Filed 11/7/18 Markoff v. Bank of America, N.A. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

STEVEN MARKOFF et al., Plaintiffs and Appellants, v. BANK OF AMERICA, N.A. et al., Defendants and Respondents.	B278071 (Los Angeles County Super. Ct. No. BC533212)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan Goodman and Michael J. Raphael, Judges. Affirmed.

Law Offices of Wilfred J. Killian and Wilfred J. Killian for Plaintiffs and Appellants.

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

Steven and Jadwiga Markoff appeal from a judgment of dismissal entered after the trial court sustained without leave to amend the demurrer filed by Bank of America, N.A., and seven bank employees (collectively, the Bank) to the Markoffs' fourth amended complaint. The Markoffs alleged causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, intentional interference with contractual relations, defamation, and false light invasion of privacy arising out the Bank's refusal to approve the sale of property to the Markoffs and the Bank's statements that it rejected the sale because of collusion between the Markoffs and the sellers to delay foreclosure on the property.

The trial court found there was no enforceable contract between the Markoffs and the Bank for approval of the sale, any reliance by the Markoffs on the Bank's counteroffer with multiple disclaimers was not reasonable, and the statements the Bank made about the Markoffs were protected by the common interest privilege. The Markoffs contend on appeal the trial court erred in sustaining the demurrer and abused its discretion by denying the Markoffs' late request for leave to file a fifth amended complaint. The Markoffs also contend the trial court erred in sustaining the Bank's demurrer to the defamation cause of action in their third amended complaint for failure adequately to plead publication of the allegedly defamatory statements. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Markoffs' Complaints and the Bank's Demurrers*

On January 14, 2014 the Markoffs filed a complaint initiating this action. After the Markoffs twice amended the complaint, the Bank filed its first demurrer, which the trial court sustained with

leave to amend. After the Markoffs filed their third amended complaint, the trial court on September 28, 2015 sustained the Bank's second demurrer. The trial court again granted the Markoffs leave to amend. However, as to the defamation and false light invasion of privacy causes of action, the trial court only allowed the Markoffs to base their claims on statements made to Bank employees, not the letters sent by the Bank to the Markoffs.

On October 28, 2015 the Markoffs filed their fourth amended complaint, asserting causes of action for breach of contract, promissory estoppel, breach of the implied covenant of good faith and fair dealing, intentional interference with contractual relations, defamation, and false light invasion of privacy. The Bank again demurred. The Markoffs opposed the demurrer, but did not seek leave to amend. On August 3, 2016 the trial court sustained the demurrer without leave to amend.[1]

The Markoffs moved for reconsideration and for a new trial, requesting leave to amend and attaching a proposed fifth amended complaint. The trial court denied both motions. On August 30, 2016 the trial court entered a judgment dismissing the action.

On September 30, 2016 the Markoffs timely appealed.

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[1] The Markoffs have forfeited any challenge to the trial court's order sustaining the demurrer as to the fourth cause of action for intentional interference with contractual relations by not discussing the cause of action in their opening brief. (*Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 296, fn. 7 ["Issues not raised in the appellant's opening brief are deemed waived or abandoned."]; *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282 [same].)

B. *The Markoffs' Proposed Sale and the Bank's Investigation and Rejection of the Sale*

The fourth amended complaint alleges the following. In August 2005 Dana and Steven Sparks purchased the property located at 2023 Trentham Road, Lake Sherwood, California. A deed of trust encumbered the property.[2] The Bank serviced the loan on the property. In September 2012 the Markoffs entered into a residential purchase agreement (Agreement) for them to purchase the property from the Sparkses for $1,245,000. The Sparkses needed the Bank's approval to complete the sale, and hired consultant Kathy Macias to negotiate with the Bank. Macias communicated to the Bank the terms and conditions of the Agreement.

Bank employee Richard Zanol responded to Macias by e-mail on November 30, 2012, stating that the Bank had "countered the offer," and including a link to the terms of its counteroffer. The e-mail also included the following disclaimer: "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."

