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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

MATTHEW POTURICH, Plaintiff and Appellant, v. GATEWAY BUSINESS BANK, etc., et al., Defendants and Respondents.	B232594 (Los Angeles County Super. Ct. No. GC045703)

APPEAL from a judgment of the Superior Court of Los Angeles County, C. Edward Simpson, Jr., Judge. Affirmed.

Old Town Law Office of Stephen R. Golden and Stephen R. Golden for Plaintiff and Appellant.

Winston & Strawn, David L. Aronoff, Gayle I. Jenkins and Jason C. Hamilton for Defendants and Respondents.

Plaintiff and appellant Matthew Poturich (Poturich) brought suit against defendants Gateway Business Bank, d/b/a Mission Hills Mortgage Bankers (Mission),[1] Bank of America, and Recontrust Company[2] on the basis of 17 causes of action[3] born of Poturich's taking a loan to purchase the subject property located on W. La Sierra Drive in Arcadia, California (the Property). Defendant and respondent Mission generally demurred to Poturich's Second Amended Complaint, the operative complaint in this appeal. The trial court sustained the demurrer without leave to amend and entered judgment in Mission's favor with respect to all causes of action other than the three that were not brought against it. Poturich appeals. We conclude that the demurrer was properly sustained with respect to Mission and therefore will affirm the judgment of dismissal.

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[1] Although Mission refers to itself as "GBB" in its response, we use Poturich's designation from his opening brief throughout our opinion for consistency.

[2] Neither Bank of America nor Recontrust is a party to this appeal.

[3] The 17 causes of action listed in Poturich's Second Amended Complaint, the operative complaint, include: "1. Breach of Implied Covenant of Good Faith and Fair Dealing [¶] 2. Violation of Calif. Civil Code § 2923.5 [¶] 3. Intentional Misrepresentation [¶] 4. Constructive Fraud [¶] 5. Violation of Calif. Unfair Competition Law (California Bus. & Prof. Code § 17200[) ¶] 6. Breach of Fiduciary Duty [¶] 7. Breach of Duty to Disclose [¶] 8. Breach of Duty to be Honest and Truthful [¶] 9. Recission [sic] [¶] 10. Conspiracy to Commit Fraud [¶] 11. Reformation [¶] 12. Unfair and Deceptive Business Act Practice (UDAP) [¶] 13. Predatory Lending [¶] 14. Wrongful Foreclosure [¶] 15. To Cancel Trustee Deed [¶] 16. Quiet Title [¶] 17. Declaratory Relief." The 2nd, 14th and 15th causes of action were the only three that were not brought against Mission.

FACTUAL AND PROCEDURAL BACKGROUND[4]

Poturich filed his first complaint on July 30, 2010. In response, Mission filed a demurrer on September 7, 2010. Before the hearing on the demurrer was held, Poturich filed a First Amended Complaint on October 6, 2010, to which Mission demurred again. The trial court sustained Mission's demurrer with leave to amend and, subsequently, Poturich filed a Second Amended Complaint, the operative complaint in this appeal, on December 27, 2010.

The claims included in Poturich's Second Amended Complaint all stem from a transaction through which he borrowed substantial funds from Mission to purchase the Property. In early April of 2006, Poturich entered into a purchase agreement to purchase the Property from L. Guerrero and C. Guerrero (the Sellers) for $1,998,000. He then sought financing from Mission at an 80% loan to value ratio. At closing, Mission informed him that he did not qualify for 80% financing. Mission then offered him a loan at 75% financing, requiring him to come up with an additional $99,900. Poturich states that he was charged $1,125.00 in appraisal fees because multiple appraisals were needed in order to find at least one that matched the value of the Property to the sale price. The transaction closed on May 18, 2006 with Poturich obtaining a $1,498,500 loan secured by a first trust deed on the Property in favor of Mission as the lender. The loan was "immediately transferred" to Countrywide Home

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[4] As the appeal is taken from a judgment following an order sustaining a demurrer without leave to amend, we rely upon and recite the facts as alleged in the operative complaint. In this case, the operative complaint is the Second Amended Complaint.

