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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

STEVEN SPARKS, Plaintiff and Appellant, v. BANK OF AMERICA, N.A., et al., Defendants and Respondents.	B280302 (Los Angeles County Super. Ct. No. BC569359)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Raphael, Judge. Affirmed in part, reversed in part and remanded.

Law Offices of Wilfred J. Killian and Wilfred J. Killian for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton and Kerry W. Franich for Defendants and Respondents.

Steven Sparks (appellant) appeals from the judgment of dismissal entered after the trial court denied his motion to reconsider its order sustaining without leave to amend the demurrer of respondents Bank of America, N.A., William F. Schnieders, and various Does (collectively Bank of America or respondents). We agree with the trial court that appellant has not stated a cause of action for breach of contract. However, because our review is based solely on the pleadings, we conclude that appellant has pled a cause of action for defamation, insofar as that claim is based on allegations of statements in letters Bank of America sent to the buyers in appellant's proposed short sale, Steven and Jadwiga Markoff. Therefore, we affirm in part, reverse in part and remand.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In June 2006, Steven and Dana Sparks obtained a $1,458,000 loan secured by a deed of trust encumbering their home on Trentham Road in the Lake Sherwood area. After the Sparks defaulted on their loan payments, a notice of default was filed in March 2015.

In September 2012, the Sparks entered into a residential purchase agreement with Steven and Jadwiga Markoff for the short sale of their Trentham Road home for $1,245,000. The Sparks were represented by

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[1] This appeal is from the sustaining of a demurrer; therefore, our summary of the facts is taken from the pleadings and facts that have been judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

a short sale and foreclosure consultant, Kathy Macias, who negotiated with Bank of America regarding the short sale.

On November 30, 2012, Bank of America sent Macias an email stating: "Bank of America has countered the offer that was submitted on the property 2023 TRENTHAM RD LAKE SHERWOOD, CA 91361. IMPORTANT INFORMATION REGARDING ACCEPTANCE OF THE COUNTER OFFER TERMS: * Your acceptance of the counter offer terms DOES NOT mean the transaction is approved. * If you accept the counter offer, we will present the transaction for approval to the investor, mortgage insurer and/or senior management. Note: Any of these parties can decline or change the terms of the transaction. * The sale transaction is not accepted until the seller signs the written contracts. * Please make your buyer aware that this may be a multiple counter offer situation. * This counter offer may have an expiration date. You must reply to the offer before the expiration date using the offers management tool in Equator. Failure to do so may result in this transaction being rejected. You can view and respond to the counter offer terms by going to http://www.equator.com and logging into the My Account section. Counter offers are located under the Offers that Need Response link."[2]

The counteroffer stated "that the purchase price would be $1,245,000 with the buyer paying $27,050 towards sellers['] closing

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[2] According to the complaint, Equator is an online platform for written communications between real estate agents and banks, including Bank of America.

costs for a total amount of $1,272,050." After receiving the counteroffer, Macias spoke with Richard Zanol, an employee of Bank of America, who "stated that the purchase price would be $1,245,000 with the buyer paying $27,050 towards sellers['] closing costs for a total amount of $1,272,050. This conversation was confirmed in an email from Ms. Macias to Mr. Zanol on or about November 30, 2012, at 3:27 p.m."

On December 1, 2012, Macias sent Zanol an email stating that she accepted Bank of America's counteroffer. On December 10, 2012, the Sparks signed the residential purchase agreement, "in reliance on [Bank of America's] counter offer."

On December 18, 2012, Zanol sent an email to Macias stating, "We have received information that the buyer has withdrawn their offer on the property at 2023 TRENTHAM RD. ACTION REQUIRED: You must submit a new offer by completing the 'Submit New Offer' task within five calendar days or your file will be declined. IF YOU HAVE ADDITIONAL QUESTIONS: Please contact R. ZANOL." A few minutes later, Zanol sent another email to Macias, stating, "Based on an Executive Review, the $1,245,000 offer has been declined. Bank of America will not consider an offer from Steven Markoff & Jadwiga Markoff."