Macias then spoke with Zanol, who "reiterated" the terms of the counteroffer, under which the purchase price would remain $1,245,000, but the Markoffs would pay an additional $27,050

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[2] The trial court took judicial notice of the grant deed and deed of trust reflecting the sale and loan, but not hearsay statements in the documents.

toward the Sparkses' closing costs. Macias sent Zanol an e-mail confirming their conversation. On December 1, 2012 Macias accepted the Bank's counteroffer on behalf of the Markoffs and Sparkses. On December 10, 2012 the Markoffs signed an addendum to the Agreement adding the new term.

On December 12, 2012 the Bank, through its employees, defendants Sean Daily and Kim Weaver, communicated reports to other employees, stating that the Bank recommended the "short sale [be] denied for pre[-]determined buyer, contract executed when subject was not listed, and potential short sale collusion/foreclosure avoidance." Weaver communicated these same statements in an e-mail to Bank employees on December 17, 2012.

On December 19, 2012 the Bank communicated to Macias that it would not consider any offer from the Markoffs. No specific reason was given.[3]

On January 9, 2013 the Bank, through its employee, defendant Michael Hollenbeck, e-mailed several other Bank employees, stating, "The short sale was to be declined on December 18, 2012 with no additional offers to be considered from the Markoff[s] . . . [.] The parties involved are involved in a short

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[3] The Markoffs' proposed fifth amended complaint includes further allegations that Zanol e-mailed Macias twice on December 18, 2012, first stating the Bank had "received information that the buyer has withdrawn their offer . . . . You must submit a new offer . . . or your file will declined," then again four minutes later 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." (Boldface and italics omitted.) The Markoffs allege that Macias responded the same day stating, "What do you mean the buyer withdrew the offer??? The buyer nor seller has cancelled. What is going on??"

sale collusion. The buyers (Markoffs) have submitted two offers with different agents." (Boldface and italics omitted.)

Also on January 9, 2013 the Bank communicated to multiple Bank employees a report stating that the Markoffs and Sparkses "have tried repeated attempts to complete the non[-]arms[-]length transaction." Further, the Markoffs had submitted offers through two separate real estate agents, and it was "apparent [the] Sparks[es] intend[ed] to remain in the property with the Markoffs as landlords." The report concluded, "Based on the two offers submitted this has elevated to the level of fraud, short sale collusion . . . and foreclosure rescue. The Sparks[es] are attempting to forestall the foreclosure of the property by submitting fraudulent short sale offers." (Boldface and italics omitted.)

On January 14, 2013 the Bank, through its employee, defendant Margo Bomar, sent a letter to Steven Markoff and a separate letter to Jadwiga Markoff, each containing identical language. The letters stated the Bank would no longer accept mortgage transactions involving the Markoffs because of "[s]hort [s]ale collusion" regarding the property, "[c]o-conspir[ing] with other individuals engaging in a non-arms[-]length relationship amongst transaction parties," and "collusion for the purpose of facilitating a foreclosure delay scheme." (Boldface omitted.) Bomar communicated the contents of these two letters to defendants William Schnieders and Hollenbeck, who were Bank employees.

On January 18, 2013 defendant Michele Schein, also a Bank employee, sent a letter to the Sparkses stating the Bank was denying approval of the sale because the transaction was not arm's length due to a preexisting relationship between the Markoffs and Sparkses. On January 28, 2013 the Bank communicated to Macias that it had denied approval of the sale "due to a non-arm's[-]length transaction."

The Markoffs allege the reports sent to Bank employees were "replete with criminal accusations and illicit conduct," and the investigation of the circumstances surrounding the proposed purchase of the property was "myopic," "anemic," and otherwise inadequate.

DISCUSSION

A. *Standard of Review*

"In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. [Citation.] Where the demurrer was sustained without leave to amend, we consider whether the plaintiff could cure the defect by an amendment." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162; accord, *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010.) When evaluating the complaint, "we assume the truth of the allegations." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230; accord, *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.)

