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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARY JONES, Plaintiff and Appellant, v. JOAN E. WILSON et al., Defendants and Respondents.	B277392 (Los Angeles County Super. Ct. No. BC594216)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed in part; reversed in part.

Dinsmore & Sandelmann, Frank Sandelmann; Sall Spencer Callas & Krueger, Suzanne Burke Spencer and Michael A. Sall for Plaintiff and Appellant.

Kelley • Semmel, Paul Kelley for Respondent Joan E. Wilson.

Law Offices of Wendy L. Sheinkope, Wendy L. Sheinkope for Respondent Michael A. Wilson.

I. INTRODUCTION

Plaintiff Mary Jones appeals from a judgment following the sustaining of a demurrer without leave to amend. The case involves title to a particular piece of real property. Plaintiff sued defendants Michael Wilson and Joan Wilson[1] in their individual capacity and as trustees in six causes of action related to an option to purchase the property and promises to gift title to the property via an estate plan. Defendants demurred to the complaint, asserting the statute of limitations barred all of plaintiff's causes of action. In support, defendants cited a declaration filed by plaintiff in a separate case, a dissolution proceeding between Michael and plaintiff. The trial court agreed with defendants and sustained the demurrers.

As explained below, we affirm in part and reverse in part. The trial court did not err by finding the statute of limitations defense applied to allegations pertaining to gifting of title to the real property via an estate plan. However, the trial court erred by finding the statute of limitations defense applied to allegations pertaining to the option contract. We also find the family law court overseeing the dissolution proceeding had concurrent exclusive jurisdiction over the issue of the option contract's validity. On remittitur issuance, the civil action should be stayed pending the resolution of the validity of the option contract by the family law court.

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[1] Because several individuals share the same last name, we will refer to them by their first name for ease of reference. No disrespect is intended.

II. BACKGROUND

A. *Facts Alleged in the Complaint*

The claims in this case involve real property located at 31626 Sea Level Drive in Malibu, California (Sea Level). Joan and her now-deceased husband Stanley acquired Sea Level via joint tenancy grant deed dated March 23, 1967. Plaintiff married Michael, Joan's son, in 1979. In 1988, Joan and Stanley transferred Sea Level to Stanley and Joan as trustees of the Wilson Family Trust dated April 4, 1988 (Wilson Family Trust).

After a fire at Michael and plaintiff's prior residence, Michael and plaintiff entered into a 1994 lease agreement to rent Sea Level from the Wilson Family Trust. Michael, plaintiff, and their two children lived at a cottage at Sea Level. In late 1995 or early 1996, Joan and Stanley on behalf of the Wilson Family Trust executed the lease option contract with Michael and plaintiff. The lease option contract provided that after Joan and Stanley die, plaintiff and Michael have the exclusive right to purchase Sea Level for $1 million.

Also, in 1995 or 1996, Joan on behalf of the Wilson Family Trust communicated through Michael that plaintiff and Michael would be gifted Sea Level outright. According to Joan's communication through Michael, the lease option contract was to protect plaintiff and Michael's interests in Sea Level while Joan and Stanley prepared their estate plans. In reliance on these promises, plaintiff agreed to use Michael and plaintiff's community property, approximately $1 million, to build a residence on Sea Level. Plaintiff also agreed to pay the carrying

costs for Sea Level beginning in 1996, including the homeowners' association dues and property taxes.

In 1997, Michael told plaintiff that Joan and Stanley completed their estate plans and that Michael and plaintiff owned Sea Level outright. Also, in 1997, plaintiff agreed to use community property to purchase the lot adjacent to Sea Level. On October 18, 1997, Michael and plaintiff executed a lot-tie agreement in which Michael covenanted that title both to Sea Level and the adjacent lot was jointly held by Michael and plaintiff. In 1998, while defending against a mechanic's lien, Michael said there was "something wrong" with the deed transferring Sea Level to plaintiff and Michael, but Michael told plaintiff that they were still the owners of Sea Level and that the lease option contract remained as a contingency plan for ownership of Sea Level. In 1999, Michael told plaintiff that Joan had executed a codicil to her will giving Sea Level to plaintiff if Michael died before Joan.[2]

In 2003, without plaintiff's knowledge, Joan and Michael caused to be prepared, executed, and recorded several back-dated trust transfer deeds. First, a trust transfer deed dated April 14, 1999 transferred Sea Level from the Wilson Family Trust to Joan and Michael as co-trustees of the Joan E. Wilson Living Trust U/A dated April 14, 1999 (Joan Wilson Trust). The Joan Wilson Trust then transferred 61 percent of Sea Level via a trust transfer deed dated January 1, 2001 to Michael, a married man, as his sole and separate property. Finally, the Joan Wilson Trust via a trust transfer deed dated January 1, 2002 transferred the

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[2] From the record, it appears Stanley died on April 13, 1999.

remaining 39 percent of Sea Level to Michael as his sole and separate property.