Loans, which was later purchased by Bank of America, one of the defendants in the underlying lawsuit.

Poturich had difficulty making the payments from the beginning and, in February of 2009, while searching online to determine the value of the Property so that he could sell it, he discovered that the Sellers had purchased the Property for $198,000 less than the price at which they sold it to him. About a year after this discovery (in February of 2010), Poturich applied for a loan modification with Bank of America but was declined. Thereafter, Bank of America began foreclosure proceedings on the Property.

Mission generally demurred to Poturich's Second Amended Complaint with respect to the first, third through 13th, 16th and 17th causes of action on the bases that the complaint failed to state facts sufficient to constitute these causes of action (see Code Civ. Proc., § 430.10, subd. (e)) and that the claims sought were barred by the applicable statutes of limitations. The trial court sustained the demurrer without leave to amend after it found that the "allegations fail[ed] to state a cause of action." The court did not address the statute of limitations argument. Judgment was entered in favor of Mission and Poturich's Second Amended Complaint was dismissed with prejudice on March 4, 2011. It is from this judgment that Poturich appeals.

CONTENTIONS ON APPEAL

Poturich contends that the trial court erred in sustaining Mission's demurrer and abused its discretion in denying Poturich leave to amend. Poturich seeks reversal of the trial court's judgment in Mission's favor and remand of the case for trial.

DISCUSSION

1. *Standard of Review*

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "We must, however, affirm the trial court's judgment if it is correct on any theory, and on appeal the responding parties are free to advance legal arguments that they did not raise in the trial court and on which the trial court did not rely." (*L.K. v. Golightly* (2011) 199 Cal.App.4th 641, 644.)

"To meet [the] burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing

court." (*William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1621.)

2. *First Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing is Insufficient*

Poturich alleges that he entered into a contract with Mission for a loan to buy the Property and that Mission "willfully breached [its] implied covenant of good faith and fair dealing" by (1) "willfully plac[ing] [him] in the . . . predatory loan that they [sic] could not afford;" and (2) "not disclosing to [him] that the [P]roperty sold to [S]ellers less than two month[s] earlier for $198,000 less than it was now being sold for." He further alleges that the contract with Mission arose from a " 'special relationship' " between them resulting in "unequal bargaining positions at the inception of the contract."

"There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract. [Citations.] This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose. [Citations.]" (*Harm v. Frasher* (1960) 181 Cal.App.2d 405, 417.) " 'The implied covenant of good faith and fair dealing is limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create obligations not contemplated by the contract.' [Citation.]" (*Pasadena Live, v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094.)

Neither of Poturich's allegations involves a breach of the express terms of the contract. Instead they imply that Mission failed to negotiate the terms of the loan in good faith prior to entering into the contract. However, as the implied covenant of good faith and fair dealing does not require a contracting party to have negotiated in good faith, his claims are unsupported. (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 799.)

Poturich's allegation that there was a "special relationship" between Mission and him which somehow created a duty for Mission to negotiate in good faith and disclose otherwise publicly available information regarding prior sales data is equally unsupported because " '[the implied covenant] cannot create a fiduciary relationship; it affords [a] basis for redress for breach of contract and that is all.' [Citation.]" (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 31.)

Poturich was given three chances to produce a complaint that sufficiently alleged a cause of action for breach of the implied covenant of good faith and fair dealing and has failed to do so each time. We conclude the trial court did not err in sustaining the demurrer with respect to this cause of action.