It is an abuse of discretion for the trial court to sustain a demurrer without leave to amend if there is a reasonable possibility that further amendment can cure the defects identified by the defendant. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100; *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "The question whether the trial court 'abused its discretion' in denying leave to amend 'is open on appeal even though no request to amend such pleading was made.' (Code Civ. Proc., § 472c, subd. (a).) 'The plaintiff has the burden of proving that [an] amendment would cure the legal defect, and may [even] meet this burden [for the first time] on appeal.'" (*Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018)

19 Cal.App.5th 1127, 1132; accord, *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 971.)

B. *The Trial Court Did Not Err in Sustaining the Bank's Demurrer to the Markoffs' Claims for Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing Without Leave to Amend*

1. *The Markoffs' fourth amended complaint fails to allege the existence of a contract*

The Markoffs contend they have adequately alleged in the first cause of action for breach of contract that their acceptance of the Bank's counteroffer created a binding contract under which the Bank was obligated to approve the sale. In response, the Bank argues there was no mutual assent because the Bank expressly stated that the Markoffs' acceptance of the counteroffer did not mean the transaction was approved, and the Bank reserved its right to reject the proposal or alter its terms. We agree.

"[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." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821; accord, *Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 690.)

"An essential element of any contract is the consent of the parties, or mutual assent." (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 270 (*Donovan*); accord, *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 921 [a contract that lacks mutual assent is void].) """The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe.""" (*Harshad & Nasir*

Corp. v. Global Sign Systems, Inc. (2017) 14 Cal.App.5th 523, 537; accord, *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 202.)

"Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59 (*Kruse*) [no mutual assent for long-term loan by bank where the possibility of a loan was subject to approval by bank employee's superiors and "left open to future negotiations and agreement"]; accord, *Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 213-214 (*Bustamante*) [no mutual assent to launch company in Mexico where final agreement was dependent on approval of third party investors]; *Santandrea v. Siltec Corp.* (1976) 56 Cal.App.3d 525, 528 (*Santandrea*), disapproved on another ground in *Bauguess v. Paine* (1978) 22 Cal.3d 626 [no contract where proposal for employment was conditioned on approval of board of directors].) "The determination of whether a particular communication constitutes an operative offer, rather than an inoperative step in the preliminary negotiation of a contract, depends upon all the surrounding circumstances." (*Donovan, supra,* 26 Cal.4th at p. 271; accord, *Kruse*, at p. 59.) "'A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.'" (*Kruse*, at p. 59, quoting Rest.2d Contracts, § 26, p. 75; accord, *Donovan*, at p. 271 [""'An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'"'"].)

The Markoffs contend there was mutual assent in that they accepted the terms of the Bank's counteroffer. Although the communication from the Bank to the Markoffs was labeled as a

"counter offer," it was rife with express disclaimers indicating that this was not the Bank's final manifestation of assent. The Bank explicitly stated, "Your acceptance of the counter offer terms DOES NOT mean the transaction is approved" and that "the investor, mortgage insurer and/or senior management" could "decline or change the terms of the transaction." Further, these statements were preceded by the warning in all capital letters: "IMPORTANT INFORMATION REGARDING ACCEPTANCE OF THE COUNTER OFFER TERMS."

Accordingly, there was no contractual offer by the Bank for the Markoffs to accept. Rather, the Bank's express disclaimers made clear the counteroffer was an "inoperative step in the preliminary negotiation of a contract." (*Donovan*, *supra*, 26 Cal.4th at p. 271; accord, *Kruse, supra*, 202 Cal.App.3d at p. 59.) Further, as in *Bustamante*, *Kruse*, and *Santandrea*, final agreement on approval of the sale to the Markoffs was subject to approval by a third party, the Bank's investors. (See *Bustamante*, *supra*, 141 Cal.App.4th at pp. 213-214 [agreement dependent on approval of third party investors]; *Kruse*, at p. 59 [loan subject to approval by bank employee's superiors]; *Santandrea, supra*, 56 Cal.App.3d at p. 528 [employment contract conditioned on approval of board of directors].) Even if the Markoffs intended to be bound by their acceptance of the counteroffer, the language of the counteroffer left no room for ambiguity—the Bank did not consent to approve the sale to the Markoffs.[4]

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[4] Because we conclude no contract was formed, we do not reach the Bank's alternative argument that the Markoffs' contract claim is barred by the statute of frauds. We also do not consider evidence produced in discovery, which the Bank relies on to show the Markoffs breached their agreement with the Bank. Consideration of this evidence would turn the demurrer "into a contested

2. *The fourth amended complaint does not allege breach of the implied covenant of good faith and fair dealing*

The trial court likewise did not err in sustaining the Bank's demurrer to the third cause of action for breach of the implied covenant of good faith and fair dealing. "[A]ll contracts impose a duty of good faith and fair dealing." (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 419; accord, *Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 557.) "'[T]he prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract.'" (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 525, disapproved on another ground in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939; accord, *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 711.) Because the Markoffs have failed adequately to allege the existence of a contract with the Bank, they have likewise failed to plead a cause of action for breach of the implied covenant of good faith and fair dealing.