Plaintiff filed a petition against Michael for dissolution of marriage on August 25, 2010. On or about January 8, 2014, in connection with the dissolution proceeding, Joan executed a declaration in which Joan claimed, "after the LEASE OPTION CONTRACT was signed, JOAN and STANLEY decided not to put the LEASE OPTION CONTRACT into effect."[3] Joan's declaration was concealed from plaintiff until revealed in September 2014 in the dissolution proceedings.

Plaintiff filed this action on September 10, 2015. Plaintiff named Joan, Michael, Joan as trustee and successor trustee of the Wilson Family Trust, and Joan and Michael as co-trustees of the Joan Wilson Trust, as defendants. Plaintiff alleged causes of action against all defendants for declaratory relief, fraud, unjust enrichment, and promissory estoppel. She alleged breach of fiduciary duty against Michael. Plaintiff finally alleged aiding and abetting breach of fiduciary duty against Joan individually, the Wilson Family Trust, and the Joan Wilson Trust. Plaintiff requested as relief compensatory and punitive damages, restitution, disgorgement of profits, specific performance, a declaration of rights, and a preliminary and permanent injunction enjoining title transfer of Sea Level.

B. *Demurrer*

Michael individually and as co-trustee of the Joan Wilson Trust demurred to the complaint. Joan, individually and as

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[3] This is the allegation in the complaint. It is unclear from our record what words Joan used in her actual declaration.

trustee of the Wilson Family Trust and co-trustee of the Joan Wilson Trust, joined in the demurrer. Defendants argued the causes of action were time-barred by the applicable statute of limitations and that the family law court had pre-existing jurisdiction over the subject matter.

In support of their statute of limitations argument, defendants cited a sworn declaration by plaintiff dated September 16, 2014, submitted in the dissolution proceeding. Plaintiff in her September 16, 2014 declaration stated that she found a copy of the lease option contract in the trash and further stated: "Respondent [Michael] gave me a signed Declaration of Disclosure of Michael A. Wilson Regarding Community Ownership Interests of [Sea Level] dated November 18, 2009, a copy of which is attached hereto as Exhibit D. In Exhibit D, Respondent purported to explain the title to the Seal Level Residence. Upon reviewing it, I discovered that he entirely omitted the Lease/Option, the one that he had just thrown away. I concluded he was planning to conceal its existence. A review of Exhibit D shows that Respondent was trying to characterize the Sea Level Residence as separate property through his parents, an attempt to fabricate a separate property ownership. [¶] In or about August 2003, Respondent recorded deeds to the Sea Level Residence, from his mother's trust purporting to transfer the entire property to Respondent as his sole and separate property. A copy of the deeds are [*sic*] attached hereto as Exhibit E, and is also in his false version of the chain of title in his 2009 declaration. Respondent thereafter executed and recorded a deed to the Sea Level Residence, transmuting the ownership of a 50% interest in the property to both of us as Community Property. A

copy of that deed is also part of Exhibit D." Plaintiff's signature as a witness is on Michael's November 18, 2009 declaration.

Defendants argued that as of November 18, 2009, plaintiff had discovered the documents and facts pertaining to the causes of action alleged in her complaint. Because plaintiff filed her complaint on September 10, 2015, defendants argued all of her causes of action were time-barred.

Plaintiff argued knowledge of the title transfers was irrelevant to the gravamen of her complaint. Plaintiff asserted her causes of action related to the lease option contract. Plaintiff asserted the option is a covenant that runs with the land, and the subsequent title transfers did not affect her rights under the option. Plaintiff also argued the family law court did not have jurisdiction over the causes of action alleged. Even if the family law court did have prior jurisdiction, plaintiff asserted the proper remedy would be a stay of the trial court proceeding.

The trial court granted the request for judicial notice and sustained the demurrer to the complaint without leave to amend. The trial court determined all of plaintiff's causes of action were barred by the statute of limitations per defendants' moving papers. Judgment was entered for defendants.

III. DISCUSSION

A. *Standard of Review*

"'Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal. [Citation.] . . . Appellate courts first review the complaint de

novo to determine whether or not the . . . complaint alleges facts sufficient to state a cause of action under any legal theory, [citation] . . . to determine whether or not the trial court erroneously sustained the demurrer as a matter of law. [Citation.]' [Citation.]" (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 791.)

