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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

SCOTT YUEN, Plaintiff and Appellant, v. C&S PROPERTIES, Defendant and Respondent.	B286264 (Los Angeles County Super. Ct. No. BC641030)

APPEAL from an order of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

Michael B. Montgomery for Plaintiff and Appellant.

Demetriou, Del Guercio, Springer & Francis and Brian D. Langa for Defendant and Respondent.

Scott Yuen (Yuen) appeals from an order of dismissal after the trial court sustained without leave to amend a demurrer to the first amended complaint filed by defendant C&S Properties (C&S). In August of 2011, Yuen entered into a written lease agreement with C&S for commercial property located in Monterey Park, California (the Property). In an addendum to the lease, the parties agreed on an option for Yuen to purchase the Property if certain conditions were met. Yuen sued C&S, alleging causes of action for specific performance, reformation, declaratory judgment, and breach of contract based on his claim that he had properly exercised the option to purchase the property in October 2016 but C&S wrongfully refused to perform. The trial court sustained C&S's demurrer without leave to amend, ruling, inter alia, Yuen "ha[d] not alleged any facts demonstrating that the conditions precedent to [Yuen's] ability to purchase the [P]roperty were fulfilled." We agree and affirm.

BACKGROUND[1]

In 2011 Yuen responded to a "'For Sale'" advertisement for the Property, which is owned by C&S. He learned the Property was not legally saleable, and only partially useable, because it was under "toxic [re]mediation." Yuen decided to rent the useable portion of the Property upon the express condition that he could purchase the entire Property at the end of a lease.

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[1] In reviewing a trial court's decision sustaining a demurrer, we accept as true all material, well-pleaded allegations of fact in the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

On August 16, 2011, the parties executed a five-year written lease agreement for the Property. They also executed an "Addendum To Lease" (Addendum), which included the terms for the option to purchase the Property.[2] Paragraph 55 of the Addendum provides:

"55. **Option to Purchase**. Provided that Lessee is not in default in the payment of rent or any other terms or conditions of the Lease, Lessor grants Lessee the option to purchase the Premises during the term of this Lease under the following terms and conditions: [¶] (a) Lessee shall have the right to exercise the Option to Purchase the Premises upon written notice by Lessor that all governing agencies having jurisdiction over the site have provided the equivalent of a 'No Further Action' or acceptable documentation ('NFA') to the Lessee/Buyer to proceed with the purchase of the property. [¶] (b) The purchase price of the Premises shall be One Million Seven Hundred Eighty Nine Thousand Dollars ($1,789,000.00), all cash at the close of escrow. The purchase price shall be adjusted by three percent (3%) per annum on the anniversary date of the Lease. [¶] (c) A copy of the purchase contract is attached hereto and made a part hereof as Exhibit 'A'. [¶] (d) Lessee shall have the right to exercise this Option to Purchase [the] Premises within thirty (30) days following written notice by Lessor. [¶] (e) Option to Purchase is personal to Lessee and not assignable. (f) Lessor is under no

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[2] The parties do not dispute that the Property required environmental remediation and issuance of a no further action letter, prior to any sale. A letter from Yuen's counsel to counsel for C&S, dated October 25 , 2016, which Yuen attached to his verified complaint and to his verified first amended complaint, acknowledges this.

obligation to pursue an NFA, and there is no liability to Lessor if an NFA is not obtained. If no NFA is obtained, this Option to Purchase lapses without further force or effect." The bottom right hand corner of the Addendum containing the above-referenced terms contains Yuen's initials.

On October 25, 2016, when Yuen attempted to exercise the option to purchase the Property, C&S "denied the validity of the option [a]greement."

On November 16, 2016, Yuen filed a complaint against C&S. On February 1, 2017, C&S filed a demurrer to the complaint. In lieu of responding to the demurrer, on April 5, 2017, Yuen filed a verified first amended complaint (FAC), alleging causes of action for specific performance, reformation, declaratory judgment, and breach of contract[3] in which he alleged

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[3] The FAC attached as exhibits (1) a document entitled "Subject Property History" which appears to show C&S as the owner of the Property since "07/23/1982," (2) an undated printout of an advertisement listing the Property for sale, (3) the Addendum, (4) a diagram of the floor plan of the Property, (5) a May 3, 2011 letter from David Freitag of DAUM Commercial Real Estate Services to Frank Wurtzel regarding Yuen's proposals for the lease of the Property, (6) a document entitled "Standard Offer, Agreement And Escrow Instructions For Purchase Of Real Estate" and an accompanying addendum, (7) an October 25, 2016 letter from Michael B. Montgomery to Stephen Wright of C&S regarding the option to purchase the Property, (8) a July 26, 2011 letter from David Freitag of DAUM Commercial Real Estate Services to Frank Wurtzel regarding recent proposals to the lease to the Property, (9) an August 18, 2011 email from David Freitag to "scott@mydhm.com" attaching a copy of a draft lease to the Property, and (10) an August 29,