A few hours later, Macias sent an email to Zanol stating, "What do you mean the buyer withdrew the offer??? The buyer nor seller has cancelled. What is going on??"

In January 2013, Bank of America sent identical letters to Steven and Jadwiga Markoff. The letters stated, "This letter is informing you that Bank of America will no longer be accepting Mortgage transactions

in which you are or have been involved either directly or indirectly. . . . This decision is due to . . . [¶] '. . . Short Sale collusion regarding the above referenced property [¶] . . . Co-conspired with other individuals engaging in a non-arms length relationship amongst transaction parties [¶] . . . working in collusion for the purpose of facilitating a foreclosure delay scheme.'" According to the complaint, these letters also were sent to various Bank of America employees. In addition, emails and reports were circulated to Bank of America employees indicating that the short sale was denied because it was not an arms-length transaction. A January 9, 2013 report to Bank of America employees stated that the Sparks "intend[ed] to remain in the property with the Markoffs as landlords," and that the Sparks and the Markoffs were engaged in a scheme to forestall foreclosure by submitting fraudulent short sale offers. On January 18, 2013, Michele Schein sent a letter to the Sparks stating that Bank of America was unable to approve the short sale request, explaining that "[t]he short sale transaction is no longer being reviewed because the buyer and seller are related. This is no longer an . . . arms length . . . transaction, which is required for a short sale."[3]

Appellant filed a complaint in January 2015 against respondents, asserting breach of contract, negligence, intentional interference with contractual relations, negligent and intentional interference with prospective economic advantage, defamation, and false light. Respondent filed a motion for judgment on the pleadings, in connection

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[3] The complaint never explains who Schein is, but she presumably is a Bank of America employee.

with which it asked the court to take judicial notice of certain of appellant's responses to requests for admission (we discuss those responses in greater detail in our discussion below, reversing the grant of judgment on the pleadings as to the defamation cause of action). The trial court granted the request for judicial notice and granted respondents' motion for judgment on the pleadings without leave to amend as to all causes of action except the breach of contract cause of action, which the court allowed appellant to amend. The court further stated that appellant's wife was an indispensable party to the claim and must be joined in the complaint.

On August 18, 2016, appellant filed a motion for reconsideration of the court's ruling on respondents' motion for judgment on the pleadings and a proposed amended complaint.

On August 30, 2016, appellant filed a first amended complaint for breach of contract (the operative complaint). Respondents demurred, asserting that appellant again failed to join his wife as a party, failed to establish the existence of a contract, and failed to allege any damages actually suffered.

The trial court sustained the demurrer without leave to amend on the ground that appellant failed to plead the existence of a contract and would not be able to remedy this defect by amendment. The court dismissed the case with prejudice and entered judgment on November 28, 2016. Appellant filed a motion for reconsideration and a proposed second amended complaint. The court denied appellant's motion for

reconsideration.[4] Appellant timely appealed from the judgment of dismissal.

DISCUSSION

"We review the ruling sustaining the demurrer de novo, exercising independent judgment as to whether the complaint states a cause of action as a matter of law. [Citation.] We give the complaint a reasonable interpretation, assuming that all properly pleaded material facts are true, but not assuming the truth of contentions, deductions, or conclusions of law. [Citation.]" (*Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 740.)

When the trial court sustains a demurrer without leave to amend, "'[t]he plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] . . . [¶] 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

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[4] The court found that it did not have jurisdiction, citing *Branner v. Regents of University of California* (2009) 175 Cal.App.4th 1043, 1048 ["A motion to reconsider is not valid if it is filed after the final judgment is signed."], but that even if it did, the motion failed to satisfy the requirements of Code of Civil Procedure section 1008.

that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation.]' [Citation.]" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491.) "We review an order denying a motion for reconsideration under the abuse of discretion standard. [Citation.]" (*Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 871.)