On appeal, appellate courts assume that all facts pleaded in the complaint are true. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) "Both trial and appellate courts may properly take judicial notice of a party's earlier pleadings and positions as well as established facts from both the same case *and other cases*. [Citations.] . . . A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false. [Citation.] Likewise, the plaintiff *may not plead facts that contradict the facts or positions that the plaintiff pleaded in earlier actions or suppress facts that prove the pleaded facts false*. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877 (emphasis original).)

"'Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action. [Citation.]' [Citation.]" (*McClain v. Octagon Plaza, LLC, supra*, 159 Cal.App.4th at pp. 791-792.) We review a trial court order declining to grant leave to amend for an abuse of discretion. (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App4th 166, 173.) Plaintiff has the burden of showing what facts he or she could plead to cure the existing defects in the complaint. (*Ibid.*) Finally, "[w]e affirm the judgment if it is correct on any ground

stated in the demurrer, regardless of the trial court's stated reasons." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111.) Erroneously sustaining a demurrer is reversible error per se. (*Deeter v. Angus* (1986) 179 Cal.App.3d 241, 251.)

B. *Judicial Notice*

We first address plaintiff's contention that the trial court erred by taking judicial notice of plaintiff's September 16, 2014 declaration from the dissolution proceeding. Under Evidence Code section 452, subdivision (d), a court may take judicial notice of a court record. Plaintiff's declaration in the dissolution proceeding is a court record, so the trial court indisputably was empowered to take judicial notice that plaintiff's declaration was filed.

A trial court, however, cannot necessarily judicially notice the facts within court records. Plaintiff's argument is that the trial court erred by relying on the truth of the sworn statements in her declaration. The statements in plaintiff's declaration, however, fell within the exception to the rule against relying on hearsay because they were statements of a party offered against that party. (See Evid. Code, § 1220 [statement of party as exception to hearsay rule].) Such statements may be judicially noticed on demurrer. "[A] court may take judicial notice of a party's admissions or concessions, but only in cases where the admission 'can not reasonably be controverted,' such as in answers to interrogatories or requests for admission, or in affidavits and declarations filed on the party's behalf. [Citations.]" (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010)

181 Cal.App.4th 471, 558; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604-605 ["The court will take judicial notice of records such as admissions, answers to interrogatories, affidavits, and the like, when considering a demurrer, only where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court."]; See also *People v. Lee* (2011) 51 Cal.4th 620, 650-651 [trial court properly took judicial notice of earlier guilty plea under Evidence Code § 1220 and relied on it as proof].)

The cases that plaintiff cites in support of her argument are distinguishable because they concern trial courts that erred by taking notice of inadmissible hearsay in court records. (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914-915 [judicial notice of hearsay statement in appendix to estate accounting]; *Fremont Indemnity Co. v. Fremont General Corp., supra*, 148 Cal.App.4th at pp. 114-115 [judicial notice of statement interpreting an agreement]; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864-865 [judicial notice of affidavit containing hearsay allegations.])

Because the court record was judicially noticeable and it contained statements admissible under Evidence Code section 1220 because they were plaintiff's sworn statements, the trial court did not err by taking judicial notice of plaintiff's statements in the September 16, 2014 declaration as party admissions.

C. *Statute of Limitations*

Defendants assert that the causes of action are barred by the statute of limitations. Demurrer pursuant to statute of limitations is a form of general demurrer under Code of Civil

Procedure section 430.10, subdivision (e). (See *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.)

The statute of limitations generally begins to run when the cause of action has accrued. (Code Civ. Proc., § 312.) "The general rule for defining the accrual of a cause of action sets the date as the time 'when, under the substantive law, the wrongful act is done,' or the wrongful result occurs, and the consequent 'liability arises.' [Citation.] In other words, it sets the date as the time when the cause of action is complete with all of its elements [citations]—the elements being generically referred to by sets of terms such as 'wrongdoing' or 'wrongful conduct,' 'cause' or 'causation,' and 'harm' or 'injury' [citations]." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) A cause of action is complete with all its elements when the plaintiff has suffered actual and appreciable harm. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 513.)

"An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.] [¶] A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' [Citations.] Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. [Citation.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807.) "The statute of limitations to be applied is determined by the nature of the right sued upon, not by the form of the action or the relief demanded. [Citations.]" (*Day v. Greene* (1963) 59 Cal.2d 404, 411; see *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22 [the "gravamen" of the cause of action].)

