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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

EASTERN MORTGAGE COMPANY, Plaintiff and Appellant, v. ISSAC NORMAN, Defendant and Respondent.	B281376 (Los Angeles County Super. Ct. No. SC122089)

APPEAL from a judgment of the Superior Court of Los Angeles County. Nancy L. Newman, Judge. Affirmed.

Frandzel Robins Bloom & Csato, Andrew K. Alper and Thomas M. Robins III for Plaintiff and Appellant.

The Leichter Firm and Kevin J. Leichter for Defendant and Respondent.

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The trial court sustained a demurrer to a cause of action to reform a loan guaranty because that cause of action was "pled in the alternative" to other causes of action seeking to enforce the guaranty. This was incorrect. We nevertheless affirm the dismissal of this cause of action because the only plaintiff before us in this appeal assigned away its rights to the guaranty and no longer has standing to sue for reformation.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

On June 1, 2006, plaintiff Dayco Funding Corporation (Dayco) loaned Sunbelt Pabco, LLC (Sunbelt) $1.6 million. The loan was memorialized in a promissory note, and was secured by a deed of trust on property in Nevada (the property).

At the same time, defendant and respondent Issac Norman (Norman) executed a guaranty "to induce Lender"—defined in the contract as plaintiff and appellant "Eastern Mortgage Company [Eastern Mortgage] . . . or its assignees"—to make a loan to Sunbelt for $1.6 million. Eastern Mortgage is a wholly owned subsidiary of Dayco, and was responsible for arranging loans made by Dayco.

The loan was due in full on July 10, 2008, but Sunbelt did not repay the loan.

In April 2010, Dayco assigned a $250,000 interest in its $1.6 million loan to plaintiffs Davoud Dayani and Shahin Ohebsion Dayani, as Trustees of the Davoud and Shahin Dayani Trust (the Trust), and quitclaimed the deed of trust to the Trust. Simultaneously, Eastern Mortgage assigned to Dayco and the Trust "all of its right, title and interest" in the loan guaranty as well as the promissory note and deed of trust.

In November 2013, Dayco foreclosed on the property and purchased it for a credit bid of $1,050,000. This left an outstanding deficiency of $1,309,143.39 as of November 21, 2013.

II. Procedural Background

In the operative fourth amended complaint, (1) Dayco and the Trust sue Norman for breach of the guaranty, and (2) Dayco, the Trust, and Eastern Mortgage sue Norman for reformation.[1] In support of the breach of guaranty claim, the operative complaint alleges that "Eastern [Mortgage] and Plaintiffs [who are defined as Dayco and the Trust] have performed all conditions, covenants, and promises . . . on their part" and seek to recover the $1,309,143.39 deficiency under the terms of the guaranty. In support of the reformation claim, the operative complaint alleges that (1) Dayco and the Trust have the right to enforce the guaranty because the guaranty applies to "Eastern [Mortgage] or its assignees," and Eastern Mortgage subsequently assigned the guaranty to Dayco and the Trust; (2) due to mutual or unilateral mistake, the guaranty erroneously names Eastern Mortgage (not Dayco) as the Lender; and (3) the guaranty must be reformed to accord with the parties' true intent, which is to guaranty the loan made by Dayco.

Norman demurred to the reformation claim.

Following a full round of briefing, and a hearing, the trial court sustained the demurrer without leave to amend as to Dayco, the Trust, and Eastern Mortgage. Prior to its final ruling,

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1 Dayco and the Trust also sue Ali Moradshahi and Hamid Mahban for breaching separate guaranties on the same $1.6 million loan, and for reformation. The validity of the claims against those additional defendants is not before us in this appeal.

the trial court issued a tentative ruling indicating that all three plaintiffs (1) "fail[ed] to allege the existence of a unilateral or mutual mistake"; and (2) cannot allege a claim seeking reformation of the guaranty at the same time they seek to recover for breach of the guaranty because pleading "in the alternative" "as a safe guard against an unfavorable determination" is not allowed where, as here, "[e]ither the [guaranty] contract is valid . . . or there is a mistake." Because the hearing was unreported, we do not know whether the trial court's ultimate ruling is based on the reasoning set forth in the tentative ruling.