I. *Indispensable Party*

We initially address respondents' contention that the judgment should be affirmed because appellant fails to address the trial court's finding that appellant failed to join his wife, an indispensable party. "A person is an indispensable party to litigation "'if his or her rights must necessarily be affected by the judgment.'" [Citation.] Stated differently, 'Where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party.' [Citation.] These principles have been codified in Code of Civil Procedure section 389." (*Washington Mutual Bank v. Blechman* (2007) 157 Cal.App.4th 662, 667.)

The complaint alleges that both appellant and his wife entered into the residential purchase agreement with the Markoffs, and the complaint seeks specific performance of the agreement. Appellant's wife clearly was an indispensable party to the litigation because her rights would necessarily be affected by the judgment.

Although the court's ruling sustaining the demurrer stated that appellant failed to join his wife, the court further stated that "leave to amend would be granted if this were the only issue, to add Dana Sparks as a defendant, as argued at the hearing." In their notice of ruling on defendants' demurrer to first amended complaint, the attorneys for respondents stated that the indispensable party finding in the trial court's tentative ruling was not adopted and therefore was not a basis for the court's sustaining of the demurrer.

Respondents specifically acknowledged that appellant's failure to join his wife was not a basis for the court's final ruling, and the court indicated its willingness to grant leave to amend on this basis. Appellant's proposed second amended complaint added Dana Sparks as a defendant and thus would have cured this defect. We therefore decline to affirm the judgment on this ground.

II. *Breach of Contract*

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) "Contract formation requires mutual consent, which cannot exist unless the parties 'agree upon the same thing in the same sense.' (Civ. Code, §§ 1580, 1550, 1565.) 'If there is no evidence establishing a manifestation of assent to the "same thing" by both parties, then there is no mutual consent to contract and no contract formation.' [Citation.] 'Mutual consent is determined under an

objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.' [Citations.]" (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208 (*Bustamante*).)

Appellant admitted in the complaint that Bank of America's email stated that the Sparks' acceptance of the counteroffer would not mean the transaction was approved, but that the transaction would be presented "for approval to the investor, mortgage insurer and/or senior management. Note: Any of these parties can decline or change the terms of the transaction." Because the email from Bank of America clearly states that the transaction needed approval from "the investor, mortgage insurer and/or senior management," and might be changed by any of those parties, there is no "'manifestation of assent to the "same thing,"'" and thus "'no mutual consent to contract and no contract formation.'" (*Bustamante*, *supra*, 141 Cal.App.4th at p. 208.)

Appellant argues that respondents "cavalierly ignore" that he accepted Bank of America's counteroffer without changing the terms. However, he ignores that the counteroffer stated that his and his wife's acceptance of the counteroffer would not mean the transaction was approved. In other words, the email clearly indicates that their acceptance would not mean a contract was formed because approval of the transaction would still be required.

Appellant also argues that even if the acceptance of the counteroffer did not form a contract for a short sale of the property, the acceptance formed a subsidiary contract under which the Bank, in the

words of the counteroffer, agreed to "present the transaction for approval to the investor, mortgage insurer and/or senior management." According to appellant, he has adequately pled a breach of that contract, because Zanol's second e-mail to Macias on December 18, 2012, stated: "Based on an Executive Review, *the $1,245,000 offer* has been declined. Bank of America will not consider an offer from" the Markoffs. (Italics added.) According to appellant, Zanol's email, which refers only to the $1,245,000 offer, shows that the Bank never presented the counteroffer, which was for a total amount of $1,272,050, to the "investor, mortgage insurer and/or senior management." Therefore, appellant contends that the Bank breached its obligation to present the counteroffer for approval. We disagree.

