Filed 6/4/12 1st Key Management v. Gateway Business Bank CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

1ST KEY MANAGEMENT, INC., Plaintiff and Appellant, v. GATEWAY BUSINESS BANK, Defendant and Respondent.	B233413 (Los Angeles County Super. Ct. No. BC433490)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan S. Rosenfield, Judge. Affirmed.

James L. Kellner for Plaintiff and Appellant.

Buchalter Nemer, Robert M. Dato, Mia S. Blackler for Defendant and Respondent.

This dispute arises from a commercial loan made by Gateway Business Bank (the Bank) to appellant 1st Key Management, Inc., which appellant mistakenly believed was a Small Business Administration (SBA) loan. The trial court gave judgment to the Bank after sustaining demurrers without leave to amend. We affirm. Appellant failed to state causes of action for negligence or constructive fraud.

FACTS

The Original Complaint and First Amended Complaint

Appellant's pleadings are internally inconsistent. The complaint alleged that the Bank orally agreed to arrange an SBA loan for appellant's proposed car wash; the first amended complaint asserted that the Bank impliedly promised to arrange an SBA loan. Attached to the pleadings—and contradicting these claims—is a May 2007 letter of intent from the Bank (the Letter), which advised appellant that the Bank "is a separate credit facility from your requested SBA 504 Perm Real Estate Loan."

The complaint alleges that in July 2007, the SBA "provided Plaintiff with an authorization number (which Plaintiff understood to mean that the [SBA] had approved the Plaintiff's application.)" In October 2007, the Bank funded a loan to cover appellant's acquisition of realty and construction of a car wash. Work began on the project and continued to 90 percent completion. In September 2008, the Bank froze the loan, and told appellant to come up with money to cover cost overruns. In 2009, the Bank foreclosed on appellant's property.

The initial pleadings asserted two theories: breach of contract and fraud. The Bank breached the contract by failing to fund construction to completion, and by foreclosing on the property. Appellant claimed that the Bank made false representations, without specifying the substance of the misrepresentations or who made them.

The Current Pleading

After demurrers were sustained, appellant filed the second amended complaint (SAC). The SAC asserts causes of action for negligence and constructive fraud, abandoning the original claims for breach of contract and fraud. There is no allegation

that the Bank made oral or implied promises to arrange an SBA loan for appellant. The Letter is not attached to the SAC.

Appellant told the Bank that it required an SBA loan to build the car wash.[1] The Bank provided an SBA checklist, which appellant completed. Appellant believed that the Bank was preparing an SBA loan when "in fact the Defendant was actually funding their 'in house' construction loan, a proprietary product of the Defendant." Contradicting the complaint, appellant alleges that it was unaware that the SBA had authorized a loan guarantee in July 2007. Because the Bank proceeded on its proprietary loan, it did not absorb cost overruns. By contrast, if appellant had an SBA loan, cost overruns would have been absorbed. The property was lost in foreclosure because the Bank "handled the transaction in a negligent fashion." Appellant alleges that the Bank was a fiduciary, and committed constructive fraud.

The Bank's Demurrer

The Bank demurred to the SAC. It argued that the negligence claim is time-barred, and that it owed appellant no duty of care, in its conventional role as a moneylender. Over appellant's opposition, the court sustained the Bank's demurrers without leave to amend. Judgment was entered in favor of the Bank on April 14, 2011. This timely appeal ensued.

DISCUSSION

1. Appeal and Review

Appeal lies from a final judgment after demurrers are sustained without leave to amend. (Code Civ. Proc., §§ 581d, 904.1, subd. (a)(1); *Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 667.) We review de novo the ruling on the

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[1] Though appellant argues on appeal that the Bank "steered 1st Key into seeking the SBA loan . . . .", the SAC alleges exactly the opposite. The SAC states that "Plaintiff met with Defendant's agents, and advised them that he was interested in developing real property he had located in Solano County for use as a commercial car wash and to develop that property, he required an 'SBA' loan in order to build the car wash." Thus, the SBA loan was appellant's idea, not the Bank's idea.

demurrer, exercising our independent judgment to determine whether a cause of action has been stated as a matter of law. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.)

2. <u>Negligence Claim</u>

Appellant's negligence claim fails for several reasons.

First, appellant knew that the Bank was funding a proprietary construction loan, not an SBA loan. The Letter attached to the first two pleadings states that the Bank "is a separate credit facility" from the SBA loan appellant desired. Appellant cannot escape the facts alleged in its earlier pleadings—or the effect of exhibits attached to the pleadings—by omitting them from the latest pleading. (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517; *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027 [""""False allegations of fact, inconsistent with annexed documentary exhibits . . . may be disregarded . . .""""].) The Letter belies the allegation that appellant "believed that the Defendant was preparing an 'SBA' loan . . . ."

Second, "a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) The lender need not advise the borrower how to handle the loan proceeds, because "'[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.'" (*Ibid.*) Lender liability for negligence arises only when the lender participates in the financed enterprise beyond the domain of the usual moneylender. (*Ibid.*; *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 864.)

Appellant does not allege that the Bank "became an active participant in a [ ] construction enterprise [with] the right to exercise extensive control of the enterprise." (*Connor v. Great Western Sav. & Loan Assn., supra,* 69 Cal.2d at p. 864.) At most, appellant alleges that the Bank funded a loan so that appellant could develop a car wash. There is no claim that the Bank had any control over appellant's construction project. Although the Bank instructed appellant to infuse money to cover cost overruns, this was a

normal response by a lender. "Normal supervision of the enterprise by the lender for the protection of its security interest in loan collateral is not 'active participation'" beyond that of the ordinary role of a lender in a loan transaction. (*Wagner v. Benson* (1980) 101 Cal.App.3d 27, 35; *Nymark v. Heart Fed. Savings & Loan Assn., supra,* 231 Cal.App.3d at p. 1097.)

3. <u>Constructive Fraud Claim</u>

Constructive fraud applies only to fiduciary or confidential relationships. (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 415; *Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI* (2002) 100 Cal.App.4th 1102, 1108.) The relationship between a lender and borrower is not fiduciary in nature. (*Nymark v. Heart Fed. Savings & Loan Assn., supra,* 231 Cal.App.3d at p. 1093, fn. 1; *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 478.) Appellant alleges that "[w]hen Plaintiff began his [*sic*] relationship with the Defendant the Defendant formed a fiduciary relationship with him [*sic*]." A mere allegation that a defendant assumed a fiduciary duty is a legal conclusion, not a well-pleaded fact. (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1558.)

Appellant asks for leave to amend, to state his constructive fraud claim with greater particularity. Plaintiff has the burden of showing a reasonable possibility that an amendment would cure any defects. (*Trinity Park, L.P. v. City of Sunnyvale, supra,* 193 Cal.App.4th at p. 1027; *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711.) The appellate brief must spell out how an amendment can cure a defect or change the legal effect of the pleading. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1467-1468.) Appellant offers no clue in its brief how its pleading might be amended to show a fiduciary relationship between itself and the Bank. Without such a showing, there is no basis for granting leave to amend.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.