Because the demurrer resulted in a dismissal of the only claim brought by Eastern Mortgage, Eastern Mortgage filed this timely appeal.

DISCUSSION

Eastern Mortgage argues that the trial court erred in sustaining the demurrer to its reformation claim.

In reviewing a trial court's order sustaining a demurrer without leave to amend, we must ask (1) whether the demurrer was properly sustained, and (2) whether leave to amend was properly denied. The first question requires us to ""'determine whether the complaint states facts sufficient to constitute a cause of action.'"" (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010.) In so doing, we independently "'examine the complaint . . . to determine whether it alleges facts sufficient to state a cause of action.'" (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230.) We accept as true "all material facts properly pled" in the operative complaint. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152.) We also accept as true all materials properly "subject to judicial notice," and disregard any allegations in the operative

complaint that those judicially noticed facts contradict or negate. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20.) The second question "requires us to decide whether ""there is a reasonable possibility that the defect [in the operative complaint] can be cured by amendment."""" (*McClain v. Sav-On Drugs* (2017) 9 Cal.App.5th 684, 695, review granted June 14, 2017, S241471.)

I. Was The Demurrer Properly Sustained?

A claim for reformation seeks to revise "a written contract [to] truly express the intention of the parties." (*American Home Ins. Co. v. Travelers Indemnity Co.* (1981) 122 Cal.App.3d 951, 963 (*American Home*).) Reformation may be warranted due to (1) fraud, (2) "a mutual mistake of the parties," or (3) "a mistake of one party[] which the other at the time knew or suspected." (Civ. Code, § 3399; *Lemoge Electric v. County of San Mateo* (1956) 46 Cal.2d 659, 663; *Shupe v. Nelson* (1967) 254 Cal.App.2d 693, 700 (*Shupe*); accord, Civ. Code, § 1640 ["When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded."].) A court's power to revise a contract through reformation is limited to "mak[ing] [the contract] conform to the real agreement"; a court "has no power to make a new contract for the parties." (*Lemoge Electric*, at pp. 663-664.) A plaintiff seeking reformation must, in its complaint, "'clear[ly] recit[e] . . . facts showing how, when and why the mistake [or fraud] occurred.'" (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1132.)

Contrary to the trial court, we conclude that Eastern Mortgage adequately pled the facts underlying a claim for reformation based on mutual mistake. The guaranty referred to a loan made by *Eastern Mortgage* to Sunbelt for $1.6 million, but

there was no such loan; the $1.6 million loan to Sunbelt was made by *Dayco*. Because the very purpose of a guaranty is to provide a means of collecting an outstanding debt should the primary borrower default (*Anglo-California Trust Co. v. Oakland Railways* (1924) 193 Cal. 451, 468; *Legendary Investors Group No. 1, LLC v. Niemann* (2014) 224 Cal.App.4th 1407, 1414), the parties clearly intended to guaranty the existing $1.6 million loan to Sunbelt made by Dayco, not a nonexistent $1.6 million loan made to Sunbelt by Eastern Mortgage. These facts are sufficiently pled in the operative complaint and are confirmed by the documents attached to that complaint. Norman points us to the deposition testimony of Eastern Mortgage's president that no errors were made "in the course of preparing any of the loan documentation," urging that this precludes a finding of mistake. But that testimony is not properly before us in considering the sufficiency of the complaint because it is not alleged in the operative complaint and is not properly subject to judicial notice (Evid. Code, §§ 451, 452); this is a demurrer, not a motion for summary judgment. Norman also cites *Mabb v. Merriam* (1900) 129 Cal. 663, 664, for the proposition that a "court of equity cannot change an agreement" to substitute one party for another. *Mabb* is doubly inapt: It did not purport to apply Civil Code section 3399 (the current reformation statute), and the reformation sought in this case was to have the guaranty accurately describe the loan it was meant to secure, not to add a new party to the guaranty.

