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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

JAMES S. GRILL, Plaintiff and Appellant, v. TICOR TITLE INSURANCE COMPANY et al., Defendants and Respondents.	C070730 (Super. Ct. No. 74263)

Plaintiff James S. Grill, in propria persona, initiated this action in November 2008 against defendants Ticor Title Insurance Company (Ticor) and its alleged successor in interest Chicago Title Insurance Company (Chicago), for their denial of his 2008 claim under a title insurance policy Ticor issued to plaintiff's predecessor in interest on real property that plaintiff transferred in 2000. The claim sought to have the title insurer obtain a right of access to the landlocked real property across federal land managed by the United States Forest Service (USFS).

The same claim had been submitted in 1992, at which point Ticor retained for the insured a lawyer who filed a quiet title action (case No. 47235). That lawsuit against USFS was dismissed without prejudice, and plaintiff signed a special use permit (SUP)

with the federal government in 1998, containing conditions and a 10-year expiration date subject to renewal. The title insurer, after resolving separate issues of access to the subject property across *privately*-owned parcels, closed its file in 2000.

In 2007, the SUP terminated by its own terms, and in 2008 USFS declined to extend it, noting plaintiff's failure to construct/maintain an engineered bridge/road, as required by the SUP.

In 2008, plaintiff submitted a new claim asking the title insurer to "complete their work undertaken in Case No. 47235 [which had been closed no later than 2000]." According to plaintiff, resolution of the 1992 claim was inadequate because it did not confer an irrevocable easement. The title insurer denied the 2008 claim on grounds that plaintiff lacked status as an insured and in any event was barred by the statute of limitations. This lawsuit asserts counts for breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and negligence.

In a prior appeal from dismissal upon defendants' demurrer to a *second* amended complaint, we reversed the judgment. (*Grill v. Ticor Title Insurance* et al., C063076, nonpublished opinion filed Feb. 2, 2011 (*Grill I*).)

Plaintiff now appeals from a judgment of dismissal following the trial court's sustaining of the demurrer to the *third* amended complaint without leave to amend. While the parties raise multiple issues, we find dispositive that plaintiff's 2008 lawsuit is barred by statutes of limitations (Code Civ. Proc., § 339 [two-year statute of limitations on action upon title insurance policy accrues upon "discovery of the loss or damage suffered by the aggrieved party thereunder"]; unless otherwise set forth, statutory references that follow are to this code; see also, §§ 337, 343 [four years for breach of written contract and actions not provided for]; § 335.1 [two years for negligence]). The 2008 lawsuit seeks to litigate a title insurance claim that was closed in 2000, by which point plaintiff knew of his supposed loss or damage. We therefore need not address other contentions.

FACTS AND PROCEEDINGS

For purposes of reviewing this ruling on demurrer, we treat the demurrer as admitting the truth of all material facts properly pleaded in the complaint, but not the truth of contentions, deductions, or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967 (*Aubry*).)

A. *Record on Appeal*

Plaintiff attaches to his appellate brief documents that were not before the trial court and are not part of the record on appeal. His brief makes factual assertions without citation that would allow us to know whether he is referring to the record on appeal or to his new documents. He claims the substance of the new documents were pleaded in his complaint, and submitting them became necessary only because the trial court raised new issues. As a general rule, documents not before the trial court cannot be included as part of the record on appeal and thus must be disregarded. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.)

We therefore reject plaintiff's argument that the new documents should be used to show the trial court erred in sustaining the demurrer. Nevertheless, we shall consider whether they show possibility of amendment to cure the complaint's defects, even though plaintiff does not seek leave to amend. (§ 472c, subd. (a) ["When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made"].) On appeal, the burden is on the plaintiff to show a reasonable possibility of amending to cure a pleading defect. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).) A plaintiff may seek leave to amend for the first time on appeal in his opening brief and may propose new facts, as long as he does not stray from his central factual claim as alleged in the complaint. (§ 472c; *Connerly v. State of California* (2014) 229 Cal.App.4th 457, 460-464.) Plaintiff's appellate brief does

not seek leave to amend but does present new facts which do not stray too far from his complaint. We shall consider the new documents in a discussion about leave to amend, *post*, but conclude they do not warrant leave to amend.

