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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ISAAC NSEJJERE, Plaintiff and Appellant, v. ALFRED E. MANN et al., Defendants and Respondents.	B275410 (Los Angeles County Super. Ct. No. PC056784)
ISAAC NSEJJERE, Plaintiff and Appellant, v. MANNKIND CORPORATION, Defendant and Respondent.	B282248 (Los Angeles County Super. Ct. No.PC056200)

CONSOLIDATED APPEALS from judgments of the Superior Court of the County of Los Angeles, Melvin D. Sanvig, Judge. Affirmed.

Isaac M. Nsejjere, in pro. per., for Plaintiff and Appellant.

Quinn Emanuel Urquhart & Sullivan, Joseph Paunovich, Ryan Landes, David C. Kramer, and Daniel H. Bloomberg, for Defendants and Respondents.

INTRODUCTION

Plaintiff Isaac Nsejjere was unsuccessful in two actions against MannKind Corporation. In the first action, the trial court sustained without leave to amend MannKind's demurrer to plaintiff's first amended complaint (FAC), asserting contract and promissory estoppel claims. Plaintiff then filed a second action against MannKind and its principal, Alfred E. Mann,[1] for promissory fraud. The trial court sustained without leave to amend defendants' demurrer to that complaint as well.

Plaintiff appealed from the ensuing judgments, and we consolidated the appeals.[2] Having independently reviewed both

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[1] Mann died during the proceedings in the trial court. His estate substituted in as a defendant.

[2] There was a delay in entering judgment in the first action due to MannKind's pending cross-complaint. MannKind eventually dismissed the cross-complaint without prejudice, and a final, appealable judgment was entered.

Plaintiff's notice of appeal in the second action was filed before the entry of the judgment in that case. We exercise our discretion to treat the premature notice of appeal as having been taken from the subsequent judgment of dismissal. (*Maxwell v. Dolezal* (2014) 231 Cal.App.4th 93, 96, fn. 1.)

records (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439), we conclude as a matter of law the operative pleadings do not state facts sufficient to state a cause of action. We therefore affirm.

DISCUSSION

Because both lawsuits were resolved at the demurrer stage, we accept as true all well-pleaded factual allegations. (*Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 101.) We do not, however, accept as true plaintiff's "contentions, deductions, or conclusions of fact or law." (*Lin v. Coronado* (2014) 232 Cal.App.4th 696, 700-701.) The following facts are taken from the respective complaints.

I. First Action

A. Allegations

Mann was the founder and chairman of MannKind, the developer of Afrezza, "a rapid-acting, inhaled insulin" for adult diabetics. In 2013, MannKind had not yet obtained FDA approval for Afrezza; and Mann approached plaintiff to see if plaintiff could "use his contacts, skills, and knowledge to help MannKind gain approval for Afrezza from the Medicine Control Counsel [*sic*] ('MCC')—South Africa's equivalent of the FDA—in case MannKind was unable to convince the FDA to change its mind."

In November 2013, Mann signed a memorandum of understanding (MOU) that required plaintiff to "help raise $80 million in addition to securing regulatory approval from the MCC. In exchange, Mann offered to give [plaintiff] the exclusive rights to distribute Afrezza in sub-Saharan Africa." The MOU

also contemplated the formation of a joint venture to be called Diabetes Solutions Ltd. (DSL), initially with plaintiff and Mann as 50 percent owners.[3]

"By spring 2014, [plaintiff] and MannKind had yet to negotiate a formal agreement." MannKind took the position that any distribution agreement would have to be disclosed "to the investing public" and it "could not finalize a deal for any region until after it had entered into a distribution deal for the United States." In a March 1, 2014 text from Mann to plaintiff, Mann advised he was looking for "a definitive proposal with the terms and we will then prepare the agreements." On March 10, Mann sent another text noting plaintiff had "not provided the proposed terms," but Mann would ask MannKind's general counsel to draft a proposed agreement.

"Over the next few weeks, [plaintiff] and Mann continued to try to finalize their agreement. Mann again stated he could not finalize the deal at that point because MannKind had yet to secure a distribution agreement for the United States. Mann also stated that the leading contender for the American distribution rights wanted a 15-day 'free look' period in its agreement that would allow it to purchase the distribution rights for any other region on the 'same terms' MannKind had negotiated with a different regional partner," e.g. DSL.