1. Declaratory Relief

Plaintiff brought a cause of action for declaratory relief, seeking to state her rights under the lease option contract. (See Code of Civil Procedure section 1060 ["Any person interested . . . under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the . . . contract. . . . The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."]; *Ginsberg v. Gamson* (2012) 205 Cal.App.4th 873, 883 ["A party may seek declaratory relief before there has been an actual breach of an obligation; in such cases the limitations period still does not begin to run until the breach occurs."].)

"The limitations period for declaratory relief claims depends on 'the right or obligation sought to be enforced' and the statute of limitations 'generally follows its application to actions for damages or injunction on the same rights and obligations.' [Citation.]" (*Ginsberg v. Gamson, supra*, 205 Cal.App.4th at p. 883.) The four-year statute of limitations for claims of breach of written contract in Code of Civil Procedure section 337, subdivision 1 thus applies to plaintiff's declaratory relief claim.

We are faced with a question of when plaintiff discovered or should have discovered an actual controversy as to her rights under the lease option contract, commencing the running of the four-year limitation period. Plaintiff asserts it occurred when

Joan submitted her January 8, 2014 declaration in the dissolution proceeding in September 2014. Michael contends the statute of limitations began to run on November 18, 2009, when plaintiff learned of the various title transfers involving Sea Level that indicated Joan's repudiation of the lease option contract.

Michael's argument fails. Michael relies on a theory that plaintiff had a claim of anticipatory breach of contract as of November 18, 2009. However, the law does not require a plaintiff who learns of an anticipatory breach to file a lawsuit at that time. "When a promisor repudiates a contact, the injured party faces an election of remedies: he can treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he can treat the repudiation as an empty threat, wait until the time of performance arrives and exercise his remedies for actual breach if a breach does in fact occur at such time. [Citation.]" (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137.) Here, the time for performance under the lease option contract has yet to occur. The lease option contract provides: "The term of the Option shall commence on the date of the death of the second to die of Joan . . . and Stanley . . . and shall expire on October 31, 2035." As alleged, Stanley has died but Joan is still alive. Thus, plaintiff could wait until the time for performance and exercise her remedies then, if Michael in fact breaches the contract by refusing to participate in the option agreement. At least as alleged, Michael took title to Sea Level with knowledge of the lease option agreement, so he is bound by it if it is valid.[4] It

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[4] "An unexercised option to purchase contained in a lease constitutes a covenant running with the land. [Citations.] Subsequent purchasers of property subject to an option who take

follows that the statute of limitations has not run on her contract-based declaratory relief claim. As we understand it, that claim is designed to determine plaintiff's rights under the lease option agreement now, due to the indications that there may be a breach following Joan's death, or perhaps due to plaintiff's desire to adjudicate rights due to the dissolution proceeding.

For her part, Joan contends she is involved in no actual controversy because, as of 2003, she no longer had title to Sea Level. Joan's argument also fails. Joan allegedly no longer had title to Sea Level as of 2003. However, plaintiff's declaratory relief cause of action concerns Joan's declaration that she and Stanley decided to not put into effect the lease option contract, which Joan signed along with Michael and plaintiff. Joan's basis for not honoring a contract she signed is unclear. Thus, as pled, the complaint alleges an actual controversy as to the validity of the lease option contract, with Joan potentially believing the contract is invalid. If the lease option contract is invalid, it may be because of some action Joan and Stanley took as co-trustees of the Wilson Family Trust, when they had title to Sea Level. Accordingly, plaintiff's declaratory relief cause action concerns an actual controversy pertaining to Joan.

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with notice of its existence take subject to the right of the optionee to complete the purchase. [Citation.]" (*Claremont Terrace Homeowners' Assn. v. United States* (1983) 146 Cal.App.3d 398, 406; accord, *Wachovia Bank v. Lifetime Industries, Inc.* (2006) 145 Cal.App.4th 1039, 1050; *Gates Rubber Co. v. Ulman* (1989) 214 Cal.App.3d 356, 365, fn. 4; see Civ. Code, § 1217 ["An unrecorded instrument is valid as between the parties thereto and those who have notice thereof."].)

Plaintiff stated a cause of action for declaratory relief. Plaintiff alleged in her complaint that there is an actual controversy as to whether the lease option contract is binding on defendants and whether plaintiff has a right to exercise that option. As alleged, plaintiff's declaratory relief cause of action was filed well within the statute of limitations.