B. *The Prior Appeal*

In the prior appeal from the prior complaint -- which alleged plaintiff did not discover defendants' breach until 2008, when he was no longer the owner -- we held in part that (1) the trial court correctly ruled plaintiff lacked standing in his individual capacity to litigate damages to the property owner, but (2) the trial court erred in failing to address a possible, though problematic, theory of liability raised by "skeletal" allegations that plaintiff kept the title insurance policy in force despite the transfers to the Trust and the LLC, by a device authorized by the policy, i.e., a covenant of warranty to the Trust making himself liable for defects in access. (*Grill I, supra,* slip opn. pp. 15-16.)

C. *The Operative Pleading*

Plaintiff's third amended complaint, filed on September 13, 2011, asserts causes of action for breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and negligence. It alleges as follows:

On October 10, 1990, Ticor issued a policy of title insurance for the subject property (the Property) to then-owners Baumeister von Altdorf, Ltd. and La Société Française de Bienfaisance Mutuelle, Trustee of the Simmons Trust, U/T/A dated August 30, 1990 (collectively, Baumeister). Baumeister was a close corporation of which plaintiff was the sole shareholder.

On May 20, 1992, Baumeister tendered a claim under the Policy after being denied access to the landlocked property by 22 private landowners and by USFS. Apparently, the neighbors claimed that an existing path across the lands was a private road while plaintiff claimed it was a historic public road. The policy included coverage

for "[l]ack of a right of access to and from the land." Ticor accepted the claim and hired a lawyer who filed a quiet title action on Baumeister's behalf.

In May 1993, Baumeister settled with the *private* landowners, who granted easements to access the property. The retained lawyer continued negotiations with USFS. The trial court ruling that is the subject of this appeal noted plaintiff fails to allege what happened to the quiet title action, implying it remained open, but the trial court on its own motion took judicial notice of its related file in the quiet title action, which was dismissed in its entirety without prejudice on September 26, 1994, at Baumeister's request. The trial court said Grill, the sole shareholder and successor to Baumeister, was charged with knowledge of that dismissal. Though not essential to our opinion, we note by way of background that an unpublished federal court order in plaintiff's federal lawsuit against USFS indicates the quiet title action was never served on USFS but was used as a prod for negotiations. (*Grill v. Quinn* (2013 E.D. Cal.) 2013 WL 3146803, filed June 18, 2013.)

In December 1995, Baumeister "dissolved" and transferred the property to plaintiff. Defendants assert the transfer terminated the title insurance policy, but we disregard that assertion for purposes of this appeal, because Ticor continued its involvement and treated plaintiff as the insured after that transfer.

As a result of the continued negotiations with the federal agency, USFS in November 1998 issued plaintiff a SUP -- signed by plaintiff -- authorizing him "to use National Forest lands for the construction, reconstruction, maintenance, and use of a road, within the Tahoe National Forest for the following purposes: [¶] to gain vehicle access to private property, which is landlocked by National Forest Sys[t]em Lands. Use also includes construction and maintenance of a bridge on said roadbed and burying and maintaining a 6" or less utility conduit in said roadbed." The SUP covered a right-of-way 0.46 mile in length and 14 feet wide. The SUP contained multiple conditions, including that plaintiff comply with federal and state construction standards and have the plans

approved by USFS, that the SUP "may be terminated or suspended upon breach of any of the conditions," and "Unless sooner terminated in accordance with the provisions of the permit, this permit shall expire and terminate on December 31, 2007. At that time, if the permittee still needs the road for the purposes for which the permit is granted, the permit will be reissued for successive periods of 10 years. At the time of reissuance, the terms and conditions may be modified and new conditions or stipulations added at the discretion of the Forest Service."

Plaintiff alleges the SUP did not satisfy the title insurer's obligation to obtain access for the property, because the SUP required future acts by plaintiff and USFS.

Plaintiff alleges Ticor assured him the SUP was equivalent to a permanent easement grant deed in perpetuity. But, as the trial court noted, any reliance by plaintiff on any such alleged assurances would have been unreasonable, given the express terms of the SUP plaintiff signed.

In 2000, a *private* landowner (Red Ledge Mine) which had not been named as a defendant in the quiet title action, denied plaintiff access to the property. The attorney retained by Ticor on plaintiff's behalf filed suit and obtained an easement from that landowner on June 19, 2000.

