rely on the recorded chain of title . . . ." (*Triple A Management Co. v. Frisone* (1999) 69 Cal.App.4th 520, 530 (*Triple A*).)

Nothing in the fifth amended complaint reflects that Golden or Western had *actual* knowledge of Cindy's fraud against Kenneth. The 2003 Power of Attorney contains a warning in bold, capped letters that the power of attorney grants broad powers to the attorney-in-fact to "handle" the principal's property, "which may include powers to pledge, sell, or otherwise dispose of any real or personal property without advance notice to you or approval by you." Kenneth's allegations of fraudulent inducement are based on an oral understanding that, despite that broad language,

Cindy would only use the power of attorney to manage his properties. It is undisputed this limitation was not reduced to writing or otherwise recorded. " '[A] subsequent bona fide purchaser or encumbrancer is not bound by off-record agreements not referenced in the recorded documents . . . .' [Citation.]" (*Gates Rubber Co. v. Ulman* (1989) 214 Cal.App.3d 356, 365.)

The record also fails to show that Golden and Western had constructive notice. "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." (Civ. Code, § 19.) There are "[s]everal limitations . . . inherent in the protection afforded a good faith encumbrancer for value." (*Triple A*, *supra*, 69 Cal.App.4th at p. 530.) For instance, a "subsequent encumbrancer is permitted only to rely on the recorded state of title as that state of title objectively presents itself: the subsequent encumbrancer is not entitled to view the record either through rose-colored glasses or with blinders on." (*Ibid*.)

Kenneth failed to plead any legally sufficient facts that showed the state of record title for the Figueroa Street Properties would have reasonably raised a red flag to any subsequent encumbrancer as to potential defects in title. Kenneth argues the defects in the 2003 Power of Attorney, including the fact that it was purportedly "stale," triggered a duty of inquiry. However, as discussed in part 1 above, those arguments are without merit. Kenneth also argues Cal Vista's initial rejection of Cindy's application for a loan to be secured by an entirely separate property should have raised a red flag to Golden and Western. Kenneth fails to explain how any information about Cal Vista either came to Golden and Western outside the chain of title, or existed in the chain of title for the Figueroa Street Properties. Kenneth also fails to cite authority indicating that the reasons for Cal Vista's lending decisions warranted investigation by Golden and Western when they considered whether to make a loan secured by the Figueroa Street Properties, which Cindy did not offer as collateral to secure the Cal Vista loan. Kenneth also fails to cite authority for the

proposition that a lender is required to compare duly notarized signatures for suspected forgeries, or to investigate whether a corporate grantee is qualified to take property as a bona fide gift. We are aware of no authority imposing any such duties of inquiry and decline to create new law in this case imposing new rules about what might constitute constructive notice.

Moreover, Kenneth, in his briefs before this court, failed to identify any additional material facts that could be pled if granted further leave to amend, stating only that unspecified facts based on "loan industry practices" could be pled showing that Golden and Western were on reasonable notice to conduct an inquiry into the state of record title. The burden to show a reasonable possibility to cure defects by further amendment falls " 'squarely on the plaintiff.' [Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) "To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.) Kenneth has failed to show the trial court abused its discretion in denying leave to amend.

It is true the "determination whether a party is a good faith purchaser or encumbrancer for value ordinarily is a question of fact." (*Triple A*, *supra*, 69 Cal.App.4th at p. 536.) However, "where the circumstances are such that only one conclusion could reasonably be reached relative to their sufficiency for that purpose, the question becomes one of law subject to ultimate resolution by the appellate court." (*Southern Pac. Co. v. City & County of S. F.* (1964) 62 Cal.2d 50, 56-57.) Objectively viewed, the recorded state of title for the Figueroa Street Properties, as reflected in

Kenneth's pleading and the documents judicially noticed, does not give constructive notice there were potentially off-record limitations on Cindy's authority or any actual fraud that resulted in subsequent unauthorized conveyances. We conclude the trial court did not err in so ruling. The demurrers were properly sustained without further leave to amend.

DISPOSITION

The judgments of dismissal entered in favor of defendants and respondents Golden Security Bank and Western Commercial Bank are affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.