After more exchanges between plaintiff and Mann, plaintiff prepared an "April Consulting Agreement" and a "May Consulting Agreement." Neither agreement was ever signed, but Mann emailed plaintiff on June 6, 2014, that *"MannKind is fully committed to deal only through you for sub[-]Saharan Africa."*

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[3] The MOU was not attached to the FAC, nor did the pleading recite verbatim any of its terms.

(Italics in original) Based on this statement, plaintiff obtained verbal commitments from potential investors who "committed to investing in the project as soon as MannKind and [plaintiff] announced they had an agreement."

The FAC conceded "that never happened because, on August 11, 2014, MannKind announced it had entered into a global distribution agreement" with another company for exclusive worldwide licensing rights for Afrezza.

B. Causes of Action

1. Breach of Written Contract

The elements of a cause of action for breach of contract are: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Coles v. Glaser* (2016) 2 Cal.App.5th 384, 391, internal quotation marks omitted.)

Exhibit A to the FAC, the May Consulting Agreement, was the alleged written contract. But it was unsigned and purported to be between MannKind and DSL, not MannKind and plaintiff. Its alleged existence was contrary to numerous allegations in the FAC conceding *the parties*—plaintiff and MannKind— never entered into any written agreement. The breach of written contract action failed as a matter of law.

2. Breach of Oral/Implied Contract

In the second cause of action, plaintiff alleged he and MannKind, "by their words and conduct," entered into an oral or implied agreement, the "complete terms" of which were "set forth in the May Consulting Agreement attached to this Complaint as Exhibit A and incorporated herein by reference." In doing so,

however, plaintiff merged two inconsistent contract theories into a single cause of action.

"A contract is either express or implied." (Civ. Code, § 1619.) The terms of an express contract are evidenced by words (Civ. Code, §1620), while an implied contract is based on conduct (Civ. Code, §1621). Moreover, as the Court of Appeal has recognized, "If written or oral contracts . . . exist, there [can] be no implied contracts." (*Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 Cal.App.4th 880, 889.)

Here, to the extent the alleged oral contract was based on the terms of the unsigned May 9, 2014 Consulting Agreement between MannKind and DSL, plaintiff was not a party to that agreement and therefore lacked standing to enforce it. In addition, the FAC conceded the contemplated DSL joint venture never came into existence and the terms of MannKind's agreement with a different global partner foreclosed any chance of an agreement between plaintiff and MannKind.

Further, plaintiff admitted the parties did not have an "agreement/JV" as of late May 2014 and never alleged he performed or offered to perform the financial terms of the alleged agreement. To the contrary, the FAC admitted plaintiff did not have the $80 million necessary to purchase the exclusive distribution rights or the $200 million to fund the expansion of MannKind's manufacturing facilities. Similarly, the FAC failed to allege plaintiff ever had firm commitments from investors to contribute such sums on plaintiff's behalf. Instead, plaintiff alleged unidentified Nigerian investors expressed a willingness to contribute unspecified amounts to the project, contingent on the finalization of an agreement between MannKind and plaintiff— a contingency that never occurred. The allegations concerning an

oral contract, like the allegations in support of the written contract, were insufficient to establish an enforceable oral agreement between MannKind and plaintiff. In sum, "the parties had at best an 'agreement to agree,' which is unenforceable under California law." (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 213 (*Bustamante*).)

Plaintiff's implied contract theory failed as well. Plaintiff did not allege any conduct by MannKind, as opposed to words by its founder, that could support the existence of an enforceable implied agreement. To the contrary, plaintiff asserted MannKind failed to act or follow through on Mann's alleged oral and written promises.

3. Promissory Estoppel

The elements of a promissory estoppel cause of action are: "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 225 (*Aceves*), internal quotation marks omitted.) *Aceves* added that promissory estoppel provides "a substitute for the consideration which ordinarily is required to create an enforceable promise. . . . The purpose of this doctrine is to make a promise binding, under certain circumstances, without consideration in the usual sense." (*Id.* at pp. 230-231, internal quotation marks omitted.) The doctrine of promissory estoppel binds the promisor who "should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement." (*Id.* at p. 231, internal quotation marks omitted.) But a promisee's

mere "hopeful expectation" does not equate to reasonable reliance. (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 55.)