Also in 2000, plaintiff engaged an estate planning lawyer and created Western Rivers Preservation Trust. Plaintiff wanted to transfer the property to his Trust, but the title insurance policy stated transfer terminates the policy unless the insured in the transfer retains liability by a covenant of warranty. Thus, Condition 2(b) of the title insurance policy states: "The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, . . . or *only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest*. [Italics added.] This policy shall not continue in force in favor of any purchaser from an insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a

purchase money mortgage given an ------." The remainder of the clause is cut off in all photocopies of the policy submitted by plaintiff.

At the advice of his estate planning lawyer, plaintiff executed a document on May 29, 2000 entitled "Covenants: Warranty; Seisin; Encumb[]rances; Appurtenant; Further Assurance" (Covenant). The Covenant stated that plaintiff, as Settlor and Trustee of Western Rivers Preservation Irrevocable Trust was conveying the property to the Trust, and "Certain liens and a lack of access to a portion of the Properties cloud the title at this time. Settlor and Trustee intend to remove these clouds on the title at a time subsequent to the conveyance." Plaintiff promised to "obtain, complete and guarantee the right of way access" within 10 years, but in April 2008 he signed an "Agreement" to extend the Covenant "for an indefinite period of time or until permanent access is achieved . . . ."

Plaintiff's complaint alleges that his estate planning lawyer "notified Defendants of the creation of the Plaintiff's Covenants, and Defendants consented to it, as evidenced [sic] that they continued to acknowledge Plaintiff as an insured under the Policy." This apparently refers to defendants' June 19, 2000, resolution of the access issue with Red Ledge Mine.

However, plaintiff did not actually convey title of the property to the Trust until June 20, 2000, as he alleges in his complaint.

Defendants have consistently ignored plaintiff's allegations about the Covenant and Condition 2(b), as noted in our prior opinion and in the trial court's ruling that is the subject of this appeal. In this appeal, defendants again ignore the matter, merely asserting that plaintiff's opening brief misrepresents that defendants assisted in preparation of the Covenant, whereas it was plaintiff's own estate planning lawyer who prepared the document.

Ticor closed its file in August 2000.

The Trust later conveyed the Property in July 2001 to Western Rivers Preservation LLC (the LLC), of which the Trust was sole member and plaintiff was the manager. (*Grill I*, *supra*, at slip opn. pp. 6-7.) In opposing the demurrer, plaintiff submitted to the trial court an April 2008 document with his signature, agreeing to extend the Covenant to both the Trust and the LLC for an indefinite period of time or until permanent access is achieved.

Apparently, plaintiff was economically unable to proceed with the improvements for several years after signing the SUP in 1998. (*Grill I*, *supra*, slip opn. p. 2.) USFS advised plaintiff in a letter dated October 5, 2007, that his bridge proposal did not meet environmental requirements and did not completely span the creek. He would need to fund a revised environmental analysis because so much time had passed. Plaintiff objected in a letter dated February 4, 2008.

The SUP terminated by its own terms on December 31, 2007. A USFS letter dated April 2, 2008 noted, "The bridge should have been constructed under the terms of the [SUP], prior to it[]s expiration on December 31, 2007. As the permit[ted] use was never established by maintenance and use of the road, or construction of the bridge, it is appropriate that the [SUP] terminated." The property owner would have to submit a new proposal. The USFS letter noted that, under the Alaska National Interest Lands Conservation Act of December 2, 1980 [16 U.S.C.A. § 3210; 36 C.F.R. § 251.110], landlocked private holdings within the National Forest System boundaries "have a statutory right to reasonable access, subject to conditions determined by the Forest Service." The USFS also noted, "[SUPs] are non-transferable. Therefore, even if the original permit to Mr. Grill were still valid, a new owner would have to submit a new application . . . ."

In February 2008, plaintiff tendered a claim to Ticor, claiming "lack of right of access to and from the land."

Ticor denied the claim on the grounds that (a) Baumeister, not plaintiff, was the named insured on the Policy and the conveyance to plaintiff was not by operation of law; (b) plaintiff was no longer the owner of the Property since he transferred it to Western Trust; and (c) Ticor closed its file in August 2000, such that plaintiff's 2008 claim was beyond the two-year statute of limitations.

In November 2008, plaintiff filed this lawsuit.

D. *The Current Demurrer and Ruling*

Defendants demurred to the third amended complaint on the grounds plaintiff was not an insured; Ticor obtained a right of access fulfilling its duties as title insurer; no facts were alleged against Chicago; plaintiff failed to show loss during the time he owned the property; the lawsuit is time-barred; and neither waiver nor estoppel could establish coverage where there was none.