3. *Third, Fourth, Sixth, Seventh and Eighth Causes of Action are Insufficient*

As each of these claims relies on Poturich's assertion that Mission acted as a broker, we address them together.

a. *Intentional Misrepresentation*

Poturich alleges that Mission "intentionally misrepresented the value of the . . . [P]roperty by purposely shopping for an appraiser who would value the property

sufficiently to approve the sales transaction" thereby assuring him that his collateral was sound and inducing him to enter into the loan transaction. He alleges further that this argument is supported by the fact that he was charged "over $1,000 for an appraisal that typically runs $300 - $400." He asserts he was "damaged by having to bring $98,000 cash into the transaction that [Mission] knew was not worth the price [he] was paying for it, that was lost because the property value was fraudulently concealed by [Mission]."

To establish a claim for intentional misrepresentation, the following elements must be shown: " '(1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it . . . ; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff *reasonably relied on the representation*; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. [Citations.]' [Citation.]" (*Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434 [italics added]; see also *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184-185.)

In general, "a lender has no duty to disclose its knowledge that the borrower's intended use of the loan proceeds represents an unsafe investment" and the appraisal of a borrower's property "in the usual course and scope of its loan processing procedures [is] to protect [the lender's] interest by satisfying it that the property provide[s] adequate security for the loan." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991)

231 Cal.App.3d 1089, 1096-1097 (*Nymark*).) Although it is foreseeable that a borrower may consider a lender's appraisal in completing a loan transaction, " '[t]he success of the [borrower's] investment is not a benefit of the loan agreement which the [lender] is under a duty to protect [citation][]' [Citation.]" unless the lender " 'goes beyond its role as mortgagee and gets involved in a capacity beyond that of a mere lending agency so that a duty relationship analogous to that of a seller or broker may come into being . . . . ' [Citation.]" (*Id.*, at pp. 1096, 1097.)

First, Poturich failed to allege any facts demonstrating that the Property was actually worth less than what Mission's appraisal showed. He did not allege, for example, the valuations in the prior and allegedly insufficient appraisal reports. As a result, he failed to allege facts sufficient to satisfy the requirements that the representation was false and that Mission knew the representation was false when made.

Next, the facts as alleged indicate that the appraisal was needed to "approve the sales transaction," in the usual course and scope of Mission's loan processing procedures. Poturich makes the conclusory statement in his Second Amended Complaint that the "appraisal 'was clearly intended to induce Plaintiff to enter into a loan transaction (and) to assure him that his collateral was sound,' " [citing dicta in *Nymark*, *supra*, 231 Cal.App.3d at pp. 1096-1097], in an effort to avoid the application of the general rule cited above. However, he failed to sufficiently allege any connection between an appraisal needed to "approve the sales transaction" and his reasonable reliance on such an appraisal to assure him his investment was sound or how the appraisal induced him to enter the loan transaction when he previously agreed on the

purchase price with Sellers *before even seeking a loan*. As such his reliance on the appraisal under these circumstances, even assuming all of his factual allegations are true, was not reasonable.

Poturich appears to argue, in his opening brief, that Mission was acting not only as a lender in the transaction at issue but also as a broker. As a broker, he continues, Mission would have had a duty to disclose " 'all material facts concerning the transaction that might affect the . . . decision' " to enter into a given transaction, which included the true value of the Property. (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 782.) While it is true that the "[i]ntentional failure to disclose a material fact is actionable fraud if there is a fiduciary relationship giving rise to a duty to disclose it" (*Black v. Shearson, Hammill & Co.* (1968) 266 Cal.App.2d 362, 367), Poturich has failed to sufficiently allege that Mission was acting as a broker.

Poturich makes the statements that "Mission is a broker" and that "Mission acted as a broker" in his Second Amended Complaint and argues in his opening brief that these statements are sufficient to allege that the relationship between Mission and him was one that is fiduciary in nature.

Wyatt v. Union Mortgage Company, *supra*, 24 Cal.3d 773, 782, extended the provisions governing real estate brokers to mortgage brokers, including those involving fiduciary duties owed to borrowers. A mortgage broker, being akin to a real estate broker, is " 'a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others: [¶] . . . [¶] (d) Solicits borrowers or lenders for or

negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.' The mortgage broker acts as the borrower's agent. [Citation.]" (*Smith v. Home Loan Funding, Inc.* (2011) 192 Cal.App.4th 1331, 1335; see Bus. & Prof. Code § 10131.)