Contrary to the trial court, we also conclude that Eastern Mortgage's reformation claim is not defective because it is pled alongside a claim for breach of the guaranty. As a general rule, plaintiffs are "entitled to plead inconsistent theories of recovery."

(*McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512, 530; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 690-691.) A plaintiff may also plead "alternative *factual* . . . theories . . . when the [plaintiff] is in doubt as to which theory most accurately reflects the events and can be established by the evidence." (*Crowley*, at pp. 690-691, italics added; *Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 29.) What a plaintiff may not do it plead "contradictory or antagonistic facts" where there is no doubt about the facts. (*Steiner v. Rowley* (1950) 35 Cal.2d 713, 719; *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1381-1382.) In the context of this case, the claim for breach of the guaranty is not "contradictory or antagonistic" to the claim for reformation. To the contrary, reformation is a prerequisite to enforcing the guaranty because it is only when the guaranty is revised to eliminate the mutual mistake (and thus to refer to the loan actually made) that the guaranty becomes enforceable by Eastern Mortgage's assigns.

Despite our disagreement with the trial court's reasoning,[2] we nevertheless affirm its dismissal of Eastern Mortgage's claim because Eastern Mortgage lacks standing to sue for reformation of the guaranty. (See *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 278, fn. 5 ["We must affirm the trial court's judgment . . . if it

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2 Although our reasoning undercuts the trial court's rationale for dismissing the reformation claim brought by Dayco and the Trust, those parties are not properly before us because their breach of guaranty claims are still pending before the trial court. (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 780 ["An order sustaining a demurrer is interlocutory and thus not appealable. Any appeal must be taken from the subsequently entered judgment of dismissal."].)

is correct on any ground"].) "A person who has no present interest in [a contract] cannot obtain its reformation." (*American Home*, *supra*, 122 Cal.App.3d at p. 962; Civ. Code, § 3399 [allowing reformation upon "application of a party aggrieved"]; see generally *National Solar Equipment Owners' Assn. v. Grumman Corp.* (1991) 235 Cal.App.3d 1273, 1281; Code Civ. Proc., § 367 ["Every action must be prosecuted in the name of the real party in interest"].) In 2010, Eastern Mortgage assigned away all of its rights in the guaranty to Dayco and the Trust; only *Dayco and the Trust* may pursue a reformation claim. (*Orcutt v. Ferranini* (1965) 237 Cal.App.2d 216, 224 ["'An aggrieved party [able to sue for reformation] need not be an original party to the transaction; it clearly includes one who has suffered prejudice or pecuniary loss.'"]; *Shupe*, *supra*, 254 Cal.App.2d at p. 698.)

Eastern Mortgage offers two responses. First, it asserts that it still has standing because Norman is contesting the validity of its assignment to Dayco and the Trust. At oral argument, Norman indicated that he was neither "contesting" nor "accepting" the assignment's validity. Ultimately, however, Norman's (lack of) position is irrelevant because we are reviewing a demurrer, and in so doing must accept as true Eastern Mortgage's allegation that the assignment was valid. Second, Eastern Mortgage urges us to follow authority suggesting that an assignor has standing to pursue an appeal. (See *Lorenz v. Commercial Acceptance Ins. Co.* (1995) 40 Cal.App.4th 981, 988 [assignor of indemnity claim against insurance company may be a party in the assignee's appeal of the trial court's order vacating a default judgment against the insurance company that necessarily included a judgment that the company owed duties to the assignor].) But this authority is not on point because the

issue before us is Eastern Mortgage's standing to sue *at all* and "[g]eneral standing to litigate as a party is distinct from the question of whether a particular ruling aggrieves a party and confers standing to appeal" (*City of Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461, 1466).

II. Should Leave To Amend Be Granted?

Because the documents assigning Eastern Mortgage's rights to the guaranty to Dayco and the Trust are undisputed, there is no reasonably possibility that Eastern Mortgage could allege any facts to cure the defect arising from its lack of standing.

DISPOSITION

The judgment is affirmed. Norman is entitled to costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