The trial court ruled the complaint adequately alleged Chicago's involvement as successor in interest to Ticor, but the court sustained the demurrer without leave to amend on the ground that there was only one defect in title, which was the subject of the 1992 claim; the 2008 claim was not a distinct claim; the statutes of limitations began to run in 2000; the lawsuit was untimely; and there was no basis for estoppel. Plaintiff's allegations that he reasonably relied on assurances from defendants did not create an estoppel, because any such reliance would be unreasonable given plaintiff's signature on the SUP which by its own terms was conditional and subject to termination or change.

The trial court added that it "struggled" with our opinion in the prior appeal and asked us to clarify, in any opinion reversing the current judgment, the following issues: (1) Does the SUP discharge Ticor's obligation under the policy to insure a right of access; (2) did plaintiff's Covenant of Warranty extend the policy and was any such extension still in effect; (3) when did plaintiff's claim accrue, when was it equitably tolled, and is actual denial of the claim a bright line rule for tolling; and (4) if the statute

of limitations has run, do the allegations of reliance suffice to show estoppel. The court entered judgment of dismissal on February 29, 2012.

The trial court sustained the demurrer without leave to amend on January 24, 2012, and entered judgment on February 29, 2012.

DISCUSSION

I

Standard of Review

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded, but does not assume the truth of contentions, deductions or conclusions of law. (*Aubry, supra,* 2 Cal.4th at pp. 966-967.) We also consider matters properly subject to judicial notice. (*Blank, supra,* 39 Cal.3d at p. 318.) If a complaint's allegations conflict with exhibits attached to the complaint, we may accept the exhibits as true on demurrer. (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83.) The judgment must be affirmed if any one of several grounds of demurrer is well taken. (*Aubry, supra*, 2 Cal.4th at p. 967.)

We apply de novo review to the trial court's ruling on the demurrer, but we apply an abuse of discretion standard to the trial court's denial of leave to amend the complaint. (*Blank, supra*, 39 Cal.3d at p. 318.)

II

Statute of Limitations

Code of Civil Procedure, section 339 [two-year statute of limitations on action upon title insurance policy] accrues upon "discovery of the loss or damage suffered by the aggrieved party thereunder." The 2008 complaint seeks to litigate an insurance claim

that was closed in 2000, by which point plaintiff knew of his supposed loss or damage. The lawsuit is time-barred as a matter of law.

Title insurance does not insure against future events, but rather against loss resulting from differences between the actual title and the record title as of the date title is insured. (*Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 41.)

A cloud on the title is damage triggering the limitations period. (*65 Butterfield v. Chicago Title Ins. Co*. (1999) 70 Cal.App.4th 1047, 1060 [possible existence of an easement constitutes a cloud on title which results in immediate damage, even absent formal enforcement of the claim to the easement].) *Herbert A. Crocker & Co. v. Transamerica Title Ins. Co*. (1994) 27 Cal.App.4th 1722 affirmed summary judgment on statute of limitations grounds in an action brought more than 19 years after the owners discovered the title insurer's failure to disclose that the city had a public trust interest in a portion of the property. The owners conceded they discovered or suspected the title insurer's negligence by 1970 but argued they did not suffer any "appreciable harm" until 1989, when the city claimed a fee title ownership of the portion of the property. (*Id*. at pp. 1728-1729.) The appellate court stated "the absence of the governmental assertion of the easement does not alter the reality of what the complaint establishes: that the public trust easement in fact existed as of 1957, that the easement constituted a cloud on the title of the property, and that Marin Guaranty was negligent in not discovering that easement and listing it on the 1957 preliminary report. What is also undisputed is that plaintiffs discovered that omission at least by 1970, and did not commence suit until 1989, long after the statute of limitations had run." (*Id*. at pp. 1729-1730.)