2. Fraud

We understand the fraud allegations to be, in essence, pled alternatively to the declaratory relief cause of action in that its viability depends upon defendants repudiating the validity of the lease option agreement and that agreement not being enforced.

"The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)" (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.) Plaintiff alleged that defendants made knowingly false misrepresentations concerning the lease option contract's validity and that Joan and Stanley would transfer title to Michael and plaintiff upon completing their estate plans; defendants intended to induce plaintiff's reliance on these statements; plaintiff justifiably relied on these misrepresentations; and plaintiff was thus harmed.

Defendants contend the fraud cause of action accrued in 2003, and was discovered at the latest on November 18, 2009. They cite plaintiff's knowledge of the title transfers involving Sea Level in November 2009, and plaintiff's knowledge that Joan

disavowed the lease option contract, which came through her agent, Michael. We find the fraud cause of action contains two different sets of allegedly false representations by Michael and Joan. One set concerned the validity of the lease option contract. The other concerned Joan and Stanley's intent to transfer title to Michael and plaintiff via their estate plan.

a. Fraud: Lease Option Contract

Knowledge of the title transfers does not demonstrate plaintiff had discovered or had reason to discover all the elements of her fraud cause of action as to the lease option contract. For plaintiff to have reason to suspect harm pertaining to the contract because of fraud, plaintiff must know or have reason to know that defendants would refuse to be bound by the lease option contract. As stated above, the title transfers are immaterial for fraud as to the lease option contract because 1) the option is a covenant that runs with the land and 2) Michael was on notice of it. That is, the title transfers demonstrate neither that Michael, upon the death of Joan, will refuse to be bound by the lease option contract nor that a court would not enforce the contract at that time. Thus, plaintiff's knowledge of the title transfers in November 2009 does not demonstrate she should have reason to suspect that she would be unable to enforce the lease option contract.

Damages are an element of fraud, and, on appeal, plaintiff contends she will not be damaged until there is a declaration from the trial court that the lease option contract is not valid. Joan contends that under such an argument, plaintiff has failed to state a cause of action for fraud because plaintiff would in

effect be disavowing harm from the alleged fraud if the lease option contract is declared valid and enforceable as to defendants. Plaintiff concedes that if the declaratory relief cause of action results in a declaration that the lease option contract is valid and enforceable, then plaintiff fails to state a cause of action for fraud because plaintiff would have suffered no damages. It is possible the fraud cause of action is not viable. However, as we noted, nothing prevents a plaintiff from pleading causes of action in the alternative. (*Adams v. Paul* (1995) 11 Cal.4th 583, 593 ["[A] party may plead in the alternative and may make inconsistent allegations."].) If the declaratory relief cause of action results in a declaration that the lease option contract was unenforceable or invalid, then plaintiff may have a viable fraud cause of action. The demurrer cannot be sustained for failure to state a cause of action for fraud related to the lease option contract at this time.

b. Fraud: Estate Plan

Knowledge of the title transfers is material for purposes of misrepresentations involving Joan and Stanley's alleged promises related to their estate plan. The title transfers indicated that Joan and Stanley had no intention of gifting title to Sea Level via their estate plan. Thus, by November 18, 2009, plaintiff knew or should have known of the harm that had occurred. Under the discovery rule, the statute of limitations began to run on November 18, 2009. The statute of limitations for fraud is three years. (Code Civ. Proc., § 338, subd. (d).) Plaintiff's fraud cause of action, insofar as it involves misrepresentations that Joan and Stanley would gift title of Sea

Level to Michael and plaintiff via their estate plan, is time-barred.[5]

3. Unjust Enrichment

Defendants assert the third through sixth causes of action are all fraud-based claims and should be time-barred. The third cause of action is unjust enrichment. "The elements of an unjust enrichment claim are the 'receipt of a benefit and [the] unjust retention of the benefit at the expense of another.' [Citation.]" (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593.) Plaintiff alleged that defendants benefited from plaintiff's reliance on their misrepresentations, and that it would be unjust for defendants to retain the benefit. Plaintiff incorporated by reference the alleged misrepresentations listed in the fraud cause of action.