Poturich failed to allege facts to demonstrate that Mission received compensation for soliciting him or negotiating loans on his behalf or for performing any other services other than lending him the funds he needed to purchase the Property. Moreover, Poturich alleged in his First Amended Complaint that Mission only held itself out as a lender, not as a broker. When "the demurrer at issue is to an amended complaint, we may properly consider allegations asserted in the prior complaints: ' "[A] plaintiff may not discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading." [Citation.]' [Citation.]" (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957.) His conclusory statements that Mission is a broker and that Mission acted as a broker are insufficient as a matter of law. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) Thus, the Second Amended Complaint does not include facts sufficient to allege that Mission is or acted as a broker. And we conclude that Poturich failed to allege facts sufficient to constitute a cause of action for intentional misrepresentation.

b. *Constructive Fraud*

Poturich alleges that Mission was acting as a broker and engaged in constructive fraud when, prior to the close of escrow, it "became aware of certain defects in the

[P]roperty, to wit: that the [P]roperty was previously purchased two months before the current purchase agreement for $198,000 less" yet it failed to disclose this information to him. Poturich asserts that he was unaware of the existence of this fact until February of 2009. He claims that he "has been damaged in the sum equal to the amount required to repair these defects."

The elements that must be alleged to properly plead constructive fraud are found in Civil Code section 1573, subdivision (1), and are: (1) a breach of fiduciary duty; (2) without an actually fraudulent intent; (3) which gains an advantage to the person in fault; (4) by misleading another to his prejudice. As noted above, Poturich has failed to sufficiently allege that Mission is a broker, without which he fails to state facts sufficient to show constructive fraud.

c. *Breach of Fiduciary Duty*[5]

Poturich alleges that Mission acted as a broker in the loan transaction and breached its fiduciary duty to him when it (1) failed to disclose "that the [P]roperty was previously purchased two months before the current purchase agreement was executed for $198,000 less;" (2) intentionally commissioned "an appraisal report that purposely concealed relevant facts that affected the accuracy of said report;" and (3) failed "to undergo a diligent underwriting process for this loan[,] . . . properly adjust and disclose facts and circumstances relating to [his] Adjustable Rate Mortgage and placed [him] in a loan, by way of misleading facts, which they should never have been [sic] approved

[5] Poturich's sixth, seventh and eighth causes of action all arise from his assertion that Mission breached its fiduciary duty to him. As a result, it is unnecessary that we address each claim separately and instead treat them all as one.

for because he could not afford it." Poturich states he has "been damaged in the sum equal to the amount required to repair these defects."

Similarly to the other claims we discuss in this section, to survive demurrer, Poturich must sufficiently allege that Mission owed him a duty. It is undisputed that "[a] mortgage broker has a fiduciary duty to a borrower . . . [and a] mortgage lender does not." (*Smith v. Home Loan Funding, Inc*., *supra*, 192 Cal.App.4th at p. 1332.) Thus, to meet the requirement that he prove Mission owed him fiduciary duties, he points to the statements included in his Second Amended Complaint that "Mission is a broker," and that "Mission acted as the mortgage broker for Plaintiff." However, these statements are merely conclusions, which we are not required to treat as facts. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) As we discussed above, Poturich has failed to sufficiently allege that Mission is a broker, without which he fails to state facts sufficient to show that Mission owed him any fiduciary duties; thus no breach of such duties has been alleged.

