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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

SHARON FOREMAN ASBERRY, Plaintiff and Appellant, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT et al., Defendants and Respondents.	B277772 (Los Angeles County Super. Ct. No. BC561970)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephanie M. Bowick, Judge. Reversed.

Law Office of Alaba Ajetunmobi and Alaba S. Ajetunmobi for Plaintiff and Appellant.

Leal Trejo and Arturo N. Fierro for Defendants and Respondents.

Sharon Foreman Asberry (Plaintiff) sued Los Angeles Community College District (District) and Los Angeles Southwest College (College) (collectively, Defendants) for promissory estoppel relating to a purported breach of a collective bargaining agreement with Plaintiff's union. Defendants moved for judgment on the pleadings, arguing that under the Government Claims Act (Gov. Code, § 810 et seq.[1]) they have immunity from Plaintiff's claim. The trial court granted Defendants' motion without leave to amend.

On appeal, Plaintiff argues that the trial court erred, because Defendants do not have immunity from claims based "on contract" principles (§ 814), such as her claim for promissory estoppel. We agree and, accordingly, reverse the judgment.

BACKGROUND

Plaintiff is a member of the faculty and an adjunct instructor at the College, and a member of a union, affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

I. Plaintiff's claim

Plaintiff alleges that the District entered into a collective bargaining agreement with Plaintiff's union, which entitled Plaintiff, due to her seniority, to teach a second class each semester from 2000 through 2012. Plaintiff further alleges that she was not assigned to teach a second class

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[1] All further statutory references are to the Government Code unless otherwise indicated.

during that period because her department chair thought there was no seniority list in existence.

In November 2012, after learning of her department chair's error, Plaintiff petitioned the District regarding the improper denial of a second class during the period 2000 to 2008 and sought reimbursement for that period. Plaintiff followed up on her petition by contacting Dr. Lawrence Bradford (Bradford), the College's vice-president for academic affairs. In an email dated March 20, 2014, Bradford wrote to Plaintiff, telling her that "it appears that you may not have been offered the 2nd class you were entitled to[ ], as a result of the 2nd seniority list not being followed." Bradford promised to research the matter further and " 'then work with Human Resources to get [Plaintiff] paid.' " In subsequent telephone conversations with Plaintiff, Bradford allegedly assured Plaintiff that the College owed her $50,000 for the erroneously denied classes.

Defendants, however, did not pay the compensation that Bradford admitted she was owed for the period 2000 to 2008. Moreover, in reliance on Bradford's "promise," Plaintiff "fail[ed] to follow through with other legal processes she could have sought for addressing the compensation issue." As an alleged result of the Defendants' failure to adhere to the collective bargaining agreement, and as an alleged result of an unidentified "misrepresentation," Plaintiff claimed that the Defendants owe her $90,000 in lost income.

II. Defendants' challenges to Plaintiff's pleadings

On March 23, 2015, Plaintiff filed her first amended complaint, in which she alleged three causes of action: breach of contract; promissory estoppel; and "compel arbitration."

On June 29, 2015, the trial court sustained without leave to amend Defendants' demurrers to the breach of contract and compel arbitration causes of action. But, with regard to Plaintiff's promissory estoppel claim, the trial court overruled Defendant's demurrer, finding that "Plaintiff has set forth sufficient facts to support her cause of action."

Defendants subsequently moved for judgment on the pleadings, arguing, inter alia, that they have immunity from the promissory estoppel claim under the Government Claims Act because Plaintiff premised her claim on a misrepresentation, which "is no different than a claim alleging fraud."[2]

On April 29, 2016, the trial court granted Defendants' motion without leave to amend. In reaching its decision, the trial court rejected Defendants' other arguments, but found their immunity argument persuasive. For the trial court, its decision was rooted in two facts: one alleged and one not alleged. First, in her complaint, "Plaintiff appear[ed] to characterize Bradford's statements as misrepresentations."

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[2] We are forced to rely on Defendants' statements about the grounds for their motion as found in their reply brief, because the record before us does not include Defendants' moving papers.