As alleged, the statute of limitations for unjust enrichment here is based on false representations. Thus, the applicable statute of limitations is three years. (Code Civ. Proc., § 338, subd. (d).) Much like the fraud cause of action, plaintiff's unjust enrichment cause of action must be parsed into two sets of misrepresentations, the lease option contract and the estate plan. As with the fraud cause of action discussed above, the trial court

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[5] Michael contends plaintiff alleged in her complaint she has been damaged, which indicates a past harm, not a present one. Michael asserts that plaintiff would have discovered her harm on November 18, 2009. Plaintiff is not prohibited from pleading inconsistent causes of action. (*Adams v. Paul, supra*, 11 Cal.4th at p. 593.) Also, as explained, plaintiff alleged she was harmed as to the promises related to Joan and Stanley's estate plan, which based on her declaration she knew of in November 2009.

erred by sustaining the demurrer on statute of limitations grounds for the unjust enrichment cause of action pertaining to the lease option contract. The demurrer was properly sustained as to the unjust enrichment cause of action related to the estate plan misrepresentations.

4. Promissory Estoppel

The fourth cause of action is promissory estoppel. "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.' [Citation.]" (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901.) "Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.' [Citation.]" (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.)

Plaintiff alleged: defendants made representations as alleged in the prior allegations; defendants knew or should have expected such representations would, and did, induce plaintiff's reliance; and as a direct result of these representations, plaintiff suffered harm. Again, as with the fraud cause of action, the trial court erred by sustaining demurrer on statute of limitations grounds for the promissory estoppel cause of action pertaining to the lease option contract. The demurrer was properly sustained as to the promissory estoppel cause of action related to the estate plan misrepresentations.

5. Breach of Fiduciary Duty

The fifth cause of action is for breach of fiduciary duty against Michael. "'The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach.' [Citation.]" (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 932.) Here, plaintiff alleged Michael owed plaintiff a fiduciary duty as her spouse. Michael allegedly breached his duties by: fraudulently inducing plaintiff to consent to using community property regarding Sea Level, including building a residence, paying property taxes and maintenance, and acquiring the adjacent lot to tie it to Sea Level; failing to disclose his parents' purported decision to not give effect to the lease option contract; transferring, in his capacity as trustee, Sea Level to himself as his sole and separate property; and later disavowing the lease option contract. Finally, plaintiff alleged these acts resulted in Michael obtaining secret profits that must be disgorged. As plaintiff alleges the breach of fiduciary duty on a theory of fraud, the statute of limitations is three years. (Code Civ. Proc., § 338, subd. (d).)

For the reasons stated above as to the fraud cause of action, the trial court erred by sustaining the demurrer on statute of limitations grounds as to the breach of fiduciary cause of action pertaining to the lease option contract. The demurrer was properly sustained as to the breach of fiduciary duty of action related to the alleged estate plan misrepresentations. Additionally, plaintiff alleged Michael breached his fiduciary duty by transferring Sea Level to himself and by later disavowing the lease option contract. The demurrer as to these allegations

was also properly sustained. As indicated in plaintiff's September 16, 2014 declaration, plaintiff knew of or should have suspected harm from Michael's alleged breach on November 18, 2009, when plaintiff learned of the title transfer of Sea Level and his disavowal of the lease option contact.

6. Aiding and Abetting Breach of Fiduciary Duty

The sixth cause of action is for aiding and abetting breach of fiduciary duty against Joan, the Wilson Family Trust, and the Joan Wilson Trust. "The elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) a third party's breach of fiduciary duties owed to plaintiff; (2) defendant's actual knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third party's breach; and (4) defendant's conduct was a substantial factor in causing harm to plaintiff. [Citations.]" (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343.) The statute of limitations for aiding and abetting the breach of fiduciary duty is the same as the underlying breach of fiduciary duty, in this instance three years. (*American Master Lease, LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1479.)

Here, plaintiff alleged: Joan, the Wilson Family Trust, and the Joan Wilson trust knew that Michael owed plaintiff fiduciary duties; defendants knew of Michael's breach of fiduciary duty; defendants provided substantial assistance or encouragement for the breach; and Michael obtained secret profits that must be disgorged to plaintiff. As stated in the above section on breach of fiduciary duty, the trial court erred by sustaining the demurrer for the cause of action as it pertains to the lease option contract.

The trial court properly sustained the demurrer to the cause of action on statute of limitations grounds pertaining to representations about Joan and Stanley's estate plan, Michael transferring the title to Sea Level to himself as separate property, and his disavowal of the lease option contract.

D. *Family Law Court Jurisdiction*

For two reasons, defendants contend that the family law court has primary jurisdiction over the issues before the trial court in this action in a general civil court. We will discuss each in turn.

First, defendants argue that the demurrer was properly sustained because, under the claim preclusion prong of the demurrer statute, there is another action pending between the parties on the same cause of action. (Code Civ. Proc., § 430.10, subd. (c).) Defendants contend that the family law court has jurisdiction over the matters herein because plaintiff's complaint concerns community property. Defendants also indicate the family law court has jurisdiction over the causes of action because it can issue injunctions against Joan, the Wilson Family Trust, and the Joan Wilson Trust, enjoining the transfer of community property.

