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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THOMAS L. KIRKPATRICK,

Plaintiff and Appellant,

v.

FRED RESTREPO et al.,

Defendants and Respondents.

B276448

(Los Angeles County
Super. Ct. No. BC591424)

APPEAL from a judgment of the Superior Court of Los Angeles County, Susan Bryant-Deason, Judge. Affirmed.

Thomas L. Kirkpatrick, in pro. per., for Plaintiff and Appellant.

Bryan Cave, Glenn J. Plattner and Richard P. Steelman, Jr., for Defendants and Respondents JPMorgan Chase Bank, N.A. and California Reconveyance Company.

I. INTRODUCTION

Slightly less than six years after the foreclosure sale of his real property, plaintiff Thomas L. Kirkpatrick filed this lawsuit against defendant Fred Restrepo, the notary who completed the certificates of acknowledgment verifying the identity of the individuals who signed the deed of trust and its assignment in connection with the foreclosure. Plaintiff claimed that Restrepo did not follow Government Code requirements in completing the acknowledgments.

Code of Civil Procedure section 338, subdivision (f) provides a specific statute of limitations for actions against a notary in his or her official capacity.¹ Plaintiff reads subdivision (f) as providing for a generally applicable six-year limitations period, under which the initial complaint here would have been timely filed. In fact, the six-year limitation period in subdivision (f)(3) is a *maximum* limitation period dating from the date of the notary's actions. Here, the governing limitation period is one year from the date of the discovery of the alleged malfeasance as set forth in subdivision (f)(2). Because this lawsuit was filed more than one year after that discovery, the trial court properly ruled that plaintiff's cause of action against the notary was barred by section 338, subdivision (f).

Plaintiff's claims against the two other defendants—the foreclosing bank, J.P. Morgan Chase Bank, N.A. (Chase Bank), and its subsidiary California Reconveyance Company, the notary's employer—are barred for the same reason to the extent

¹ Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

based on the notary's conduct, and by other statutes of limitations to the extent based on other conduct. We therefore affirm the trial court's judgment dismissing this action.

II. BACKGROUND

On March 7, 1995, plaintiff purchased a single-family residence in Palmdale, California, as a rental property. On August 27, 2009, the property was sold at a public auction in a foreclosure sale. On August 31, 2009, the trustee's deed of sale was signed by Karime Arias, the assistant secretary for California Reconveyance Company. On the same date, the assignment of deed of trust was signed by Deborah Brignac, a vice president of Chase Bank. Restrepo, a licensed notary public employed by California Reconveyance Company, notarized these documents.

Plaintiff alleged that on January 16, 2013, he discovered that Restrepo's acknowledgments on the deed of trust and assignment were knowingly false and did not comply with the recordkeeping requirements in Government Code section 8206. On August 14, 2015, plaintiff filed the original verified complaint in this case, asserting claims against all three defendants.

Following two demurrers that were sustained with leave to amend,² plaintiff filed the operative second amended complaint. He alleged two causes of action against Restrepo, for negligence and fraud. He asserted two causes of action against California

² The demurrer to the FAC states that plaintiff was afforded the opportunity to amend.

Reconveyance Company and Chase Bank for fraud and wrongful foreclosure.

Defendants demurred to the second amended complaint, arguing, among other things, that plaintiff's claims were barred by the statute of limitations.³ Plaintiff argued that the causes of action against Restrepo were not time-barred because there is a six-year statute of limitations for claims against notaries. He claimed the three-year fraud statute of limitations did not bar his claim against Chase Bank and California Reconveyance Company because he discovered the fraud in 2013 and filed his complaint in 2015.

The trial court sustained the demurrer without leave to amend, based on, among other things, the statute of limitations. Plaintiff appealed from the judgment dismissing with prejudice the entire case.

III. DISCUSSION

A. *Standard of Review*

On appeal from a judgment based on an order sustaining a demurrer, we assume all the facts alleged in the complaint are true. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 528; *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th

³ It appears that Restrepo never actually appeared in this action. All three demurrers were filed by the other two defendants, yet the parties briefed the demurrers as to the claims against Restrepo. The trial court sustained the demurrer to the claims against all defendants including Restrepo and dismissed the entire case.

992, 998.) In addition, we consider judicially noticed matters. (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 346; *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42 (*Committee for Green Foothills*).) We accept all properly pleaded material facts but not contentions, deductions or conclusions of fact or law. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152; *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 (*Evans*).) We determine de novo whether the complaint alleges facts sufficient to state a cause of action under any legal theory. (*Committee for Green Foothills, supra*, 48 Cal.4th at p. 42; *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We read the complaint as a whole and its parts in their context to give the complaint a reasonable interpretation. (*Evans, supra*, 38 Cal.4th at p. 6; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

B. The Claims Against the Notary Are Barred by the Statute of Limitations in Section 338, Subdivision (f)

The trial court ruled plaintiff's negligence and fraud causes of action against Restrepo were barred by the statute of limitations in section 338, subdivision (f). This ruling was correct.