In relevant part, the terms of the counteroffer stated that: (1) acceptance did not "mean the transaction is approved," (2) upon acceptance, the "transaction," not simply the counteroffer, would be presented "for approval to the investor, mortgage insurer and/or senior management," and (3) "[a]ny of these parties [referring to 'the investor, mortgage insurer *and/or senior management*' (italics added)] can decline or change the terms of the transaction." Zanol's email, as well as the Bank's later letters to the Markoffs and the Bank's internal communications, make it clear that the Bank's senior management declined to move ahead with any short sale of the property, regardless of its terms, because it believed appellant and the Markoffs were involved in a fraudulent short-sale scheme. The right of the Bank's senior management to disapprove the transaction on such a ground was expressly reserved in the counteroffer, which provided, as we have

noted, that "[a]ny of these parties [referring, inter alia, to 'senior management' of the Bank] can decline or change the terms of the transaction." Thus, the Bank's blanket rejection of any proposed sale to the Markoffs, regardless of the terms, did not violate the terms of the counteroffer.

Appellant's breach of contract claim in the proposed second amended complaint relied on the same allegations (the email setting forth the counteroffer and the subsequent email exchanges) as the operative complaint. The only new allegation in the proposed second amended complaint is that Bank of America's Short Sale Guide for Agents provides that "acceptance of the counteroffer is an agreement between the agent (and parties) and Bank of America to submit the offer to investors and/or MI for consideration." This proposed amendment does not address the defects in the complaint we have identified.[5] The trial court properly sustained the demurrer and denied appellant's motion for reconsideration.

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[5] Because appellant does not show he could allege the existence of a contract, we need not address his contentions that he can overcome the Statute of Frauds and that Bank of America breached a contractual duty to use good faith in investigating the short sale.

III. *Defamation*[6]

"'Defamation requires the intentional publication of a false statement of fact that has a natural tendency to injure the plaintiff's reputation or that causes special damage.' [Citation.] The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. [Citations.]" (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97.)

Appellant's defamation claim was based on two types of communications: (1) internal emails and other communications the Bank sent to its employees, and (2) two letters Bank of America sent to the Markoffs (one to Steven, the other to Jadwiga). We first discuss the internal emails.

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[6] The court granted respondents' motion for judgment on the pleadings without leave to amend as to the defamation cause of action. "'A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review.' [Citation.] 'All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law . . . .' [Citation.]" (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777.) As with a demurrer, "we must review the pleadings to determine whether the facts, as alleged in the complaint, support any valid cause of action against the defendant, or if not, whether the complaint could be reasonably amended to do so. [Citations.] Where a complaint could reasonably be amended to allege a valid cause of action, we must reverse the judgment. [Citation.] Leave to amend is liberally allowed; a specific request to amend is not required as a prerequisite to review on appeal the trial court's decision not to grant leave to amend. [Citation.]" (*Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1347–1348.)

Internal Communications

Appellant's defamation cause of action relied in part on internal communications between Bank of America and its employees. Appellant alleged that one such email stated that the short sale was declined because "[t]he parties involved are involved in short sale collusion," and that denial was recommended because of "potential short sale collusion/foreclosure avoidance." A later report circulated to Bank employees stated, "Based on the two offers submitted this has elevated to the level of fraud, short sale collusion between the sellers and buyers and foreclosure rescue. The Sparks are attempting to forestall the foreclosure of the property by submitting fraudulent short sale offers. . . . A recommendation to decline the short sale due to short sale collusion was made."

Respondents contend that appellant cannot base his defamation cause of action on these communications because they fall within the common interest privilege of Civil Code section 47, subdivision (c). We agree.