"A plea in abatement pursuant to section 430.10, subdivision (c), may be made by demurrer or answer when there is another action pending between the *same parties* on the *same cause of action*. [Citations.]" (*Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 787.) The identical cause of action must be involved in both suits such that a judgment in the first action would be res judicata on the claim in the present suit.

(*Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1384.) To be the same cause of action, each complaint must allege violation of the same primary right. (*Ibid.*)

"The primary right theory is a theory of code pleading that has long been followed in California. It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] A pleading that states the violation of one primary right in two causes of action contravenes the rule against 'splitting' a cause of action. [Citation.]

"As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.' [Citation.] The primary right must also be distinguished from the *remedy* sought: 'The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.' [Citation.]" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682; accord, *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1145.)

Defendants' argument for abatement under Code of Civil Procedure section 430.10, subdivision (c), fails as to three of the

four defendants—Joan, the Wilson Family Trust, and the Joan Wilson Trust—because they are not the same parties that are in the family law proceeding, and thus the demurrer on this ground cannot be sustained under Code of Civil Procedure section 430.10, subdivision (c). As to all the defendants, as well, the claim fails because the primary right involved in the dissolution proceeding differs from the primary right before the trial court. The right before the trial court involves contractual obligations pertaining to the lease option contract. The right before the family law court involves rights to property.

Defendants' second contention is that under the exclusive concurrent jurisdiction rule, the family law court has exclusive jurisdiction.[6] "The established rule of exclusive concurrent jurisdiction provides that where two or more courts possess concurrent subject matter jurisdiction over a cause, the court that first asserts jurisdiction assumes it to the exclusion of all other courts. In essence, the rule renders concurrent jurisdiction exclusive with the first court." (*County of Siskiyou v. Superior Court* (2013) 217 Cal.App.4th 83, 89.) "Unlike the statutory plea of abatement, the rule of exclusive concurrent jurisdiction does not require absolute identity of parties, causes of action or

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[6] Defendants assert that because the exclusive concurrent jurisdiction rule applies, the trial court lacked jurisdiction pursuant to Code of Civil Procedure section 430.10, subdivision (a). This is an incorrect argument even if the rule applies. The exclusive concurrent jurisdiction rule is a judicial rule of preference and does not divest a court of its jurisdiction. (*People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 769.) If exclusive concurrent jurisdiction is found, the second action should be stayed, not dismissed. (*Id.* at p. 771.)

remedies sought in the initial and subsequent actions. [Citations]. If the court exercising original jurisdiction has the power to bring before it all the necessary parties, the fact that the parties in the second action are not identical does not preclude application of the rule. Moreover, the remedies sought in the separate actions need not be precisely the same so long as the court exercising original jurisdiction has the power to litigate all the issues and grant all the relief to which any of the parties might be entitled under the pleadings. [Citation.]" (*Plant Insulation Co. v. Fibreboard Corp., supra*, 224 Cal.App.3d at p. 788.)

The relevant family law court jurisdiction in a dissolution proceeding is provided in Family Law Code section 2010, subdivision (e): "In a proceeding for dissolution of marriage, . . . the court has jurisdiction to inquire into and render any judgment and make orders that are appropriate concerning the following: [¶] . . . [¶] (e) The settlement of the property rights of the parties." This includes resolving the characterization of property as either community or separate property. (Fam. Code, §§ 2550, 2551; *Askew v. Askew* (1994) 22 Cal.App.4th 942, 962.) "'Property' includes real and personal property and any interest therein." (Fam. Code, § 113.)

Defendants' argument is based on their assertion that the trial court has jurisdiction to determine the validity of the lease option contract. Plaintiff's counsel, Frank Sandelmann, submitted a declaration dated September 22, 2015 to the family law court that this civil action should be consolidated with the dissolution proceeding. Sandelmann declared: "Petitioner commenced [the divorce proceeding] on August 25, 2010. Among the issues presented in this [dissolution] action are the

characterization and valuation of the property owned by Petitioner and Respondent . . . ('Sea Level'). The trial of these issues has been bifurcated by the [family law court]. In short, the parties dispute the value of their interests in the Sea Level property, in part based upon . . . an option to purchase Sea Level upon the surviving spouse's death. Petitioner contends the Lease Option is valid. Respondent and his mother contend the Lease Option is not valid."[7]