Here, plaintiff discovered the cloud on the title, i.e., lack of access, in 1992 when the neighbors denied him access. This triggered the statute of limitations but, as defendants concede, the limitations period was equitably tolled while defendants worked on a solution. (*Aryeh v. Canon Business Solutions, Inc*. (2013) 55 Cal.4th 1185, 1192 (*Aryeh*) [time to file lawsuit is tolled while plaintiff reasonably and in good faith pursues

alternate remedy and notice function of statute of limitations has been served].) The tolling ended no later than 2000, when defendants closed the file. It is clear that plaintiff accrued and discovered loss or damage no later than the year 2000, when defendants closed the file on their lack-of-access claim. Indeed, plaintiff alleges the SUP itself damaged him. In one of the new documents submitted with plaintiff's appellate brief -- his letter to Chicago dated October 30, 1996 -- plaintiff asserted the SUP "may be inadequate because the permit does not run with the land but rather the applicant, that it must be renewed every 10 years and that it is subject to modification if the governing law changes." Plaintiff claimed the Forest Service had granted easements in the past, though it prefers use permits. Plaintiff took the position defendants should object to USFS's insistence on a use permit because "If not, my property will continue to be devalued . . . and potentially unmarketable. Remember, I gave away the commercial rights to the property as a compromise to a settlement of the [quiet title] lawsuit. Consequently, the only use remaining is that of a private single family residential property. Given that, I seriously question whether I can obtain a residential 30 year mortgage lenders policy to construct a single family structure. Fidelity Title and Chicago Title in Santa Rosa say not."

Additionally, the complaint alleged defendants breached their obligations under the title insurance policy by electing not to obtain an easement from USFS but rather electing "in lieu to accept from the Forest Service an administrative [SUP] that was not a binding and insurable access instrument but merely a revocable and non-insurable license to maybe or maybe not access the Property being subject to unilateral and arbitrary revision and termination at the whim of the Forest Service. In other words, the [SUP] did not confer 'a right of access to and from the land' that Defendants, and each of them, were obligated to obtain under the Policy. Rather it conferred a license (which by definition is not a right)."

Moreover, the complaint itself alleged that the SUP damaged plaintiff, in that "Defendants, and each of them, delegated to Plaintiff their contractual liability to obtain access to the Property by obligating him to lengthy negotiations and performances under the terms and conditions of the [SUP]."

Thus, the cause of action accrued no later than 2000, when defendants closed the file on plaintiff's claim leaving a cloud on the title. This conclusion applies not only to the two-year limitations period for breach of title insurance, but also the four-year limitations periods for breach of contract and claims otherwise not provided for (§§ 337, 343) , and the two-year limitations period for negligence (§ 335.1). Even assuming for the sake of argument that plaintiff could assert such additional counts for breach of title insurance, and further assuming that mere discovery of the cloud on title did not trigger the limitations period for such counts, plaintiff alleged damage and discovery of damage from defendants' alleged breach no later than 2000, when defendants closed the file. Therefore, the 2008 lawsuit was time-barred.

We recognize that in our opinion concerning the prior, second amended complaint, we said plaintiff's ownership interest "did not incur *any* diminution in value for a lack of access *before* its transfer to his successors in interest [the Trust and LLC] on which he could have filed suit under any statute of limitations." (*Grill I, supra*, slip opn. p. 14, orig. italics.) We said it was therefore not a question of statute of limitations but rather standing to sue in plaintiff's individual capacity to litigate the issue of any damages to the owner (the Trust or LLC). (*Ibid*.)

However, in *Grill I* we were presented with a prior pleading -- the *second* amended complaint -- which did not contain the foregoing allegations of damage predating 2000, but instead alleged plaintiff did not suffer or discover damage until the USFS terminated the SUP in April 2008. In contrast, the third amended complaint alleges damage and discovery of damage no later than 2000, as we have set forth above. Defendants in their respondents' brief say plaintiff has not shown he suffered any damage

while he was owner of the property. But they disregard the new allegations in the current complaint. And defendants rely on an assumption that the SUP fulfilled their obligations as title insurers, and that the subsequent termination of the SUP was plaintiff's fault. Defendants have not established on demurrer that the SUP fulfilled their obligations. They point to the policy clause that they could cure the access issue "by any method." However, the key word is "cure." They fail to show the SUP cured the access problem. The trial court noted that "any method" means the vehicle by which the right is acquired, e.g., purchase or litigation, not the ability to substitute an inferior right. The trial court saw language in *Grill I* that might imply the SUP fulfilled the insurer's obligation but said *Grill I* did not specifically determine the issue, and the trial court considered it an unresolved question.