The trial court found such a choice of language significant because section 818.8 immunizes a public entity for injuries caused by an employee's negligent or intentional misrepresentations. Second, Plaintiff failed to allege that her promissory estoppel or misrepresentation claim was based on a statute, as required by section 815. "Accordingly, even if the . . . District was not immune from liability under Government Code section 818.8 for the misrepresentation by Bradford, it is immune under section 815." Plaintiff timely appealed.

DISCUSSION

I. Standard of review

" 'A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. [Citation.] 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.' " (*People ex rel. Harris v. Pac. Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777 (*Harris*).) We review the complaint to determine whether it "alleges facts sufficient to state a cause of action under any legal theory." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.) "We review the disposition, not the court's reasons for that disposition." (*Ellerbee v. County of Los Angeles* (2010) 187 Cal.App.4th 1206, 1214.)

We review a trial court's order denying leave to amend after granting a motion for judgment on the pleadings for abuse of discretion. (*Disney v. City of Concord* (2011) 194 Cal.App.4th 1410, 1415.) "To show an abuse of discretion, the plaintiff has the burden of demonstrating that 'there is a reasonable possibility the plaintiff could cure the defect with an amendment.' " (*Foundation for Taxpayer & Consumer Rights v. Nextel Communications, Inc.* (2006) 143 Cal.App.4th 131, 135.)

II. Government immunity

"[S]overeign immunity is the rule in California." (*Cochran v. Herzog Engraving Co*. (1984) 155 Cal.App.3d 405, 409.) In other words, "[p]ublic entities in California are not liable for tortious injury unless liability is imposed by statute." (*San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 427; *Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983, 990–991.)

More specifically, section 815 provides "that public entity tort liability is exclusively statutory: 'Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.' " (C.*A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, 868.) In addition, section 818.8 specifically immunizes public entities for injuries caused by intentional or negligent misrepresentations.

"However, the doctrine of governmental immunity does not protect public entities from liabilities arising out of

contract." (*Universal By–Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 153.) Section 814 provides as follows: "Nothing in this part affects liability based *on contract* or the right to obtain relief other than money or damages against a public entity or public employee." (Italics added.)

" ' "Whether an action is based on contract or tort depends upon the nature of the right sued upon, not the form of the pleading or relief demanded. If based on breach of promise it is contractual; if based on breach of a noncontractual duty it is tortious. [Citation.] If unclear the action will be considered based on contract rather than tort." ' " (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 (*Utility Audit*) [holding government tort immunity did not bar claim for interest].)

III. Promissory estoppel and governmental entities

"The elements of a promissory estoppel claim 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.' " (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901–902 ; *Cooper v. State Farm Mutual Automobile Ins. Co.* (2009) 177 Cal.App.4th 876, 892, fn. 3.)

"Promissory estoppel was developed to do rough justice when a party lacking contractual protection relied on another's promise to its detriment." (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority*

(2000) 23 Cal.4th 305, 315 (*Kajima*).) Consequently, "a claim for promissory estoppel is an equitable theory rooted in contract, not tort." (*Piccinini v. California Emergency Management Agency* (2014) 226 Cal.App.4th 685, 689; see *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6–7.)

The Restatement Second of Contracts, section 90, subdivision (1) provides as follows concerning claims for 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. The remedy granted for breach may be limited as justice requires." California has adopted the Restatement's view on promissory estoppel claims. (See *Kajima*, *supra*, 23 Cal.4th at p. 310.)

The principles of promissory estoppel apply to claims against the government, particularly where the application of the doctrine would further public policies and prevent injustice. For example, in *Kajima*, *supra*, 23 Cal.4th 305, a contractor which was the low bidder on a project proved at trial that the city wrongfully failed to award it the contract. (*Id.* at pp. 309–310.) The California Supreme Court held that although the contractor could not state a breach of contract action against the city, it was entitled to recover bid preparation costs under a promissory estoppel theory. (*Id.* at pp. 313–318.) The court noted that the city represented that it would award the contract to the lowest

responsible bidder, the contractor relied on this representation, and the city thereafter violated its promise. (*Id.* at p. 315.) Similarly, in *Hilltop Properties v. State of California* (1965) 233 Cal.App.2d 349, 362–369, the Court of Appeal reversed the trial court, holding that the plaintiff stated a promissory estoppel cause of action against the state based on allegations that it detrimentally relied on a promise by state officials to buy certain real property.