Section 338 provides for a three-year statute of limitation for a number of causes of action, and subdivision (f) applies that limitation period to suits against notaries in their official capacity.⁴ Section 338, subdivision (f)(1) states that the cause of

⁴ Section 338, subdivision (f) provides: "Within three years: [¶] . . . [¶] (f)(1) An action against a notary public on his or her bond or in his or her official capacity except that a cause of

action against a notary does not accrue until the discovery of the facts constituting the cause of action. Section 338, subdivision (f)(2) then provides a particular limitation period for suits against notaries based on their wrongdoing: “Notwithstanding paragraph (1), an action based on malfeasance or misfeasance shall be commenced within one year from discovery, by the aggrieved party . . . of the facts constituting the cause of action or within three years from the performance of the notarial act giving rise to the action, whichever is later.” Thus, an action against a notary public based on “malfeasance or misfeasance” must be brought by the latest of either (a) three years from the date of the notarization or (b) one year from discovery of the falsity.

Plaintiff’s negligence and fraud claims against Restrepo arise from the notary’s alleged false acknowledgment of the signatures of Arias and Brignac on the trustee’s deed of sale and assignment, which were notarized on August 31, 2009. A knowingly or negligently false acknowledgment is malfeasance or misfeasance. Three years from the date of notarization is August 31, 2012. Plaintiff, however, alleged he did not discover

action based on malfeasance or misfeasance is not deemed to have accrued until discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action. [¶] (2) Notwithstanding paragraph (1), an action based on malfeasance or misfeasance shall be commenced within one year from discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action or within three years from the performance of the notarial act giving rise to the action, whichever is later. [¶] (3) Notwithstanding paragraph (1), an action against a notary public on his or her bond or in his or her official capacity shall be commenced within six years.”

Restrepo's false acknowledgements until January 16, 2013. One year from that date is January 16, 2014. Given these allegations, under section 338, subdivision (f)(2), plaintiff was required to bring his action against the notary before January 16, 2014.

Here, the action was commenced on August 14, 2015, more than a year after discovery of the notary's alleged misdeed, and more than three years after the August 31, 2009 notarial act giving rise to the action. Consequently, the negligence and fraud claims against Restrepo are barred by the statute of limitations in section 338, subdivision (f)(2).

Plaintiff argues his causes of action against Restrepo are not time-barred because he filed his complaint 17 days before the expiration of the six-year statute of limitations in section 338, subdivision (f)(3). That subdivision states, in relevant part: "Notwithstanding paragraph (1), an action against a notary public on his or her bond or in his or her official capacity shall be commenced within six years." Plaintiff contends he has six years to bring claims against a notary, relying on *Purdum v. Holmes* (2010) 187 Cal.App.4th 916, 923 (*Purdum*). Plaintiff's reliance on subdivision (f)(3) and *Purdum* is misplaced.

Section 338, subdivision (f)(3) is an *additional* limitation on actions against notaries, not one that replaces subdivision (f)(2). Subdivision (f)(3) governs when a plaintiff discovers the facts underlying the notary's wrongdoing more than five years from the notarization. Under subdivision (f)(2) alone, the plaintiff would have one year from that discovery to file the lawsuit, no matter when the discovery occurs. Subdivision (f)(3) provides for a maximum limitation period, placing an outer limit on how long discovery may extend the statute of limitations.

Purdum involved such a situation where the action was time-barred because it commenced on September 11, 2008, more than six years after the notary notarized the signature on September 2, 2002. (*Purdum, supra*, 187 Cal.App.4th at p. 924.) In *Purdum*, subdivision (f)(3)'s six-year maximum limitation governed because the plaintiff allegedly did not discover the malfeasance until the notary's deposition on March 14, 2008. (*Id.* at pp. 919, 924.) Under subdivision (f)(2) alone, the plaintiff would have had a year from that date to file his lawsuit, and his complaint would have been timely. But (f)(3) places a six-year limit on any action against a notary, and "[t]he six-year limit applies regardless of whether the action is based on malfeasance and whether its discovery is delayed." (*Id.* at p. 923; see *Butterfield v. Northwestern National Ins. Co.* (1980) 100 Cal.App.3d 974, 976 [subdivision (f)(3) precluded suit where plaintiff allegedly discovered the notary's malfeasance over seven years after the notarization].)

Here, the six-year maximum limit in subdivision (f)(3) is inapplicable because plaintiff discovered Restrepo's misconduct on January 16, 2013, less than four years after notarization. Once plaintiff discovered the malfeasance in January 2013, he had one year to commence action against the notary under section 338, subdivision (f)(2), and the six-year limitation period in subdivision (f)(3) has no application. Plaintiff's contrary view would require that the six-year limitation period replace the subdivision (f)(2) period and render the latter meaningless. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955 [statutes must be read to give force and effect to all their provisions].)

