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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RICHARD MARKOWICZ, Plaintiff and Appellant, v. JPMORGAN CHASE BANK, N.A., Defendant and Respondent.	B233602 (Los Angeles County Super. Ct. No. BC418153)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald M. Sohigian, Judge. Affirmed.

Andrew Levin; Law Offices of P. Paul Aghabala, P. Paul Aghabala; and Richard Markowicz, in pro. per., for Plaintiff and Appellant.

AlvaradoSmith, Theodore E. Bacon, Mikel A. Glavinovich, and Irma L. Martinez for Defendant and Respondent.

Plaintiff and appellant Richard Markowicz[1] (Markowicz) appeals from a judgment entered against him following the trial court's order sustaining without leave to amend the demurrer brought by defendant and respondent JPMorgan Chase Bank, N.A. (Chase) to the second amended complaint (SAC).

FACTUAL AND PROCEDURAL BACKGROUND

This litigation arises out of the foreclosure of Richard and Jolanta Markowiczes' real property. According to the SAC,[2] the Markowiczes owned real property located at 5936 Maury Avenue (the Maury property) free and clear of all encumbrances, without any mortgage or deed of trust against the property. Beginning in July 2005, defendant Patrick Downey (Downey), along with defendants Stacey Eagle, Gregory Blair Clark, and Historical Real Estate and Finance Company, made fraudulent representations to the Markowiczes, causing the Maury property to be depleted of its equity and more. As a result of these defendants' fraud, the Markowiczes were unable to keep their family home or any other property.

Regarding Chase, the SAC alleges that the Markowiczes owned two properties, the Maury property and real property located at 1771 Eucalyptus Hill Road in Santa Barbara (the Santa Barbara property). There were promissory notes and deeds of trusts on those properties in favor of Washington Mutual, Inc. (Washington Mutual), that were then assigned or transferred to Chase. The Markowiczes aver that the promissory notes and deeds of trust were obtained by deceit, fraud, misrepresentation, and/or in violation of statute or regulation, and, consequently, were void and subject to cancellation. They

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1 Although the appellant's opening brief suggests that there are two appellants (as there were two plaintiffs), pursuant to the notice of appeal, only Richard Markowicz is an appellant. And, he cannot represent Jolanta Markowicz. (*Abar v. Rogers* (1981) 124 Cal.App.3d 862, 865.)

2 "Because this matter comes to us on demurrer, we take the facts from plaintiff's complaint, the allegations of which are deemed true for the limited purpose of determining whether plaintiff has stated a viable cause of action. [Citation.]" (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.)

further contend that the promissory notes and deeds of trust were obtained without their consent and were therefore unenforceable.

In particular, the Markowiczes claim that Washington Mutual knew of Downey's criminal record and knew that he was disqualified from engaging in mortgage brokering. Notwithstanding that knowledge, Washington Mutual continued to work with him to make mortgage loans, including the loans made to the Markowiczes. "The fraud, deceit and misrepresentations of and attributable to . . . Washington Mutual . . . in securing the various deeds on [the Maury property and the Santa Barbara property] is imputed to" Chase. Thus, in the third cause of action, the Markowiczes were seeking cancellation of all promissory notes and deeds of trust on the subject real properties. In the fourth cause of action, they sought to quiet title.

Chase demurred, arguing that Chase did not assume any liabilities arising from claims by the borrowers of Washington Mutual. On September 25, 2008, the Office of Thrift Supervision closed Washington Mutual and appointed the FDIC as receiver. When the FDIC is appointed as receiver, it succeeds to "all rights, titles, powers and privileges of" the failed institution, and may "take over the assets of and operate" the failed institution with all of the powers thereof. (12 U.S.C. § 1821(d)(2)(A)(i) & (d)(2)(B)(i).)

On that same date, the bulk of Washington Mutual's assets were transferred to Chase pursuant to a purchase and assumption agreement (P&A agreement) between FDIC as receiver, FDIC in its corporate capacity, and Chase. Article 2.5 of that agreement expressly provides that Chase did not assume the potential liabilities of Washington Mutual. Thus, Chase could not be liable.

Chase further argued that even if Chase could be liable for Washington Mutual borrower claims, the SAC still failed. Although the SAC alleged that many documents were forged, the Markowiczes did not allege fraud or forgery with sufficient specificity.