C&S was required to sell the Property to him because he offered to pay the full consideration called for in the lease agreement. Yuen alleged he could waive any conditions precedent preventing the sale of the Property because he was purchasing the entire Property with cash and the conditions precedent were unenforceable as an "unlawful restraint upon alienation." Alternatively, Yuen alleged the Addendum should be reformed to remove subdivision (f) of paragraph 55 because Yuen was never advised of that term prior to executing the agreement.

On May 3, 2017, C&S filed a demurrer, arguing the FAC failed to state a claim as a matter of law because Yuen could not allege the performance of the conditions precedent required to trigger the option to purchase as C&S never obtained an NFA. It also argued Yuen did not have the right to unilaterally waive any terms of the lease agreement, and his requested reformation of the Addendum was "unhelpful" because even if subdivision (f) were stricken, the conditions precedent relating to the NFA were also present in subdivision (a) of paragraph 55. C&S further argued Yuen failed to plead the fraud portion of his reformation claim with specificity.

Yuen opposed the demurrer, restating his claim that because he was purchasing the entire Property with cash, C&S did not have the right to enforce the conditions precedent related to the NFA. He also argued the conditions precedent were unenforceable because they were an invalid restraint against alienation relying on Civil Code section 711.[4] With respect to the

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2016 email chain between David Freitag and Yuen regarding the status of the offer to purchase the Property.

[4] All further statutory references are to the Civil Code.

reformation cause of action, Yuen argued he properly stated a claim because "[w]hat transpired" between the real estate broker, who also represented C&S, and him regarding the addition of the NFA language to the Addendum was "a question of fact."

Following a hearing on July 19, 2017, the trial court sustained C&S's demurrer to the FAC without leave to amend. It agreed with C&S that Yuen did not have the right to purchase the Property because he had failed to allege an NFA had been obtained and did not proffer any additional facts that might be alleged to show the condition had been fulfilled. The trial court also rejected Yuen's contention that he—rather than C&S— could waive the condition precedent regarding the NFA, noting Yuen did not provide any legal support for such a proposition. It further ruled Yuen failed to show that the NFA was an "illegal restraint on alienation" in violation of section 711 because he had alleged "no facts demonstrating" it "would be deemed an unreasonable restraint on alienation." On the reformation claim, the trial court ruled Yuen's claim that subdivision (f) of paragraph 55 was added to the Addendum by a fraud was not pled with specificity, and was contradicted by the presence of Yuen's initials on pages of the Addendum, which "demonstrate[d] that he had the opportunity to review the final version of the option agreement and that [he] specifically agreed to the terms and conditions therein." The court also noted that striking subdivision (f) of paragraph 55 from the Addendum would not provide a basis to order specific performance of the option to

purchase the Property because the conditions precedent still remained in subdivision (a) of paragraph 55.[5]

On August 2, 2017, the trial court dismissed the action with prejudice.[6] On August 10, 2017, Yuen filed an objection to

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[5] The trial court also granted C&S's request for judicial notice of the following documents: (1) a May 2, 2017 printout from the California Secretary of State website indicating the status of D.H.M. International Corporation, the entity to which Yuen wished to assign his right to purchase the property, as "FTB Suspended"; (2) a February 22, 2017 judgment in favor of C&S in case No. 16P05448, an unlawful detainer action related to the Property; (3) a March 7, 2017 amended judgment in favor of C&S in the unlawful detainer action; and (4) Yuen's declaration in support of the opposition to the motion for summary judgment filed in the unlawful detainer action.

Based on our review of these documents, it is clear the right of immediate possession of the Property had been adjudicated in favor of C&S in the unlawful detainer action. (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 255 [unlawful detainer "proceeding is summary in character; that, ordinarily, only claims bearing directly upon the right of immediate possession are cognizable"].) The ruling in that case has no bearing on this appeal because a judgment in an unlawful detainer action "will not prevent one who is dispossessed from bringing a subsequent action to resolve questions of title [citations], or to adjudicate other legal and equitable claims between the parties." (*Ibid.*) While there are exceptions to this rule, Yuen has not presented any arguments concerning any exceptions; therefore we need not consider their application, if any, in the present case.

[6] On August 1, 2017, Yuen filed a motion for reconsideration, asking the trial court to amend its ruling to note that he had requested leave to amend so the issue would not be waived on appeal. It does not appear that the trial court ruled on the motion. We nevertheless address the issue in this opinion,

the order of dismissal, pointing out, among other things, that the trial court's July order sustained the demurrer to the third cause of action twice (declaratory judgment), but made no mention of its decision as to the second cause of action (reformation). Correcting this oversight, on September 11, 2017, the trial court set aside its August 2, 2017 order of dismissal, and on September 8, 2017, it issued a nunc pro tunc order correcting its July order, indicating the demurrer to the second cause of action was also sustained without leave to amend. On October 23, 2017, the trial court issued a second amended order dismissing the action with prejudice.

Yuen filed a timely notice of appeal.[7]

DISCUSSION

I. The Trial Court Did Not Err in Sustaining C&S's Demurrer to the First Amended Complaint

A. *Standard of Review*

"The standard governing our review of an order sustaining a demurrer is well established. We review the order de novo, 'exercising our independent judgment about whether the

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concluding the trial court did not abuse its discretion in denying leave to amend.

[7] Although "the [trial court's] order sustaining the demurrer without leave to amend is not appealable[,] [t]he propriety of the trial court's ruling on the demurrer is subject to review on appeal from the appealable order of dismissal," which is the case here. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1032, fn. 1, relying on *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 611.)

complaint states a cause of action as a matter of law. [Citations.]' [Citation.]" (*Lefebvre v. Southern California Edison* (2016) 244 Cal.App.4th 143, 151.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.) "In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)[8]

B. *Breach of Contract and Specific Performance Causes of Action*

Yuen contends he alleged a valid option to purchase the Property, and any conditions precedent preventing the sale of the Property have been either "waived" or are an "unreasonable restraint against alienation." We disagree.

"The standard elements of a claim for breach of contract are '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom. [Citation.]' [Citation.]" (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th

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[8] Yuen has elected to proceed without a reporter's transcript of the hearing. When an "appeal is from the sustaining of a demurrer, a reporter's transcript or agreed-on settled statement is not necessary" because we are reviewing legal issues de novo. (*Lin v. Coronado* (2014) 232 Cal.App.4th 696, 700, fn. 2, relying on *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 699.)

1171, 1178.) "[S]pecific performance is a *remedy* for breach of contract." (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 49.) A plaintiff seeking specific performance of a contract must demonstrate: "(1) the inadequacy of his legal remedy; (2) an underlying contract that is both reasonable and supported by adequate consideration; (3) the existence of a mutuality of remedies; (4) contractual terms which are sufficiently definite to enable the court to know what it is to enforce; and (5) a substantial similarity of the requested performance to that promised in the contract." (*Tamarind Lithography Workshop, Inc. v. Sanders* (1983) 143 Cal.App.3d 571, 575; see § 3384.)

We agree with the trial court that a condition precedent to Yuen's right to purchase the Property was C&S's obtaining an NFA, the terms of which were explicitly set forth in subdivisions (a) and (f) in paragraph 55 of the Addendum. However, nowhere in the FAC are there any allegations that C&S obtained the NFA. Because Yuen failed to allege any facts demonstrating the conditions precedent were performed, his claims arising out of C&S's purported failure to sell the Property each fail and the demurrer to the FAC was properly sustained. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1192 ["a party's failure to perform a condition precedent will preclude an action for breach of contract"]; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1389 ["Where contractual liability depends upon the satisfaction or performance of one or more conditions precedent, the allegation of such satisfaction or performance is an essential part of the cause of action"].)

Yuen's attempt to save his claims with allegations that the conditions precedent have been either "waived" or are an

"unreasonable restraint against alienation" also fail. Yuen cites no legal authority in support of his allegation that he has the right to "waive" the subject conditions precedent because he is purchasing the entire Property in cash; therefore, that issue has been forfeited on appeal. (*Central Valley Gas Storage, LLC v. Southam* (2017) 11 Cal.App.5th 686, 695 ["The argument contains no legal analysis or legal authority in support and is therefore forfeited"]; *City of Riverside v. Horspool* (2014) 223 Cal.App.4th 670, 681 ["[The d]efendants cite no legal authority in support of the argument that the orders were void, which renders the issues forfeited"].) And his allegations that the conditions precedent regarding the NFA are "unenforceable" under section 711 are insufficient; moreover, the conditions at issue are reasonable as a matter of law. Section 711 provides: "Conditions restraining alienation, when repugnant to the interest created, are void." "It is well settled that this rule is not absolute in its application, but forbids only *unreasonable* restraints on alienation. [Citations.] Reasonableness is determined by comparing the justification for a particular restraint on alienation with the quantum of restraint actually imposed by it." (*Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 498.) Here, Yuen alleged the "condition precedent as written" was unlawful, but did not provide any facts in support. These allegations are too conclusory and do not survive demurrer. (*Careau & Co. v. Security Pacific Business Credit, Inc.*, *supra*, 222 Cal.App.3d at p. 1391 ["The pleading of excuse or waiver of performance of conditions precedent requires specific not general allegations"]). Moreover, given the nature of the condition at issue in this case—relating to the need for "toxic [re]mediation" of the Property prior

to allowing it to be sold, this condition precedent was reasonable a matter of law.

Accordingly, the FAC failed to allege facts sufficient to state a viable claim for breach of contract and for the remedy of specific performance.

C. *Reformation Cause of Action*[9]

Yuen contends the Addendum should be reformed to remove subdivision (f) from paragraph 55 because it was obtained by fraud. We are not persuaded.

"When, through fraud . . . a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." (§ 3399.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] 'Thus '"the policy of liberal construction of the pleadings . . . will not ordinarily be invoked . . . ."' [Citation.] [¶] This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered."' [Citation.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.)

Here, the fundamental flaw with the FAC is that it is devoid of any false representations made by C&S to Yuen regarding the conditions precedent contained in the Addendum. Instead, exhibit G to the FAC makes clear that Yuen was

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9 Legally, reformation is a remedy, not a cause of action. (*Landis v. Superior Court* (1965) 232 Cal.App.2d 548, 555.)

specifically advised by C&S that it intended to add language to the Addendum addressing the "environmental" issues related to the Property, as follows: "[C&S's] attorney will need to add some additional language to address the current status of the environment[] and make some refinements as it pertains to the notice of completion." Eight days later, Yuen executed the Addendum, initialing the page containing the addition of subdivision (f). Under these circumstances, it was incumbent on Yuen to review the Addendum prior to signing it; his failure to do so precludes his reformation claim as a matter of law. (*California Trust Co. v. Cohn* (1932) 214 Cal. 619, 627 ["where the failure to familiarize one's self with the contents of a written contract prior to its execution is traceable solely to carelessness or negligence, reformation as a rule should be denied"].)

Accordingly, we conclude the FAC failed to allege facts sufficient to state a viable remedy for reformation.

D. *Declaratory Judgment Cause of Action*

"'"The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject."' [Citation.]" (*Levi v. O'Connell* (2006) 144 Cal.App.4th 700, 706.) "The 'actual controversy' requirement concerns the existence of [a] *present* controversy relating to the legal rights and duties of the respective parties pursuant to contract (Code Civ. Proc., § 1060), statute or order. [Citation.] Where the allegations of the complaint reveal the controversy to be conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court, the fundamental basis of declaratory relief is lacking. [Citations.]" (*Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410; see also *American Meat*

Institute v. Leeman (2009) 180 Cal.App.4th 728, 741 ["In a complaint seeking declaratory relief, "'an actual, present controversy must be pleaded specifically" and "the facts of the respective claims concerning the [underlying] subject must be given"'"].)

Here, Yuen alleges an actual controversy exists because C&S "contends that the challenged condition precedent gives it the right to deny the exercise of the Option to Purchase, whereby [he] contends otherwise." As discussed in this opinion, because we conclude the conditions precedent set forth in the Addendum are valid and enforceable as a matter of law, Yuen cannot allege facts supporting the existence of an actual and present controversy between the parties. (*DeLaura v. Beckett* (2006) 137 Cal.App.4th 542, 545 ["court may sustain a demurrer on the ground that the complaint fails to allege an actual or present controversy"].)

Accordingly, we conclude the FAC failed to allege facts sufficient to state a viable claim for declaratory relief.

II. The Trial Court Did Not Abuse Its Discretion in Denying Leave to Amend

"'If we see a reasonable possibility that the plaintiff could cure the defect by amendment, then we conclude that the trial court abused its discretion in denying leave to amend. If we determine otherwise, then we conclude it did not.' [Citation.] "'The burden of proving such reasonable possibility is squarely on the plaintiff.'" [Citation.] To satisfy this burden, "'a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading'" by clearly stating not only the legal basis for the amendment, but

also the factual allegations to sufficiently state a cause of action. [Citation.]" (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618.)

Yuen contends he should be permitted to amend his complaint to add a "separate cause of action" but does not actually identify the additional cause of action. Thus, it is unstated how, if given the opportunity, he could amend his complaint to properly assert a claim. Accordingly, there is no basis upon which to conclude the trial court abused its discretion in denying Yuen leave to amend.

DISPOSITION

The trial court's order sustaining the demurrer without leave to amend is affirmed. C&S Properties shall recover its costs on appeal.

GOODMAN, J.*

We concur:

RUBIN, Acting P. J.

GRIMES, J.

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* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.