"Privilege is an affirmative defense to a claim of defamation. [Citation.]" (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 492.) Civil Code "section 47 creates two privileges: (1) an absolute privilege, commonly called the litigation privilege, that applies irrespective of the speaker's motive (§ 47, subd. (b)), and (2) a qualified privilege that 'applies only to communications made without malice' (see *id.*, subd. (c)). [Citation.]" (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1337.) """"The malice necessary to defeat a qualified privilege is "actual malice" which

is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable ground for belief in the truth of the publication and thereafter acted in reckless disregard of the plaintiff's rights [citations].'" (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1538 (*McGrory*), quoting *Taus v. Loftus* (2007) 40 Cal.4th 683, 721.) "'The defendant has the initial burden of showing the . . . statement was made on a privileged occasion, whereupon the burden shifts to the plaintiff to show the defendant made the statement with malice.' [Citation.]" (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 617 (*Klem*).)

"The general rule is that a privilege must be pleaded as an affirmative defense. [Citation.] But where the existence of a privilege is revealed on the face of the complaint, it may be asserted in a demurrer. In such a case, the complaint must allege the statement was made maliciously, if it is to state a cause of action for libel. [Citations.] Malice cannot be inferred. [Citations.]" (*Tschirky v. Superior Court* (1981) 124 Cal.App.3d 534, 538.)

Under the common interest privilege of Civil Code section 47, subdivision (c), a communication without malice is privileged if made "to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." Here, Bank of America clearly shared a common business interest with its employees in explaining

why transactions with the Markoffs would not be accepted. We find the decision in *McGrory*, *supra*, 212 Cal.App.4th at page 1538, analogous. There, the court reasoned that the common interest privilege applies "to statements by management and coworkers to other coworkers explaining why an employer disciplined an employee." "'Clearly, an employer is privileged in pursuing its own economic interests and that of its employees to ascertain whether an employee has breached his responsibilities of employment and if so, to communicate, in good faith, that fact to others within its employ so that (1) appropriate action may be taken against the employee; (2) the danger of such breaches occurring in the future may be minimized; and (3) present employees may not develop misconceptions that affect their employment with respect to certain conduct that was undertaken in the past.' [Citation.]" (*Ibid.*) Similarly, in the instant case, by communicating to its employees the reasons why it would not approve any transaction involving the Markoffs, Bank of America was pursuing its economic interest and those of its employees in order to (1) ensure appropriate action was taken in pending transactions with the Markoffs, (2) minimize the risk of approval of any future transactions with them, and (3) prevent any misconceptions about why such transactions were improper. The qualified privilege therefore applies to the internal communications regarding the proposed short sale.

Appellant does not effectively dispute respondents' assertion that qualified privilege applies. Instead, he argues that the question whether the privilege can be overcome by a showing of malice is a question of fact. He argues that he alleged malice in his proposed

amended complaint. His proposed amendment alleged that respondents acted with reckless disregard for the truth by failing to interview the parties and failing to allow the parties to rebut the allegations. However, ""[t]he malice necessary to defeat a qualified privilege is "actual malice" which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable ground for belief in the truth of the publication and thereafter acted in reckless disregard of the plaintiff's rights (citations)."" [Citation.]" (*McGrory, supra*, 212 Cal.App.4th at p. 1538.) Appellant's proposed amendment is insufficient to plead malice. He does not propose to allege facts that would establish ill will toward him, or to allege facts showing that Bank of America (even if it did not interview the parties) lacked a reasonable belief that the statements in the internal communications regarding collusion and possible fraud were true. (See *Locke v. Mitchell* (1936) 7 Cal.2d 599, 602-603 [complaint must "contain affirmative allegations of malice in fact"; conclusory allegations of malice are insufficient].) Thus, he has failed to show that he can overcome the common interest privilege insofar as it applies to Bank of America's internal communications as alleged in the complaint. Thus, as pled, he cannot base his defamation claim on statements in those communications.