Moreover, Chase asserted that the Markowiczes ratified the deeds of trust and promissory notes by accepting the benefits of the loans that they made payments on. After the bank documents were finalized, the Markowiczes made regular payments under the terms of the promissory notes until they defaulted; they made regular payments on the

Maury property loan for over a year and made regular payments on the Santa Barbara property loan for over two years.

Because the Markowiczes failed to state a claim for cancellation, their claim to quiet title necessarily failed.

The Markowiczes opposed Chase's demurrer. They claimed that Chase took the promissory notes and deeds of trust subject to all of the Markowiczes' defenses. They further argued that their alleged fraud was sufficient to withstand attack.

The trial court sustained Chase's demurrer to the third and fourth causes of action without leave to amend, "essentially accept[ing] the arguments of [Chase]." Judgment was entered in favor of Chase and against the Markowiczes. Richard Markowicz's timely appeal ensued.

DISCUSSION

I. *Standard of review*

"Our Supreme Court has set forth the standard of review for ruling on a demurrer dismissal as follows: 'On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citations.]" (*Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1043–1044.)

II. *The trial court did not err*

Markowicz's opening brief is largely unintelligible, and consists primarily of rambling, unfounded, and incoherent statements, and questions that are never answered. But we are mindful of the standard of review, and we consider the SAC independently. Considering the SAC de novo, we conclude that Markowicz did not sufficiently allege his claims against Chase.[3]

In the third cause of action, Markowicz purports to state a claim for cancellation or rescission. Pursuant to Civil Code section 1689, subdivision (b)(1), a contract may be rescinded if the consent of the rescinding party was obtained through fraud. The elements of a claim based on fraud are: (1) a misrepresentation, (2) knowledge of the falsity, (3) intent to defraud or induce reliance, (4) justifiable reliance, and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Fraud must be alleged specifically, with the complaint setting forth facts showing "'"how, when, where to whom, and by what means the representations were tendered."'" (*Id*. at p. 645; see also *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.)

Here, the SAC fails to allege fraud with adequate specificity. Significantly, Chase is not alleged to have made any misrepresentation to Markowicz or concealed any information from him. Rather, the alleged fraud stems from Downey's alleged misconduct and Washington Mutual's alleged knowledge of Downey's misfeasance. While the SAC alleges that Washington Mutual knew of Downey's criminal record and knew that he was disqualified from engaging in mortgage brokering, it never alleges how that knowledge was imputed to Chase. And, Markowicz never explains in his appellate brief how that purported knowledge transferred to Chase as a matter of law. Necessarily we conclude that the trial court properly sustained Chase's demurrer to the third cause of action.

For the same reasons, we conclude that the trial court properly sustained the demurrer to the fourth cause of action for quiet title. To plead a cause of action to quiet

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3 We reach this conclusion without taking judicial notice of any documents.

title, the complaint must be verified and allege: (1) a legal description of the property and its street address or common designation; (2) the title of the plaintiff and the basis of the title; (3) the adverse claims to the title of the plaintiff; (4) the date as of which the determination is sought; and (5) a prayer for the determination of the title of the plaintiff against the adverse claims. (Code Civ. Proc., § 761.020.) When a plaintiff seeks to quiet title on the basis of the cancellation of an instrument, the plaintiff must plead a cancellation claim. (*Moss Estate Co. v. Adler* (1953) 41 Cal.2d 581, 584; *Ephraim v. Metropolitan Trust Co.* (1946) 28 Cal.2d 824, 833.)

As set forth above, the trial court properly sustained Chase's demurrer to the rescission cause of action. It follows that the trial court rightly sustained Chase's demurrer to the quiet title cause of action.

Finally, we conclude that the trial court did not abuse its discretion in denying Markowicz leave to amend. To show abuse of discretion, Markowicz was required to show in what manner the SAC could have been amended and how the amendment would change the legal effect of the complaint, i.e., state a cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) Here, Markowicz has not met his burden. While he requests leave to amend to "cure any defects" in the SAC, he does not explain what or how he could amend the SAC to properly plead his claims against Chase. Under these circumstances, we readily find that the trial court did not err in sustaining the demurrer without leave to amend.

All remaining arguments, including those based on the purchase and assumption agreement, ratification, and tender, are moot.

DISPOSITION

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

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD