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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

MARIA D. ROBERTS, Plaintiff and Appellant, v. ROBERT HARO, Defendant and Respondent.	B285997 (Los Angeles County Super. Ct. No. LC100835)

APPEAL from an order of the Superior Court of Los Angeles County, Rupert A. Byrdsong, Judge. Affirmed.

Steinhart Law Offices and Terran T. Steinhart for Plaintiff and Appellant.

GabrielSalomons, Jonathan G. Gabriel and David S. Mayes for Defendant and Respondent.

INTRODUCTION

Maria D. Roberts sold her residential property to Robert Haro through a short sale approved by her lender, Bank of America. In conjunction with the written agreement to sell her house, she and Haro orally agreed that if Roberts sold her home to Haro instead of another prospective buyer, Haro would procure employment for Roberts and provide $90,000 in salary. Roberts did not disclose this oral agreement to Bank of America.

After the short sale, Haro obtained employment for Roberts, who received $5,000 for her work. Haro did not provide the remaining $85,000 promised. In 2013, Roberts filed suit, alleging breach of their oral agreement and promissory fraud. Haro demurred, arguing that the oral agreement was subject to the statute of frauds, and was illegal because it constituted a fraud on the short sale lender. The trial court sustained the demurrer without leave to amend. Roberts appealed from the ensuing judgment. In an earlier appeal, we affirmed the sustaining of the demurrer but reversed to allow Roberts leave to amend. (*Roberts v. Haro* (Aug. 16, 2016, B266157 [nonpub.opn.].) Back in the trial court, Haro demurred to Roberts's third amended complaint on essentially the same grounds. The trial court again sustained the demurrer without leave to amend and Roberts again appealed.

In her present appeal, Roberts argues (1) the oral agreement falls within an exception to the statute of frauds, and (2) the agreement is not an illegal contract because the short sale lender did not suffer any detriment, and because multiple attorneys had opined that the agreement was legal. We conclude that the agreement constituted a fraud on the lender, and thus, was unenforceable on grounds of public policy. Accordingly, we do not address the statute of frauds.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Roberts owned a home in Tarzana on Wilbur Avenue that she had leased to Haro. Roberts was having financial difficulties and arranged for a lender-approved short sale at the price of $480,400. "A 'short sale' is a sale of property for a price that is less than the amount of debt on the property, resulting in a shortfall of sales proceeds to pay off the existing loans." (5 Miller & Starr, Cal. Real Estate (4th ed. 2018) § 13:120.) A lender that approves a short sale may not pursue a deficiency judgment against the borrower. (Code Civ. Proc., § 580e; 5 Miller & Starr, Cal. Real Estate, *supra*, § 13:259.)

Two potential buyers—Haro and another individual—submitted offers to buy Roberts's home. Both potential buyers offered the bank-approved $480,400. Roberts advised Haro and the alternative potential buyer that she had received offers from both of them, which, according to the complaint, "created competition between them to become the buyer of the Wilbur property."

Competition notwithstanding, the price of the property did not increase. Instead, "in addition to offering to purchase [the] property at the aforesaid price [of $480,400] the alternative buyer orally offered to provide [Roberts] with an additional $100,000 in some manner that would be legal [while Haro] orally offered to procure [Roberts] an engagement as a marketing program/project manager with a third party . . . with payment for her services in one or more projects to be provided by [Haro] in the sum of $90,000 . . . ."

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1 As the appeal comes following an order sustaining a demurrer, we take our factual recitation from the operative complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

In May 2013, Roberts accepted Haro's offer. A few days later, Haro orally agreed that Roberts would perform project management and marketing services for a company called Encon for a period of 6 to 11 months. In exchange, Roberts would be paid $90,000 funded by Haro through Encon, although Roberts would be responsible for mileage and other business expenses. The sale of the house was completed two months later through the usual process of a written agreement handled through escrow.

In July 2013, Haro gave Encon $5,000 as a start on Roberts's compensation, and Encon paid Roberts that amount. But by August, Haro would not commit to paying the remainder of Roberts's salary. In September 2013 he repudiated the deal. Encon then ended the employment relationship with Roberts. Roberts sued Haro, alleging that he breached their oral agreement for employment. Her complaint included a cause of action for fraud, alleging that Haro never intended to honor their oral agreement, the agreement was intended to dupe her into selling the house to him and not the other prospective buyer, Roberts justifiably relied on Haro's assurances, and, as a result, she lost out on the employment opportunity that the other potential buyer had promised.

The trial court sustained a demurrer to the complaint. On appeal, we reversed but allowed Roberts leave to amend.

On remand, Roberts filed a third amended complaint (TAC) with the following new allegations: she had consulted with attorneys as to the legality of the proposed oral agreement for employment, and those attorneys told her the agreement would not be a fraud on the short sale lender. The TAC sought damages

for breach of contract in the amount of $85,000 ($90,000 minus the $5,000 paid by Haro under the employment agreement).[2]

Haro demurred, arguing again that the oral agreement, was subject to the statute of frauds and that Roberts failed to plead facts showing that the agreement fell within an exception to the statute. In the alternative, he asserted that Roberts had unclean hands by going behind her lender's back to obtain additional compensation outside the lender-approved short sale. The trial court again sustained the demurrer without leave to amend, and entered judgment for Haro. The present appeal followed.

DISCUSSION

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, . . . [t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967.) "We [] review the complaint de novo to determine . . . whether the trial court erroneously sustained the demurrer as a matter of law. [Citation.]" (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.)

Haro argues that the oral agreement is illegal and cannot be enforced. Roberts counters that the contract was enforceable because the lender suffered no detriment, and Roberts acted in good faith by consulting with multiple lawyers about the contract's legality. Roberts does not persuade us.

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[2] For her promissory fraud cause of action, Roberts sought $95,000 in damages presumably measured by the $100,000 lost opportunity from the alternative buyer less the $5,000 Haro had paid.

Haro contends that by the oral contract Roberts was seeking to defraud her lender by personally garnering $90,000 above the approved short sale price of her home. "California statutes require that a contract have 'a lawful object.' [Citations.] Otherwise the contract is void. [Citation.] Civil Code section 1668 provides that a contract that has as its object a violation of law is 'against the policy of the law.' Civil Code section 1667 states that 'unlawful' is '1. Contrary to an express provision of law; [¶] 2. Contrary to the policy of express law, though not expressly prohibited; or, [¶] 3. Otherwise contrary to good morals.' [Citations.] California courts have stated that an illegal contract 'may not serve as the foundation of any action, either in law or in equity' [citation] and that when the illegality of the contract renders the bargain unenforceable, ' "[t]he court will leave them [the parties] where they were when the action was begun" ' [Citations]." (*Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118 Cal.App.4th 531, 541 (*Kashani*).)

We agree the object of the oral agreement was to defraud the lender. According to the TAC, Roberts's residence was encumbered by two deeds of trust in favor of Bank of America; Roberts defaulted on her loans due to "financial difficulty"; she put her property up for a short sale under terms that Bank of America approved; Haro and a third party offered to purchase the property; Roberts told Haro and the alternative buyer about the competition to purchase her property; Haro proposed to procure employment for Roberts "as an inducement to [her] transferring the [] property to [him]"; Roberts and Haro entered into an oral contract for the procurement of employment in exchange for Roberts's agreement to sell the property to him; and the parties then executed a written agreement for the sale of the property to Haro for $480,400 that did not mention the oral agreement.

More directly, after Roberts had trouble making her loan payments, Bank of America agreed to the short sale of the property for an amount less than Roberts owed with the understanding that Roberts was protected from a deficiency judgment—liability for the remainder of the debt. Roberts then made a side agreement with Haro for an offer of employment by which Haro would pay Roberts $90,000 using Encon as the payment vehicle, all as part of the agreement to sell Haro the property. Nowhere in the TAC does Roberts allege she informed Bank of America of the presence of the competing bids for the property, that each prospective buyer had offered her extra incentives to sell, or that she ultimately negotiated the $90,000 compensation that Haro funded.

The agreement for the additional $90,000 in compensation violated Roberts's short sale agreement with Bank of America. Although the agreement is not in the record, the parties agree that the transaction with Bank of America was for a short sale. Nor is there any dispute about what is a short sale. As our Supreme Court has said. "In a short sale, the borrower sells the home to a third party for an amount that falls short of the outstanding loan balance; the lender agrees to release its lien on the property to facilitate the sale; *and the borrower agrees to give all the proceeds to the lender*." (*Coker v. JP Morgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 671, italics added (*Coker*).)

The facts alleged in the TAC show that Roberts did not keep up her end of the bargain: "to give all the proceeds to the lender." (*Coker*, *supra*, 62 Cal.4th at p. 671.) She concealed from the bank the $90,000 additional compensation. And, when she agreed to the short sale at the outset she effectively misrepresented that Bank of America would receive the full

purchase price.[3] (See *Bank of America Corp. v. Superior Court* (2011) 198 Cal.App.4th 862, 870–871 [setting forth the elements of a cause of action for fraud based on concealment].) The allegations of the complaint alone demonstrate the object of the parties' oral agreement was to defraud Bank of America of a benefit to which it was contractually entitled.

Roberts does not dispute that fraud is contrary to good morals. (Civ. Code, § 1667, subd. (3).) She argues the oral contract here was not fraudulent because a short sale provides benefits to both the lender and the homeowner. While a short sale has advantages for all parties involved, nothing in the mechanism authorizes the borrower to conceal benefits promised by the buyer in exchange for the sale of the subject property.

The true purchase price Haro paid for the property here was more than the $480,400. Roberts concedes that, "By virtue of Haro's entering into the oral agreement . . . it is reasonably inferrable that there was benefit to Haro." While Roberts does not articulate what "benefit" she has in mind, the benefit is clear: he purchased her residential property for the price of $480,400 without having to engage in a bidding war with the alternate buyer. By extension, although Roberts argues that the oral agreement "resulted in no detriment to the lender," the detriment to the lender is clear: the lender did not receive the full purchase

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[3] During argument, counsel for Roberts argued to the court: "You said she lied when she said she was going to perform $90,000 of services." This court does not resolve credibility questions generally (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968) and certainly does not in reviewing an order sustaining a demurrer (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at pp. 966–967). Our decision today has nothing to do with Roberts's credibility; we hold only that the allegations in the complaint present an illegal contract.

price for the property because Haro agreed secretly to funnel $90,000 to Roberts instead of paying the bank the additional $90,000 as part of what he was willing to pay for the house.

We find it significant that the TAC does not allege that Haro merely introduced Roberts to Encon and that ultimately Encon hired Roberts at an arms-length salary that Encon agreed to pay. That is not our case and we express no opinion on the lawfulness of such an arrangement. Here, no less than eight times in the TAC, Roberts alleges that it was Haro who was obligated to make the $90,000 payment, not Encon. And it was Haro she sued when Haro (not Encon) did not fulfill that part of the bargain. If the side oral agreement with Haro would have been consummated, Haro would have been out of pocket not just the $480,400 short sale price, but an additional $90,000 -- a total purchase price of $570,400. The only problem was that Bank of America was not to receive the full price it was entitled to under the short sale agreement.

Roberts also argues that her behavior was not unlawful because the TAC alleges that multiple attorneys told her that the oral agreement was not "a fraud on the short sale lender." In support of this argument, Roberts cites to *Bertero v. National General Corp.* (1974) 13 Cal.3d 43. The portion of this case cited by Roberts stands only for the proposition that a defendant acting on the advice of counsel has a valid defense to an action for malicious prosecution. (*Id.* at pp. 53–54.) That case does not support "a complete defense to any contention that she acted contrary to good morals."

Roberts also cites to a federal case from the 1st District in support of this point. (See *In re Mascolo* (1975) 505 F.2d 274, 276–277.) That case, which is not an authority for our court, provides only that a bankrupt's explanation "that he acted upon advice of counsel who in turn was fully aware of all the relevant

facts generally *rebuts* an *inference* of fraud." (*Id.* at p. 277 (emphasis added).) That court further acknowledged the proposition that "even the advice of counsel is not a defense [to fraud] when it is transparently plain" the bankrupt should have declared property to the court. (*Id.* at p. 277, fn. 4.)

Lastly, Roberts argues, without further explanation or citation to authority, that a contract's "voidness should not be deemed to vitiate a promissory fraud cause of action based on that contract." On the contrary, "an illegal contract 'may not serve as the foundation of *any* action, either in law or in equity' [citation] . . . ." (*Kashani*, *supra*, 118 Cal.App.4th at p. 41; see also *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 1001, fn. 8 [holding that where a contract was void when made, the plaintiff could not reasonably rely upon the promises in it to support a cause of action for promissory fraud].)

As the object of the parties' oral agreement was to defraud the lender, it was unenforceable on grounds of public policy and, therefore, could not be the foundation for Roberts's claims against Haro.[4]

DISPOSITION

The judgment is affirmed. The parties shall bear their respective costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J. GRIMES, J.

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[4] Roberts makes a fleeting reference to leave to amend, but does not explain how she would do so. We therefore do not address this argument further.