4. *Fifth, 12th and 13th Causes of Action*[6] *for Violations of California Unfair Competition Law are Insufficient*

Each of Poturich's fifth, 12th and 13th causes of action involves the alleged violations of the Unfair Competition Law. (Bus. & Prof. Code § 17200 et seq.;

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[6] Each of these causes of action involves alleged violations of the Unfair Competition Law. As a result, it is unnecessary that we address each claim separately and instead treat them all as one. Although Poturich's 12th cause of action is titled, "Unfair and Deceptive Business Act Practice (UDAP)," he cites Business and Professions Code section 17200. Therefore, we treat it as a claim under the UCL. Additionally, Poturich's 13th cause of action for "predatory lending" is entirely meritless as he failed to assert under which prong of the UCL it was brought and we need not address it further.

henceforth UCL.) " 'Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition – acts or practices which are unlawful, or unfair, or fraudulent. "In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." ' [Citations.]" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.)

"The 'unlawful' act prong of the UCL embraces ' " ' "anything that can properly be called a business practice and that at the same time is forbidden by law." ' " [Citation.]' [Citation.] Thus, the UCL 'borrows' violations of other laws and makes them independently actionable as unfair competitive practices. [Citation.]" (*Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1093.)

" ' "The 'unfair' standard, the second prong of [the UCL] also provides an independent basis for relief. This standard is intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud. [Citation.] The test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . . [Citations.]' [Citation.] . . . [A]n 'unfair' business practice occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' [Citation.]" [Citation.]'

[Citation.]" (*Ticconi v. Blue Shield of California Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528, 539.)

The third prong of the UCL, fraud, is unlike common law fraud or deception. (*Bardin v. Daimlerchrysler Corp*. (2006) 136 Cal.App.4th 1255, 1274.) "A fraudulent business practice is one which is likely to deceive the public. [Citations.] It may be based on representations to the public which are untrue, and ' "also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. . . . A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under" ' the UCL. [Citations.] The determination as to whether a business practice is deceptive is based on the likely effect such practice would have on a reasonable consumer. [Citation.]" (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1471.) But "[a]bsent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL." (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1557.)

In asserting his claims under the UCL, Poturich makes the same allegations he made supporting his claim for breach of fiduciary duty. These allegations are also insufficient here. He failed to allege that any of Mission's actions as alleged (1) were unlawful; (2) created a substantial injury not outweighed by any countervailing benefits

and which could not reasonably have been avoided; or (3) were likely to deceive the public. Therefore, his causes of action under the UCL all fail as a matter of law.[7]

5. *Ninth Cause of Action for Rescission is Insufficient*

Poturich's ninth cause of action states, "In the alternative to Plaintiff's cause of action for intentional misrepresentation, Plaintiff may elect to rescind the loan agreement with Defendant MISSION, and be reimbursed monies paid to Defendant B OF A." It lacks any further explanation and appears to be an alternative

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[7] In his reply brief, Poturich cites *Boschma v. Home Loan Center, Inc*. (2011) 198 Cal.App.4th 230 in support of his position that he alleged sufficient facts to survive demurrer relating to his UCL claim under the fraudulent prong. In *Boschma*, the plaintiffs sued their lender for fraudulent omissions and violations of the UCL. "The gravamen of [their] operative complaint is that defendant failed to disclose prior to plaintiffs' entering into their Option ARM's: (1) 'the loans were designed to cause negative amortization to occur'; (2) 'the monthly payment amounts listed in the loan documents for the first two to five years of the loans were based entirely upon a low "teaser" interest rate (though *not* disclosed as such by Defendant) which existed for only a single month and which was substantially lower than the actual interest rate that would be charged, such that these payment amounts would never be sufficient to pay the interest due each month'; and (3) 'when [plaintiffs] followed the contractual payment schedule in the loan documents, negative amortization was *certain* to occur, resulting in a significant loss of equity in borrowers' homes, and making it much more difficult for borrowers to refinance the loans [because of the prepayment penalty included in the loan for paying off the loan within the first three years of the loan]; thus, as each month passed, the homeowners would actually owe more money than they did at the outset of the loan, with less time to repay it.' " (*Id*., at p. 242.) The plaintiffs alleged that " 'had Defendant disclosed the payment amounts sufficient to avoid negative amortization from occurring [plaintiffs] would not have entered into the loans.' " (*Id*.) The *Boschma* court found that plaintiffs has sufficiently pleaded fraud based on concealment of material facts by means of complex and obtuse documents. *Boschma*, however, does not help Poturich as he has only alleged that Mission "failed to properly adjust and disclose facts and circumstances relating to Plaintiff's Adjustable Rate Mortgage and placed Plaintiffs [sic] in a loan, by way of misleading facts, which he should never have been approved for." These conclusory facts do not form a sufficient basis for a cause of action under the UCL.