Plaintiff advances no argument overcoming the limitations bar. He throws out the terms equitable tolling and equitable estoppel without offering any legal analysis or authority, thereby forfeiting those points. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) Moreover, we see no merit. Tolling and estoppel are distinct doctrines. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383-384.) Tolling suspends the running of the statute of limitations while the plaintiff pursues the alternate remedy. (*Aryeh, supra*, 55 Cal.4th at p. 1192.) Equitable estoppel comes into play after the limitations period has run and prevents a defendant from asserting the statute of limitations as a defense where his conduct induced another to forbear filing a timely lawsuit. (*Lantzy, supra*, 31 Cal.4th at pp. 383-384.)

As indicated, any tolling ended in 2000 when defendants closed the file.

Plaintiff suggests the statute of limitations for the 1992 denial of access claim that was closed in 2000 should run until plaintiff no longer has liabilities under his Covenant of Warranty to the Trust. He claims he "has standing in this action under no statute of limitation except the cessation of his liabilities under the Covenants." He thinks the

Covenant equitably tolled defendants' obligations under the policy to achieve access through the SUP until it was finalized upon the completion of the administrative process.

However, there is no allegation of any fact to show that defendants' alleged agreement (that a covenant of warranty would extend the title policy) was an agreement to revive a claim for lack of access across a particular property after that claim was closed. The 2008 claim was the same as the 1992 claim -- lack of access across federal land -- which was barred by the statute of limitations. Even assuming his Covenant maintained the title policy in force, it did not allow plaintiff to revive a claim already barred by the statute of limitations, and plaintiff offers no authority that it did. Plaintiff claims it is a question of fact that the access denial in 2008 was distinct from the access denial in 1992. It is not; they are the same claim. That plaintiff claims additional damage subsequent to the first claim does not make it a different claim. Plaintiff argues the policy allows multiple claims for the same issue. Even assuming for the sake of argument that it does, plaintiff cites nothing allowing subsequent claims for a matter already barred by the statute of limitations.

Plaintiff fails to allege any conduct by defendants inducing him to forbear filing suit so as to estop defendants from asserting the limitations defense.

Estoppel is not raised by plaintiff's alleged reliance on defendants' alleged assurances that he had perpetual access, because any such reliance was unreasonable, given the SUP he signed. Plaintiff takes issue, noting he raised the point that the 10-year term of the SUP was inconsistent with an easement deed in perpetuity. On appeal, he says defendants and USFS "negotiated around that limitation by having automatic successive ten year terms . . . ." However, the extensions are not automatic, as shown on the face of the SUP, which says that the SUP can terminate upon plaintiff's failure to build the bridge, and that extensions are subject to new conditions. Despite his recording the SUP with the county, plaintiff cannot have reasonably believed the SUP gave permanent access.

III

No Leave to Amend

Plaintiff does not seek leave to amend, but we consider whether the new documents attached to his appellate brief show any possibility that he can cure the defects through amendment. We conclude they do not.

We take the documents in chronological order.

Plaintiff attaches to his appellate brief his own declaration attesting that Exhibit B was (1) a December 4, 1996, letter from his lawyer to USFS stating plaintiff requested and received assurances from USFS that the SUP was equivalent to an easement deed, and (2) a September 15, 1998, letter from defendants' lawyer to plaintiff stating they achieved access to the property through the SUP and were closing their file. However, no documents were attached to the appellate brief as Exhibit B documents. Plaintiff later submitted to this court documents that were supposedly the missing Exhibit B. However, they do not match plaintiff's declaration. Instead, they consist of the following two letters:

1. An October 23, 1996, letter from Chicago to retained counsel for the insured stated: "If Ticor Title has the right, either under the provisions of the policy or under some separate agreement with Baumeister, to fulfill its obligations by obtaining the [SUP], Baumeister cannot prevent it from doing so by refusing to cooperate in the processing of the application. Conversely, if the obtaining of the [SUP] does not fulfill Ticor Title's obligations, Baumeister will not be prejudiced in any way if you proceed with the application and obtain the permit. This being the case, I can see no reason why you should not proceed to obtain the [SUP] for Baumeister as expeditiously as possible and *leave it to me and Mr. Grill to discuss and resolve any questions he may have about problems that arise in the future as a result of the nature of his right of access across federal land.* [Italics added.] [¶] Therefore, unless Mr. Grill has some objection, I would

like you to proceed with the application and obtain the [SUP] for Baumeister. By copy of this letter, I am requesting Mr. Grill to contact me directly if he believes that Ticor Title may have further obligations under the policy if there are future problems resulting from the nature of Baumeister's access across federal land. I will be glad to discuss with him any concerns that he may have." (Italics added.)