Defendants' argument under the exclusive concurrent jurisdiction rule is correct as to the validity of the lease option contract. Plaintiff alleged causes of action pertaining to the validity of the lease option contract. As noted, the declaratory relief concerns the validity of the lease option contract, and plaintiff's other causes of action are pled in the alternative if the lease option contract was found to not be valid. The family law court resolving the dissolution proceeding has jurisdiction over the characterization of property of the parties because the family law court can render any judgment or make orders concerning the settlement of the property rights of the parties. (Fam. Code, § 2010, subd. (e).) As declared by plaintiff's counsel, the matter of plaintiff and Michael's interests in Sea Level before the family law court is premised in part on the lease option contract. In order to resolve property rights of Michael and plaintiff as to Sea Level, the family law court necessarily must determine whether the option contract is valid. Consequently, the rule of exclusive

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[7] For the reasons stated above, the trial court properly judicially noticed this document. Plaintiff's counsel is a person authorized to speak on behalf of plaintiff. (Evid. Code, § 1222.) Thus, his declaration can be judicially noticed for the truth of the admissions therein.

concurrent jurisdiction applies. The family law court in the dissolution proceeding has primary jurisdiction over the issue of the validity of the lease option contract. This civil action will not be dismissed, however, but stayed, pending the outcome of the family law court's ruling on the validity of the lease option contract. (*People ex rel. Garamendi v. American Autoplan, Inc., supra*, 20 Cal.App.4th at p. 771.)

Plaintiff asserts the family law court does not have jurisdiction over all defendants and thus should not have concurrent exclusive jurisdiction. The argument is unpersuasive. We agree that the family law court does not have the power to bring Joan, the Wilson Family Trust, and the Joan Wilson Trust, before it in the dissolution proceeding. "A party who claims or controls an interest in any matter subject to disposition in the proceeding may be joined as a party to the family law case only as provided in this chapter." (Cal. Rules of Court, rule 5.24.) Joan, the Wilson Family Trust, and the Joan Wilson Trust are not parties who can be properly joined in the dissolution proceeding because Joan, the Wilson Family Trust, and the Joan Wilson Trust have no current interest in the property. However, in the event the family law court determines the lease option contract is not valid, this civil action would have jurisdiction over Joan and the trusts. As noted, plaintiff's causes of action against Joan and the trusts would be viable only if there was a finding that the lease option contract is not valid.

Accordingly, the demurrer cannot be sustained on the grounds of statutory plea of abatement under Code of Civil Procedure section 430.10, subdivision (c). The demurrer is sustained on the grounds of exclusive concurrent jurisdiction. However, this action will be stayed, not dismissed.

E. *Remaining Issues*

Defendants also generally demurred on the grounds that plaintiff failed to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged. [Citation.]" (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) As discussed above, plaintiff sufficiently alleged facts to state her causes of action.

Defendants also argued the pleadings were uncertain, ambiguous and unintelligible, under Code of Civil Procedure section 430.10, subdivision (f). Defendants' argument on this ground is that the pleadings incorporated various allegations from elsewhere in the complaint. Defendants' argument is without merit. Nothing prohibits plaintiff from using the common pleading practice of incorporating by reference previously mentioned allegations, or allegations in other causes of action. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 931-932; *Cal-West National Bank v. Superior Court* (1986) 185 Cal.App.3d 96, 101.)

Finally, we review whether the trial court erred in denying plaintiff leave to amend her complaint. As to the second through sixth causes of action pertaining to alleged misrepresentations related to Joan and Stanley's estate plans, the trial court did not abuse its discretion. Plaintiff's September 16, 2014 declaration submitted in the dissolution proceeding was properly judicially noticed and the statute of limitations barred those causes of

action in part. Plaintiff has not demonstrated she can amend her complaint to cure the deficiencies discussed above.

We note the trial court did not rule on other motions, including a motion to strike and a motion for consolidation, finding them to be moot. We express no opinion on those motions.

IV. DISPOSITION

The judgment is affirmed in part and reversed in part. The judgment is affirmed as to plaintiff's causes of action pertaining to promises that the Sea Level property would be gifted via Joan and Stanley Wilson's estate plan. The judgment is also affirmed on the grounds that the exclusive concurrent jurisdiction rule applies and the family law court has primary jurisdiction over the validity of the lease option contract. The judgment is otherwise reversed as stated herein. The civil action should be stayed, not dismissed, following remittitur issuance, pending the outcome of the family law court's ruling on the validity of the lease option contract. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RAPHAEL, J.*

We concur:

KRIEGLER, Acting P.J. BAKER, J.

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