Because the complaint was not filed until August 14, 2015—more than one year after discovery of the notary’s misconduct—the claims against Restrepo are barred by the statute of limitations in section 338, subdivision (f)(2).

C. The Fraud Claim Against the Corporate Defendants Is Barred by the Statute of Limitations in Section 338, Subdivision (d)

The trial court ruled plaintiff’s fraud cause of action against Chase Bank and California Reconveyance Company was barred by the statute of limitations. Plaintiff alleged Chase Bank and California Reconveyance Company, through Brignac and Arias, knew Restrepo’s acknowledgment certificates were false and that plaintiff relied on the acknowledgment certificates. This fraud allegation is based on Restrepo’s notarial misconduct; thus, it is barred by the statute of limitations in section 338, subdivision (f)(2). (*Butterfield v. Northwestern National Ins. Co.*, *supra*, 100 Cal.App.3d at p. 979 [predecessor of section 338 subdivision (f) applies to actions against the notary’s surety as well as the notary]; *City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 889 [“The statute of limitations that applies to an action is governed by the gravamen of the complaint, not the cause of action pled”].)

To the extent the fraud cause of action against the corporate defendants is based on conduct other than that of Restrepo, it is governed by the three-year statute of limitation in section 338, subdivision (d). That provision states: “Within three years: [¶] . . . [¶] (d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to

have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

In the second amended complaint, plaintiff alleged that Chase Bank and California Reconveyance Company actively concealed the illegality of the foreclosure sale. In support of plaintiff’s opposition to the demurrer, however, he submitted an August 11, 2009 letter that he sent to California Reconveyance Company, stating, in relevant part: “A foreclosure action has been initiated by Washington Mutual Bank aka Chase Bank with the undersigned. [¶] Under Federal Banking Laws, [s]ection 3-305 . . . I have a right to see the original Promissory Note and obtain [a] certified copy of said note to verify that the bank or banks, in question, is the Holder in Due Course and has a legal right to proceed with the foreclosure. [¶] Please respond in writing, within ten days, advising that the above request will be scheduled at a local bank in the city of Simi Valley, California.”⁵

The trial court explained that although plaintiff adequately pled the fraud cause of action, “the events giving rise to these allegations occurred from 2004-2009. This case was not filed until August 2015—some six years after the foreclosure sale took place. . . . there is documentary evidence that as of August 11, 2009, Plaintiff was concerned about Defendant’s authority to foreclose. On August 11, 2009, Plaintiff requested by certified mail from JP Morgan Chase a copy of the original promissory note. . . . In fact, the letter specifically references that Plaintiff was concerned that Defendant was the correct entity that was

⁵ In support of his opposition to the demurrer, plaintiff requested judicial notice of his August 11, 2009 letter. The trial court granted plaintiff’s request by considering the letter when sustaining the demurrer.

entitled to foreclose. . . . Therefore, Plaintiff was at least on inquiry notice as of August 11, 2009 about alleged problems with Defendant's ability to foreclose. Therefore, under the Plaintiff's own exhibits, as a reasonable prudent person he suspected fraud or problems with the chain of title as early as August 2009—thereby precluding his claims under the statute of limitations.”

The trial court reasoned correctly. Plaintiff's August 11, 2009 letter to defendant California Reconveyance Company demonstrated that he suspected problems with the change of title on that date. He requested a certified copy of the promissory note “to verify that the bank or banks, in question, is the Holder in Due Course and has a legal right to proceed with the foreclosure.” Yet plaintiff did not bring his fraud claim until August 14, 2015. His fraud cause of action against Chase Bank and California Reconveyance Company is barred by the three-year statute of limitations in section 338, subdivision (d).⁶

Plaintiff does not argue that the trial court should have granted leave to amend any cause of action of the complaint. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

⁶ On appeal, plaintiff does not clearly challenge the dismissal of the wrongful foreclosure cause of action, but the demurrer was correctly sustained as to that claim. That cause of action, which sought to set aside and cancel the allegedly void trustee's deed of trust and assignment, was governed by the four-year statute of limitations in section 343. (*Walters v. Boosinger* (2016) 2 Cal.App.5th 421, 428; *Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319, 1326-1327.) Plaintiff did not bring his wrongful foreclosure action until August 14, 2015, close to six years after the August 27, 2009 foreclosure. Thus, the wrongful foreclosure claim is barred by the four-year statute of limitations in section 343.

He does not propose any specific amendment to cure the pleading defects identified above, and we can conceive of none.

Because all the causes of actions are barred by the statute of limitations, we need not discuss the parties' other arguments.

IV. DISPOSITION

The judgment of dismissal is affirmed. Defendants JP Morgan Chase Bank, N.A. and California Reconveyance Company shall recover their costs on appeal from plaintiff Thomas L. Kirkpatrick.

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RAPHAEL, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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