3. *The Markoffs' proposed amendment cannot cure their defective contract claim*

In their motions for reconsideration and for a new trial, the Markoffs proposed to amend their complaint to bolster their breach of contract cause of action with new allegations relating to the

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evidentiary hearing through the guise of having the court take judicial notice. . . ." (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 477.)

Bank's failure to communicate the terms of the proposed transaction as stated in the counteroffer to the investors, mortgage insurers, or senior management after the Markoffs and Sparkses accepted the counteroffer. The Markoffs contend the Bank's failure to communicate acceptance of the counteroffer breached the Bank's contract with the Markoffs based on the language in the counteroffer. In its ruling on the Markoffs' postjudgment motions, the trial court rejected the Markoffs' request for leave to amend, finding the Markoffs "have failed to set out any new or different facts."

The Markoffs' late-proffered alternative breach of contract theory fails for the same reason discussed above—no contract was ever formed. The Bank's counteroffer, and the Markoffs' acceptance, were nothing more than steps in the negotiation process. The Bank's statement to the Markoffs that "[i]f you accept the counter offer, we will present the transaction for approval to the investor, mortgage insurer and/or senior management" was expressly qualified by the language, "[a]ny of these parties can decline or change the terms of the transaction." Thus, under an objective reading of the Bank's counteroffer, the Bank's statement that it would "present the transaction for approval to the investor, mortgage insurer and/or senior management" was an "inoperative step in the preliminary negotiation of a contract." (*Donovan*, *supra*, 26 Cal.4th at p. 271; accord, *Kruse, supra*, 202 Cal.App.3d at p. 59.)

The Markoffs' new theory also fails because they have failed adequately to plead any damages resulting from the alleged breach. "A breach of contract is not actionable without damage." (*Bramalea California, Inc. v. Reliable Interiors, Inc.* (2004) 119 Cal.App.4th 468, 473; accord, *Monster, LLC v. Superior Court* (2017) 12 Cal.App.5th 1214, 1230 [damages are "an element that must be proved to prevail on the merits of a contract claim"]; *Hecimovich v.*

Encinal School Parent Teacher Organization (2012) 203 Cal.App.4th 450, 475 [breach of contract claim failed for lack of evidence of formation of contract and that plaintiff "has pleaded no damages compensable in contract"].)

The Markoffs only alleged damages arising from the Bank's denial of approval for their purchase of the property from the Sparkses. But given that the counteroffer made clear that any of the third parties could "decline or change the terms of the transaction," the Bank's alleged failure to communicate the terms of the counteroffer to the third parties did not cause the Markoffs to suffer any quantifiable harm. Without causation, damages are not available. (Civ. Code, § 3300 [contract damages are limited to those "proximately caused" by the breach]; see Civ. Code, § 3358 ["[N]o person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides."].)[5]

Nor could the Bank have reasonably foreseen damage to the Markoffs from the Bank's failure to communicate the counteroffer terms given the disclaimers in the counteroffer. "Contract damages, unlike damages in tort [citation], do not permit recovery for unanticipated injury." (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 969; accord, *Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 469 ["[R]ecoverable damages are those that could fairly and reasonably be seen as arising naturally from a breach."].)

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[5] In addition, the Markoffs did not allege they paid the Sparkses any amount of money, only that they became "obligated to pay" the Sparkses as a result of their acceptance of the counteroffer. (See *Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 190 ["[D]amages cannot be recovered until they have occurred."].)

The Markoffs have not proposed how they could amend their complaint to cure these defects. Thus, the Markoffs have not carried their burden to show there is a reasonable possibility that further amendment can cure the defects identified by the defendant. (*Loeffler v. Target Corp., supra,* 58 Cal.4th at p. 1100.)