Well, plaintiff did have objections, as shown by the second document.

2. The second document is a letter plaintiff wrote to Chicago on October 30, 1996, stating he thought the SUP "may be inadequate because the permit does not run with the land but rather the applicant, that it must be renewed every 10 years and that it is subject to modification if the governing law changes." Plaintiff asserted the Forest Service had granted easements in the past. He said they should appeal the federal use of the SUP, because "If not, my property will continue to be devalued . . . and potentially unmarketable." He doubted whether he could be able to obtain a mortgage to build a single family structure on the property. He said, "I desire to obtain irrevocable acknowledgement by the Forest Service of the historical right of way subject to their proposed use permit governing the improvements only."

Despite this position, plaintiff nevertheless went on to sign the SUP in 1998 without any irrevocable acknowledgement of a historic right of way, and plaintiff took no action when defendants closed the file in 2000 without qualification.

On their face, the two October 1996 letters might support a theory of estoppel because Chicago (1) acknowledged there was some doubt whether the SUP would fulfill Ticor's obligations under the title insurance policy and (2) represented that, if it did not, plaintiff would not be prejudiced because defendants would help him should access become a problem in the future. However, plaintiff's opening brief on appeal defeats any such theory by stating "Plaintiff raised the issue with Defendants that a ten year term was inconsistent with an easement deed in perpetuity [citing to attachment to brief]. Defendants and the USFS *negotiated around that limitation* by having automatic

successive ten year terms: ‘ . . . this permit shall expire and terminate on December 31, 2007. At that time, if the permittee still needs the road . . . the permit will be reissued for successive periods of 10 years.’ ” (Italics added.)

Thus, though plaintiff’s reply brief tries to invoke a delayed discovery rule based on promises of future help, plaintiff admits in his opening brief on appeal that there were no assurances of future help. While briefs are outside the record, they are reliable indications of the party’s position on the facts, and we may take factual statements in a party’s appellate brief as admissions against that party. (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 444, fn. 4.)

Next in chronological order is Exhibit A to plaintiff’s appellate brief, which is a December 4, 1996, letter from the lawyer who represented him in negotiations with USFS, stating plaintiff was “very pleased with your department’s processing of the above-referenced [SUP],” but plaintiff planned to obtain conventional financing for improvements, which raised the issue whether or not any lender would deem the SUP a functional equivalent of deed access for the purpose of insuring a lender’s deed of trust. Counsel asked for a meeting to discuss “whether or not [USFS] can accommodate Mr. Grill and assist him in removing this as an obstacle to improving the property and having it financed by a conventional lender.” Thus, plaintiff was aware the SUP did not secure unequivocal access, yet plaintiff in 1998 signed the SUP anyway and admits in his appellate brief that his concerns were resolved before he signed the SUP by inclusion of the provision for extensions of the SUP.

Exhibit C to the appellate brief shows a March 2008 e-mail, apparently from someone at Chicago, to someone at a different title insurance company not party to this appeal (United Independent Title), indicating Chicago denied the claim “because the present owner does not qualify as an insured. Please post something to your title plant [sic] to let title officers know not to insure access.” Plaintiff’s declaration says his Exhibit C also includes a title insurance policy by that non-party insurer which

supposedly says its policy does not insure against loss or damage from the private road SUP. However, the exhibit contains only excerpts of the policy and a page is missing that would supposedly show such an exclusion. Even assuming the new policy excludes loss from the SUP, e.g., plaintiff's alleged loss of financing due to the conditional nature of SUP access, nothing in the new documents would overcome the limitations bar at issue here.

Our opinion does not preclude the property owner from pursuing access under the Alaska National Interest Lands Conservation Act (16 U.S.C.A. § 3210), as landlocked private holdings within the National Forest System boundaries "have a statutory right to reasonable access, subject to conditions determined by the Forest Service." As noted, plaintiff has pursued action against USFS in federal court on the issue of access. We hold only that plaintiff's lawsuit against the title insurers is time-barred.

DISPOSITION

The judgment of dismissal is affirmed. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

HULL, J.

We concur:

RAYE, P. J.

DUARTE, J.