remedy for his intentional misrepresentation cause of action rather than a separate cause of action.

While it is true that a contract may be rescinded by a party whose consent was obtained by fraud (see Civ. Code, § 1689, subd. (b)(1)), we have already concluded above that Poturich failed to allege facts sufficient to constitute a cause of action for intentional misrepresentation; therefore, he has no basis for seeking the remedy of rescission. Additionally, under Civil Code section 1691, Poturich must not only give Mission notice of rescission, but he must also "[r]estore to [Mission] everything of value which he has received from [it] under the contract . . . . " (Civ. Code, § 1691, subd. (b).) Poturich has not alleged that he offered to restore to Mission the value of the loan he received. His ninth cause of action thus fails as a matter of law.

6. *The 10th Cause of Action for Conspiracy to Commit Fraud is Insufficient*

Poturich alleges that Mission conspired with its appraisers to create appraisal reports that specifically omit "vital information, which information directly and knowingly leads to the inaccuracy of the appraisal report." He asserts that the "damage which resulted from the appraisal report is that [he] relied on knowingly false information to place extra [sic] $99,000 cash into the transaction, to fund a purchase for a price that was more than the [P]roperty was ever to be worth."

Even assuming the facts alleged by Poturich are true, he failed to meet the requirements to demonstrate a civil conspiracy. To show civil conspiracy, a plaintiff must allege (1) that two or more people agree to perform a wrongful act; (2) the commission of such wrongful act; and (3) damage to the plaintiff as a result. (*Applied*

Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 511.) As his conspiracy claim relies on his claim of intentional misrepresentation regarding the appraisal reports and we have found that such claim, as alleged, failed to include facts sufficient to state a cause of action, this claim also fails as a matter of law.

7. *The 11th Cause of Action for Reformation is Insufficient*

Poturich's 11th cause of action, like his ninth for rescission, is a remedy and not a separately stated cause of action. In the Second Amended Complaint, he seeks, in the alternative to his causes of action for intentional misrepresentation and constructive fraud, "that the Court reform the loan agreement to conform to the promises made in paragraphs 21-22 of the complaint,[8] specifically that Plaintiff receive 80% financing and have the additional $99,900 Plaintiff to put [sic] into the [P]roperty returned to him."

"[A] written contract [that] does not truly express the intention of the parties, . . . 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 [the] rights acquired by third persons, in good faith and for value." (Civ. Code, § 3399.) However, "[a]n executed contract cannot be reformed where the aggrieved party, with knowledge of the facts accepts performance in accordance with the terms of the contract as written. [Citation.]" (*Vantress Farms, Inc. v. Sydenstricker* (1970) 11 Cal.App.3d 943, 950.)

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[8] These paragraphs provide, "21. As stated in paragraph 7 above, Plaintiff went to MISSION in order to obtain a loan for the purchase of the above mentioned property at 80% financing, with a purchase price of $1,998,000.00. [¶] 22. At the time of closing, when Plaintiff went in to sign the loan documents, Plaintiff was then told that he did not qualify for 80% financing, but could only qualify for 75% financing, meaning he would have to put an extra $99,900 of his own money into the transaction."