C. *The Trial Court Did Not Err in Sustaining the Bank's Demurrer to the Markoffs' Cause of Action for Promissory Estoppel Without Leave To Amend*

The Markoffs alleged in their second cause of action for promissory estoppel that they increased their offer to the Sparkses and signed an addendum to the Agreement in detrimental reliance on the Bank's counteroffer. As the trial court found, this cause of action fails for lack of reasonable reliance.

"The elements of promissory estoppel are (1) a promise, (2) the promisor should reasonably expect the promise to induce action or forbearance on the part of the promisee or a third person, (3) the promise induces action or forbearance by the promisee or a third person, and (4) injustice can be avoided only by enforcement of the promise." (*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1225, *affd.* (2018) 4 Cal.5th 637; accord, *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310 ["[U]nder the doctrine of promissory estoppel, 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'"].) "'While California law recognizes the doctrine of promissory estoppel, the party claiming it must plead all facts establishing the doctrine's elements.'" (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199

Cal.App.4th 1132, 1155; accord, *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 459.)

Here, the Bank could not reasonably have expected to induce any detrimental reliance by the Markoffs given that its counteroffer was replete with express disclaimers. The counteroffer's statement that "[y]our acceptance of the counter offer terms DOES NOT mean the transaction is approved" is inconsistent with any claim by the Markoffs that they acted in reasonable reliance on the Bank's future approval of their transaction. Even if the Markoffs were subjectively convinced of the reasonableness of their reliance, they cannot satisfy this element. "'"[A] party plaintiff's misguided belief or guileless action in relying on a statement on which no reasonable person would rely is not justifiable reliance . . . ."'" (*Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411, 418; accord, *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 227.) Accordingly, the Markoffs have not adequately alleged a cause of action for promissory estoppel, nor have they shown they can amend the complaint to allege a viable claim.

D. *The Trial Court Did Not Err in Sustaining the Bank's Demurrer to the Markoffs' Claims for Defamation and Invasion of Privacy Without Leave To Amend*

The fifth cause of action for defamation and the sixth cause of action for false light invasion of privacy as alleged in the fourth amended complaint rely on the same underlying facts relating to the Bank's alleged defamatory statements about the Markoffs. The Markoffs do not dispute that these causes of action must rise or fall together. (See *Fellows v. National Enquirer, Inc.* (1986) 42 Cal.3d 234, 243 [false light invasion of privacy claim must meet same requirements as defamation claim, including proof of special damages]; *Daniel v. Wayans* (2017) 8 Cal.App.5th 367, 397 ["A 'false

light' cause of action is a variety of defamation and is subject to the same requirements."].)

The Markoffs contend they were defamed in two ways. First, the Bank mailed a letter to each of the Markoffs indicating the bank would no longer accept mortgage transactions in which they were involved because the Bank had found collusion among the "transacting parties." (Italics omitted.) Steven Markoff contends the statements in the letter to him were published to his wife, Jadwiga Markoff; Jadwiga Markoff contends the statements in the letter to her were published to her husband, Steven Markoff.[6] Second, the Bank relayed similar statements internally to various Bank employees. The Markoffs contend these statements defamed them to each employee who received the reports and e-mails.

"The tort of defamation 'involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.'" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720 (*Taus*); accord, *Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1007.) The existence of a privilege is an affirmative defense, but may be raised by demurrer if the facts alleged in the complaint show the existence of the privilege. (*Redfearn*, at p. 1007; *Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420-1421.) Here, the face of the complaint shows the common interest privilege applies to both sets of communications.

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[6] These allegations were included only in the third amended complaint because the trial court sustained the Bank's demurrer without leave to amend to allege defamation and false light privacy claims based on the letters to the Markoffs.

1. *The common interest privilege applies to the alleged communications by the Bank; the third and fourth amended complaints fail to allege malice*

The fourth amended complaint on its face shows the existence of the common interest privilege as to the Bank's communications.[7] The Markoffs do not in their appellate briefs argue otherwise.[8] Instead, they contend they have adequately alleged malice and that, in the alternative, the trial court abused its discretion by failing to allow them to file a fifth amended complaint to plead additional facts demonstrating malice. We disagree.

The common interest privilege protects "communication[s], without malice, 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." (Civ. Code, § 47, subd. (c).) This privilege is qualified, in that it applies only to communications made without malice. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360; accord, *Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1337.)

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[7] Because we conclude the privilege applies to the letters the Bank sent to the Markoffs, we do not reach the Markoffs' contention that the trial court erred in sustaining the demurrer to the third amended complaint based on lack of publication to a third party or that the Markoffs should be allowed leave to allege a theory of compelled self-publication.

[8] The Markoffs have forfeited their argument that the common interest privilege does not apply by failing to raise it in their opening or reply briefs. (*Aptos Council v. County of Santa Cruz, supra*, 10 Cal.App.5th at p. 296, fn. 7; *Pfeifer v. Countrywide Home Loans, Inc., supra*, 211 Cal.App.4th at p. 1282.)

For purposes of the common interest privilege, "malice" means "actual malice," requiring a showing that the defendant ""'was motivated by hatred or ill will towards the plaintiff *or* . . . lacked reasonable grounds for [its] belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights.'"" (*Taus, supra*, 40 Cal.4th at p. 721; accord, *Schep v. Capital One, N.A., supra*, 12 Cal.App.5th at p. 1337.)

A "general allegation of malice will not suffice" to defeat the common interest privilege; a "plaintiff must allege detailed facts showing defendant's ill will towards him." (*Robomatic, Inc. v. Vetco Offshore* (1990) 225 Cal.App.3d 270, 276; accord, *Maidman v. Jewish Publications, Inc.* (1960) 54 Cal.2d 643, 653-654 ["A general allegation of malice is not sufficient . . . ."]; *Tschirky v. Superior Court* (1981) 124 Cal.App.3d 534, 539 ["[A]ctual facts must be alleged, unless they are apparent from the statement itself."]; *Martin v. Kearney* (1975) 51 Cal.App.3d 309, 312 ["Actual facts of malice must be alleged."].)[9]

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[9] *Mullins v. Brando* (1970) 13 Cal.App.3d 409, relied on by the Markoffs, is not to the contrary. In *Mullins*, the defendant stated on television that certain police officers were "out to get the [Black] Panthers," and had shot and killed a member of the Black Panthers even though he had surrendered with his hands up. (*Id.* at pp. 412-413.) The Court of Appeal concluded the plaintiffs had adequately alleged malice by alleging the statements were made "'with evil motive and malice, willfully and wrongfully, and with intent to injure, disgrace and defame plaintiffs and with wanton and reckless disregard for the truth or falsity of the statements made.'" (*Id.* at pp. 419-420.) Although the court acknowledged that other Courts of Appeal had required greater specificity for allegations of malice under Civil Code section 47, it declined to require greater specificity for the plaintiff's claim under federal constitutional law. (*Id.* at p. 421.) We are not aware of any California cases applying a lesser

The fourth amended complaint alleges in only a conclusory fashion that the Bank's communications were made "with reckless disregard for the truth of the[] statements" and that the Bank's investigation was "myopic," "anemic," and otherwise incomplete. The Markoffs have alleged no facts showing *why* the investigation was myopic, anemic, and incomplete. This is fatal to their claims. "Actual malice '"is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." [Citation.] Lack of due care is not the measure of liability, nor is gross or even extreme negligence.' [Citation.] Thus 'mere failure to investigate the truthfulness of a statement, even when a reasonably prudent person would have done so, is insufficient' to demonstrate actual malice." (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 90; accord, *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 276 (*Khawar*) ["failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient"]; *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 114 ["[T]o support a finding of actual malice, the failure to investigate must fairly be characterized as demonstrating the speaker purposefully avoided the truth or deliberately decided not to acquire knowledge of facts that might confirm the probable falsity of charges."].)

Further, the specific statements in the Bank's internal communications, as quoted in the complaint, contradict the conclusory averments of malice. Those communications indicated that approval of the transaction would be denied because "[t]he

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standard of particularity to allegations of malice to defeat the privilege under Civil Code section 47.

buyers (Markoffs) have submitted two offers with different agents," the contract between the Markoffs and the Sparkses was "executed when [the] subject [property] was not listed," and there was a preexisting relationship between the Markoffs and Sparkses suggesting that the purpose of the sale was "foreclosure avoidance." The Markoffs allege the communications were false. However, regardless of whether the information relied on by the Bank was true, the alleged statements show that the Bank was reasonably motivated by an innocent intent to avoid becoming enmeshed in an impermissible short sale between colluding parties, which concerns were appropriate to the Bank's business interests.

Given the lack of specific factual allegations demonstrating malice, the trial court did not err in sustaining the Bank's demurrer as to the Markoffs' defamation and false light privacy claims.

2. *The trial court's denial of leave to amend was not an abuse of discretion*

The Markoffs contend the trial court abused its discretion by failing to grant them leave to file a fifth amended complaint with additional factual allegations showing malice by the Bank and its employees. However, the Markoffs proffer mostly additional conclusory allegations of malice. They propose to allege that the Bank's statements were published "with reckless disregard for the truth"; the statements "are so inherently improbable that only a reckless person" would have published them; "there is a lack of reasonable grounds for believing the statements to be true"; "the investigation was grossly inadequate under the circumstances"; and the Bank "fail[ed] to provide exculpatory information."

The only specific facts the Markoffs allege are that the Bank "avoided the truth by failing to interview the parties, the agents and the brokers; [refused] to disclose to the parties the sources of

the defamatory information; [and failed to] allow the parties to rebut the allegations prior to publishing the statements." However, as discussed above, the "'mere failure to investigate the truthfulness of a statement, even when a reasonably prudent person would have done so, is insufficient' to demonstrate actual malice." (*Christian Research Institute v. Alnor*, *supra*, 148 Cal.App.4th at p. 90; accord, *Khawar*, *supra*, 19 Cal.4th at p. 276.)

The cases relied on by the Markoffs to show that an inadequate investigation is sufficient in limited circumstances to show malice are inapposite. The proposed amendment does not allege the Bank made "a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the subject] charges." (*Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 692 [publisher acted with actual malice in failing to listen to tape recording of witness that would likely show published statement was false]; accord, *Khawar, supra*, 19 Cal.4th at p. 276 [newspaper acted with actual malice in failing to interview witnesses to the murder of Senator Robert Kennedy before publishing defamatory article making "highly improbable claim" that the plaintiff was the killer, not Sirhan Sirhan, who was convicted of the murder]; *Antonovich v. Superior Court* (1991) 234 Cal.App.3d 1041, 1048 [elected official acted with actual malice in failing to investigate statement that his predecessor eight years earlier destroyed office files after he lost the election in light of evidence that the predecessor left files in his vacated office that could fill 177 boxes]; cf. *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 259, 266 [concluding there was no showing of actual malice where publisher based article on writings and conversations with two professors but did not contact subject of publication as part of investigation, noting there was "nothing at all in the record to suggest that [defendants] had any serious doubt as

to the reliability of the sources or the truth of the challenged statements"].)

Neither does the proposed amendment plead specific facts suggesting the Bank relied on a source known to be hostile toward or biased against the Markoffs. (See *Fisher v. Larsen* (1982) 138 Cal.App.3d 627, 640 [question of fact as to whether allegations of criminal conduct made by rival for school board were made with actual malice where candidate performed no investigation into the truth of the allegations].)

Moreover, as noted above, the Bank's allegedly defamatory letters to the Markoffs invited them to respond in writing to the Bank's findings of collusion within 45 days. Although the invitation to respond to the Bank's findings postdates the circulation of some of the allegedly defamatory communications, its presence in the letters sent to the Markoffs undermines their assertion that the Bank acted in reckless disregard for the truth of its statements. The proposed amendment is silent as to whether the Markoffs submitted any response or documentary evidence to the Bank following their receipt of the letters.

On appeal, the Markoffs have not proffered any additional facts they can allege to show malice, instead only pointing to the fifth amended complaint. Further, the Markoffs have had five opportunities to plead their case. The parties have conducted substantial discovery, as part of which the Markoffs obtained the internal Bank communications that form the basis of their amended defamation and false light privacy claims. Yet they still cannot point to any facts that would have been sufficient "to permit the conclusion that the [Bank] in fact entertained serious doubts as to the truth of [its] publication." (*Christian Research Institute v. Alnor, supra,* 148 Cal.App.4th at p. 90.) Accordingly, there is no reasonable possibility that the Markoffs can cure the defects by

further amendment. (See *Loeffler v. Target Corp.*, *supra*, 58 Cal.4th at p. 1100.)

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

FEUER, J.

WE CONCUR:

ZELON, Acting P. J.

SEGAL, J.