IV. Plaintiff's claim sounds in contract, not tort

The trial court erred by granting Defendants' motion, because Plaintiff's claim for promissory estoppel sounds in contract, not in tort, and, as result, sections 815 and 818.8 are inapplicable.

As noted above, the key in determining whether a claim sounds in contract or tort is whether the claim is based on a promise or a noncontractual duty. (*Utility Audit, supra*, 112 Cal.App.4th 950, 958.) If there is any doubt, the claim will be found to be based on a contract theory. (*Ibid.*)

Here, Plaintiff plainly and expressly alleged that her claim was based on a Bradford's promise to her: "[Bradford] *promised* to work out a modality for payment of compensation owed to plaintiff. [¶] . . . Plaintiff justifiably relied on Dr. Bradford's *promise* . . . . [¶] . . . As a proximate and direct result of Dr. Bradford's *promise* to pay plaintiff for breach of the Agreement and for failure to follow through with Dr. Bradford's *promise*, plaintiff has lost income in the total amount of $90,000." (Italics added.) These allegations, as the trial court found when it overruled Defendants'

demurrer, fulfill Plaintiff's pleading requirements for asserting a promissory estoppel claim: promise, justifiable reliance, and resulting injury. (*US Ecology, Inc. v. State of California*, *supra*, 129 Cal.App.4th at pp. 901–902.)

Both Defendants and the trial court make too much of the word "misrepresentation" found in Plaintiff's promissory estoppel cause of action. First, the word appears in the following paragraph: "As a result of Defendants' failure to fully perform its part of the contract and for the misrepresentation, a sum of $90,000 is now due and owing to Plaintiff, together with interest." This allegation is not essential to Plaintiff's claim, because in the immediately preceding paragraph, she alleged that she was injured by her reliance on Bradford's promise. The allegation, in other words, is surplusage.

Second, even if the misrepresentation allegation was not surplusage, the term has more than one meaning. To misrepresent is commonly understood to mean either "to represent incorrectly; to give a false, imperfect or misleading representation"; or "to serve badly or improperly as a representative of." (Webster's 3d New Internat. Dict. (2002), p. 1445, col. 1.) Construing Plaintiff's claim "liberally," as we must (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1232), the word misrepresentation could easily be read to refer to Bradford's failure to deal fairly with one of his faculty members.

Third, even if the misrepresentation allegation was not surplusage and the only reasonable interpretation of

misrepresentation is in the sense that it is used in fraud or other tort claims, it is a legal contention or conclusion which we do not credit when reviewing a grant of judgment on the pleadings. (*Harris*, *supra*, 59 Cal.4th at p. 777.)

In sum, the mere presence of the word "misrepresentation" does not necessarily transform Plaintiff's cause of action from one sounding in contract to one sounding in tort.[3] Accordingly, we hold that the trial

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[3] Nor does the absence of a contract transform a claim for promissory estoppel from one sounding in contract to one sounding in tort. Defendants argue that because there was no contract between the parties (as purportedly affirmed in the trial court's decision to sustain Defendants' demurrer to Plaintiff' breach of contract claim), Plaintiff's "cause of action based on promissory estoppel cannot be treated as a contractual claim and thus is subject to the immunity provisions." Defendants' argument is based on a fundamental misunderstanding of the essential nature of a claim for promissory estoppel. As discussed above, promissory estoppel was "developed to do rough justice when a party *lacking contractual protection* relied on another's promise to its detriment." (*Kajima*, *supra*, 23 Cal.4th at p. 315.) Put a little differently, it is firmly established that a valid contract is not required for a plaintiff to allege a cause of action for promissory estoppel. (See *US Ecology, Inc. v. State of California*, *supra*, 129 Cal.App.4th at pp. 901–902.)

However, it should be noted that in this case we reach no conclusion as to whether Bradford's statements are binding on Defendants under a theory of promissory estoppel. Although there may be exceptional cases to the contrary, "the general rule [is] that a governmental agency

court erred in granting Defendants' motion for judgment on the pleadings.

DISPOSITION

The judgment is reversed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

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may not be estopped by the conduct of its officers and employees." (*Hilltop Properties, Inc. v. State*, *supra*, 233 Cal.App.2d at p. 364.)