Poturich's request for reformation not only fails because the causes of action on which he relies are both insufficient as a matter of law, but also because the facts as he alleged them show that he executed the loan contract in full knowledge of its terms (75% financing with an additional amount down) and he accepted the performance of the contract as written when he purchased his home with the loan proceeds. Thus, his 11th cause of action fails as a matter of law.

8. *The 16th Cause of Action for Quiet Title is Insufficient*

Poturich alleges in his 16th cause of action that he "seeks to quiet title against the . . . claims" of all defendants who assert "(a) any legal or equitable right, title, estate, lien, or interest in the [P]roperty described in the Complaint adverse to Plaintiff's title, or (b) any cloud on Plaintiff's title to the [P]roperty." He bases his claim on "fraud in securing [the] purchase transaction by Defendant MISSION."

To sufficiently plead a cause of action for quiet title, a plaintiff must allege facts that demonstrate: (1) a description of the property; (2) the title to which the determination is sought and the basis of the title; (3) the defendant's adverse claims at issue; (4) the date as of which the determination is sought; and (5) a prayer for the determination of the title against the adverse claims. (Code Civ. Proc., § 761.020, subds. (a) – (e).) Each of these elements must be included.

Poturich's allegations fail to state facts sufficient to constitute a cause of action for quiet title. First, he specifically alleges in the Second Amended Complaint that Mission has no interest in the Property because Mission sold the loan to Bank of America. He also alleges that it is Bank of America that is holding an adverse interest

in the Property because Bank of America is the entity foreclosing on it. Additionally, Poturich failed to include the date as of which the determination is sought. Thus, his 16th cause of action for quiet title fails as a matter of law.

9. *The 17th Cause of Action for Declaratory Relief is Insufficient*

Poturich alleges in his 17th cause of action that an "actual controversy exists currently between Plaintiff and Defendants as to whether Defendants had any authority to foreclose and Defendants' rights to title of the property." He requests that the court "issue a declaratory judgment that Defendants had no right or authority to foreclose, nor enjoys [sic] any interest in the [P]roperty, and further, that Plaintiff is the sole interest holder in the [P]roperty."

Declaratory relief may be sought where an "actual controversy relating to the legal rights and duties of the respective parties" exists. (Code Civ. Proc., § 1060.) Poturich seeks a declaratory judgment regarding Mission's ability to foreclose on the Property. However, he admits that Mission sold its interest in the Property to Bank of America and that it is Bank of America, not Mission, that has instituted foreclosure proceedings. Thus, Mission is not a proper party because there is no controversy regarding the right of Mission to foreclose under the loan contract.

Each of Poturich's claims is missing factual allegations sufficient to establish all of the required elements. Accordingly, they all fail as a matter of law. Thus, we find that the trial court's sustaining Mission's general demurrer was not in error. As all of Poturich's causes of action are insufficiently pled, we need not address whether any one is also barred by the applicable statute of limitations.

10. *Poturich Failed to Show How the Complaint Can Be Amended to State a Cause of Action*

Poturich contends that "[t]here is a reasonable possibility [his Second Amended Complaint] can be cured by amendment." Without making any arguments or citing any facts that support his contention, Poturich concluded his opening brief with the following statement, "[T]here is no doubt that the requisite showing has been made that Poturich's Second Amended Complaint can be cured by amendment."

As we noted above, Poturich has the burden to show how the complaint can be amended to state a cause of action. (*William S. Hart Union High School Dist. v. Regional Planning Com.*, *supra*, 226 Cal.App.3d at p. 1621.) He has failed to do so with respect to each and every cause of action asserted and thus he has failed to show that the trial court's sustaining Mission's demurrer without leave to amend was an abuse of discretion. As Poturich has been given three opportunities to draft a complaint alleging facts sufficient to state valid causes of action and has failed each time, we conclude that the trial court did not abuse its discretion in denying him yet another bite at the apple.

DISPOSITION

The judgment of dismissal in favor of Mission is affirmed. Mission shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.