Markoff Letters

Appellant's defamation claim also alleged that defamatory statements were made in two letters to the Markoffs. The letters stated that the Bank "will no longer be accepting Mortgage transactions in

which [the Markoffs] are or have been involved" because they "Co-conspired [*sic*] with other individuals engaging in a non-arms length relationship amongst transaction parties" in order to "facilitat[e] a foreclosure delay scheme." Construing the complaint broadly, appellant alleged that because the Markoffs were the buyers in appellant's proposed short sale, appellant was necessarily identified as one of the transaction parties with whom the Markoffs conspired, "engaging in a non-arms length relationship," and with whom the Markoffs "work[ed] in collusion for the purpose of facilitating a foreclosure delay scheme."

Respondents do not contend that the letters to the Markoffs are not defamatory of appellant on their face. Rather, they contend that appellant cannot state a defamation cause of action, because the facts stated in the letters as applicable to appellant are true. "'"In all cases of alleged defamation, . . . the truth of the offensive statements or communication is a complete defense against civil liability, regardless of bad faith or malicious purpose."' [Citation.]" (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 28.) "The question whether a statement is defamatory can be reached on a demurrer as a matter of law. [Citations.] If the material complained of is not fairly susceptible of a defamatory meaning, it is proper to dismiss the action." (*Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 551.)

Respondents' contention depends on their characterization of the letters as accusing the Markoffs and appellant merely of engaging in a non-arms length relationship. This accusation is true, according to respondents, because in requests for admission (of which the court took judicial notice), appellant admitted that he had received a prior loan

from a business controlled by the Markoffs. The requests asked appellant to admit that before September 6, 2012, he received a personal loan of approximately $250,000 from Steven and Jadwiga Markoff, or any business or entity in which they owned a controlling interest. Appellant responded: "Admit. A loan was made to Steven and Dana Sparks on or about March 18, 2009 from A-Mark Auction Galleries, not from Steven Markoff, individually." Appellant also admitted that before September 6, 2012, he had not paid the loan back and the loan had not been forgiven. Based on these admissions, respondents contend that the allegedly defamatory statements were true: appellant had a prior business relationship with A-Mark Galleries, a business in which the Markoffs had a controlling interest, and therefore the proposed short sale was not an arms-length transaction.

The problem with respondents' contention is that the letters accused the Markoffs and appellant not simply of having a non-arms length relationship, but of having such a relationship in the context of colluding to "facilitat[e] a foreclosure delay scheme." That appellant had received a loan from a business associated with the Markoffs, and that the loan was still outstanding, does not mean, as a matter of law, that appellant, in the words of the letters, "Co-conspired with [the Markoffs] engaging in a non-arms length relationship" so as to "work[] in collusion for the purpose of facilitating a foreclosure delay scheme." It simply cannot be said, as a matter of law, that appellant's admissions demonstrate the truth of the full meaning of the accusations in the letters.

Respondents also contend that the statements in the letters fall within the common interest privilege of Civil Code section 47, subdivision (c). They assert that they shared a common business interest with the Markoffs, namely, "the proposed short sale of the property and [Bank of America]'s investigation to see whether the transaction was arm's length." "The privilege is "'recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest.'" [Citation.]" (*Klem*, *supra*, 17 Cal.App.5th at p. 617.) However, here, respondents did not share a common interest with the Markoffs. The Markoffs were merely proposed buyers in a short sale, which was disapproved. On the face of the allegations in the complaint, they had no contractual or business relationship with Bank of America. Moreover, respondents' interest in investigating the proposed short sale and declaring their findings was, in fact, adverse to the Markoffs– respondents accused them of colluding as part of a foreclosure avoidance scheme. Therefore, the letters did not contain privileged communications, and judgment on the pleadings was not properly granted on the defamation cause of action insofar as the claim rested on the letters to the Markoffs.

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DISPOSITION

The order sustaining the demurrer as to the breach of contract cause of action is affirmed. The order granting the motion for judgment on the pleadings is reversed as to the defamation cause of action insofar as the claim rests on allegations of statements made in two letters to the Markoffs. The judgment is affirmed in part and reversed in part and the matter remanded for further proceedings. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.