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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SUZY FRANK GERBASI,

Plaintiff and Appellant,

v.

PHH HOME LOANS, LLC,

Defendant and Respondent.

B240288

(Los Angeles County
Super. Ct. No. SC113994)

APPEAL from a judgment of the Superior Court of Los Angeles County.

H. Chester Horn, Jr., Judge. Affirmed.

Robert Hindin & Associates, Robert Marc Hindin for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton, Jon D. Ives for Defendant and Respondent.

Appellant contends the trial court erred by sustaining a demurrer without leave to amend. We find that the complaint's allegations clearly establish appellant's claims are barred by the statute of limitations. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Allegations

Plaintiff and appellant Suzy Frank Gerbasi knew Ian Mitchell for almost 20 years.¹ Mitchell worked for defendant and respondent PHH Home Loans, LLC, dba First Capital (First Capital). Gerbasi, who deals in real estate, frequently referred her clients to Mitchell and First Capital to obtain loans for their real estate purchases.

In June 2008, Mitchell contacted Gerbasi and urged her to make a three-month term loan in the principal amount of \$270,000 to his "friend," Shannon Masjedi. Mitchell told Gerbasi that the money was for Masjedi to invest in a business in Florida and that Gerbasi would receive interest payments in addition to repayment of the principal. Gerbasi agreed to make the loan and delivered \$270,000 to Mitchell, who prepared a promissory note.

In around late June, Gerbasi was given a promissory note secured by deed of trust (the note) in the amount of \$270,000, which called for monthly interest-only payments in the amount of \$2,700, beginning on June 30, 2008, until the principal sum became due on September 30, 2008. The interest on the loan was 24 percent, the note was signed by both Masjedi and Mitchell as borrowers receiving the proceeds of the loan, and the note stated that First Capital was paid \$8,700.65 in commission as the brokerage arranging the loan. Gerbasi had not been advised by Mitchell that he would be a borrower. She also had not been told that the interest rate for the loan would be usurious, or that First Capital would receive a commission.

¹ The allegations are taken from Gerbasi's complaint. On review of a demurrer, we treat all properly pleaded facts as true. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

In early July, Gerbasi received a Housing and Urban Development statement and, for the first time, discovered that the \$270,000 loaned to Masjedi was not for business use, but was instead paid to an entity called Mam Wealth Management Real Estate Fund I, L.P. (Mam Wealth) to resolve a debt owed by Masjedi. According to the complaint, “Mitchell lied about the use of the money, failed to disclose himself as a borrower on the Note, did not advise plaintiff about the usurious interest rate and fabricated statements about Masjedi’s honesty.” Gerbasi received only one payment against the note in the amount of \$2,700, after the initial check was returned and marked “NSF.” Mitchell and Masjedi both filed for bankruptcy.

Procedural Posture

Gerbasi filed a complaint against First Capital on August 31, 2011, for fraud (deceit), negligent misrepresentation, and breach of fiduciary duty. First Capital filed a demurrer to the complaint arguing, among other things, that the complaint was barred by the statute of limitations. The trial sustained the demurrer without leave to amend, and judgment was entered against Gerbasi on January 30, 2012.

Gerbasi timely appealed.

DISCUSSION

We review a ruling sustaining a demurrer de novo, exercising independent judgment on the issue of whether the complaint states a cause of action as a matter of law. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) We give the complaint a reasonable interpretation, treating the demurrer as admitting all material facts properly pleaded, but not assuming the truth of contentions, deductions or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) A demurrer tests the legal sufficiency of the complaint. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) As such, we are not concerned with the difficulties a plaintiff may have in proving the claims made in the complaint. (*Desai*, at p. 1115.)

On appeal, Gerbasi argues that the complaint’s causes of action sound in fraud, which has a three-year statute of limitations. (Code Civ. Proc., § 338, subd. (d).) First

Capital contends that Gerbasi's complaint was filed more than three years after the statute of limitations began to run, and is therefore time-barred.

When a complaint shows on its face that it is barred by the statute of limitations, the defense may properly be asserted by demurrer. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315; *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174.) The complaint's defect "must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred." (*E-Fab, Inc.*, at p. 1316; *Czajkowski*, at p. 174.)

A cause of action accrues when all elements are complete, at which time the statute of limitations begins to run. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.) "The well-established common law elements of fraud which give rise to the tort action for deceit are: (1) misrepresentation of a material fact (consisting of false representation, concealment or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to deceive and induce reliance; (4) justifiable reliance on the misrepresentation; and (5) resulting damage." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 481.) Gerbasi filed her complaint on August 31, 2011. In order for her fraud cause of action to be timely, therefore, it had to accrue no earlier than August 31, 2008. (See Code Civ. Proc., § 338, subd. (d).)

We find that Gerbasi's complaint clearly discloses her claim is barred by the statute of limitations. "[T]he infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period." (*Davies v. Krasna* (1975) 14 Cal.3d 502, 514.) Per her complaint, Gerbasi was to receive monthly interest payments beginning on June 30, 2008. Thus, at least two payments were due before August 31, but Gerbasi only received one payment, after the original check was returned because of insufficient funds. The missed payment was actual harm sufficient to commence the statutory period.

Nevertheless, Gerbasi contends that she did not discover the fraud until around September 30, 2008, when the principal amount of the loan was to be repaid but was not. "Under the 'delayed discovery rule,' . . . the accrual date of a cause of action is delayed

until the plaintiff is aware of his or her injury and its cause. The plaintiff is charged with this awareness as of the date he or she suspects or should suspect that the injury was caused by someone's wrongful act. The period of limitations, therefore, will begin to run when the plaintiff has a 'suspicion of wrongdoing'; in other words, when he or she has notice of information of circumstances to put a reasonable person on inquiry."

(*Brandon G. v. Gray* (2003) 111 Cal.App.4th 29, 35.) "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111.)

Gerbasi's pleadings belie her claim of delayed discovery. Gerbasi premises her fraud claim on a number of deceitful representations. She alleges, among other things, that: (i) the loan was supposed to be only for Masjedi, but Mitchell executed the note as well; (ii) Gerbasi was not told that First Capital would be receiving a commission; (iii) Gerbasi was not informed that the interest rate stated in the note would be usurious; and (iv) Gerbasi was told that the loan was for a business in Florida, but Masjedi used the money to resolve a debt owed to Mam Wealth instead. The complaint shows that Gerbasi learned of all of these issues, at latest, by July 2008, when she received the HUD statement. By that time, a reasonable person in Gerbasi's position would have been put on inquiry of a potential wrongful act. The statute thus began running by July 2008, and Gerbasi's complaint, filed on August 31, 2011, was untimely.

Finally, Gerbasi argues that she should be allowed to amend her complaint to strengthen her claim of delayed discovery. To establish that the trial court abused its discretion in denying leave to amend, Gerbasi "must show in what manner the complaint could be amended and how the amendment would change the legal effect of the complaint, i.e., state a cause of action." (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 992.) Gerbasi has failed to make this showing. A plaintiff cannot avoid the defects of her original complaint merely by omitting them from her amended complaint. (*Vallejo*

Development Co. v. Beck Development Co. (1994) 24 Cal.App.4th 929, 946.) Gerbasi does not state how she can amend her complaint to explain away her imputed discovery of wrongdoing in July 2008. Accordingly, there is no basis to grant leave to amend.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.