In the promissory estoppel cause of action, plaintiff identified the following three promises Mann allegedly made to him on behalf of MannKind: "On March 17, Mann sent [plaintiff] an email stating '*I do assure you that we would do nothing for the Africa territory other than through you*.' Further, during their May 4th breakfast meeting, Mann said '*Absolutely*' in response to [plaintiff's] statement that 'nothing is going to be done in Africa without me.' Finally, Mann's June 6 email to [plaintiff] made clear '*MannKind is fully committed to deal only through you for sub[-]Saharan Africa*.'" According to plaintiff, in reasonable reliance on those promises, he "invested time, effort, and money. Specifically, [plaintiff] met government officials, potential investors, and potential distribution partners about the Afrezza project."

Mann's alleged promises cannot be viewed in isolation, however. When read in context, it is apparent they were conditioned on the occurrence of other material events, e.g., MannKind's entering into a United States distributorship agreement or plaintiff's obtaining funding commitments from investors to cover the $80 million cost of the exclusive distributorship rights and the $200 million cost for improvements to MannKind's manufacturing facilities. They were not the clear and unambiguous promises required to invoke the doctrine of estoppel. Nor were they the type of promises that would induce a reasonable person to rely upon them to his detriment. At best, the allegations of the amended complaint, taken as a whole, suggested the parties were agreeing to commit to a binding

agreement in the future, assuming certain third-party contracts and funding commitments could be obtained. These allegations were insufficient as a matter of law to state a cause of action for promissory estoppel. (*Aceves, supra,* 192 Cal.App.4th at p. 225; *Bustamante, supra,* 141 Cal.App.4th at p. 213.)

II. Second Action

The second lawsuit relied on the same allegations as the first, but added Mann as an individual defendant. The sole cause of action was for promissory fraud. In this action, plaintiff sought general and punitive damages and an injunction prohibiting MannKind from performing the August 2014 contract with its global partner.

This complaint began with a series of allegations of misconduct by Mann and MannKind wholly unrelated to the promissory fraud claim. Plaintiff also alleged in conclusory terms that Mann and MannKind did not intend to perform any of the promises made to plaintiff concerning a sub-Saharan distribution agreement. The essence of this action was defendants' fraudulent promise that if plaintiff obtained the $80 million licensing fee, plaintiff "would create a Joint Venture DBA-DSL, under which plaintiff would consummate a transaction of the $80,000,000 in exchange for Afrezza rights in Africa." Plaintiff alleged his performance, i.e., the obligation to raise a total of $280 million, was excused because "MannKind pulled the plug and entered into a global distribution [agreement] with [another company] before [plaintiff] could finish raising the $280 million called for in the parties' agreement."

"'The elements of promissory fraud . . . are (1) a promise made regarding a material fact without any intention of

performing it; (2) the existence of the intent not to perform at the time the promise was made; (3) intent to deceive or induce the promisee to enter into a transaction; (4) reasonable reliance by the promisee; (5) nonperformance by the party making the promise; and (6) resulting damage to the promise[e].' [Citation.] As with any other form of fraud, each element of a promissory fraud claim must be alleged with particularity." (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1498.) Stated another way, "[t]he elements of [promissory] fraud are similar to the elements of promissory estoppel, with the additional requirements that a false promise be made and that the promisor know of the falsity when making the promise." (*Aceves, supra,* 192 Cal.App.4th at p. 231.)

Plaintiff's failure to allege clear and unambiguous promises and reasonable reliance, which doomed the promissory estoppel claim in the first lawsuit, was also fatal here. As a matter of law, plaintiff failed to state a cause of action for promissory fraud.

III. Leave to Amend

Plaintiff did not seek leave to amend the pleadings, either in the trial court or here. He has the burden to propose factual allegations or legal authority to demonstrate the pleadings can be amended to state one or more causes of action against Mann or MannKind. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.) Plaintiff has failed to do so. Accordingly, we agree the court properly sustained the demurrers without leave to amend.

DISPOSITION

The judgments are affirmed. Defendants are awarded costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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