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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

RAMON TEJEDA et al., Plaintiffs and Appellants, v. WELLS FARGO BANK, N.A., Defendant and Respondent.	B277568 (Los Angeles County Super. Ct. No. KC067991)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dan Thomas Oki, Judge. Affirmed.

Law Offices of Charles T. Marshall and Charles T. Marshall for Plaintiffs and Appellants.

Severson & Werson, Jan T. Chilton and Kerry W. Franich, for Defendant and Respondent.

INTRODUCTION

Plaintiffs Ramon and Antonia Tejeda appeal the trial court's judgment sustaining defendant Wells Fargo, N.A.'s (Wells Fargo) demurrer without leave to amend. Plaintiffs assert the court erred because they alleged sufficient facts to prove fraud and wrongful foreclosure. Plaintiffs also contend that they could amend to allege an additional cause of action for cancellation of instruments. We affirm the trial court's decision to sustain the demurrer without leave to amend because plaintiffs failed to allege a basis to void the deed of trust and failed to allege they were damaged.

FACTS AND PROCEDURAL BACKGROUND

Because this case comes to us on demurrer, we base our recitation of the facts on the operative complaint. "All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law. . . ." (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

1. *Deed of Trust on Plaintiffs' Property and Plaintiffs' Default*

In February 2007, plaintiffs obtained a loan secured by a deed of trust encumbering a property they owned in La Puente, California. The deed of trust identified Wells Fargo Financial California, Inc. (WFFC) as the lender and beneficiary. Plaintiffs thereafter defaulted on their monthly payments. In July 2014, Barrett Daffin Frappier Treder & Weiss was substituted as the new trustee under plaintiffs' deed of trust. An employee of defendant Wells Fargo signed the notice of substitution. The substitution document identified defendant Wells Fargo as the

loan servicer for WFFC.[1] The new trustee recorded a notice of default in July 2014, followed by notice of trustee's sale in October 2014 and a second notice in October 2015. The sale has yet to occur.

2. *Plaintiffs' Lawsuit Against Wells Fargo*

Plaintiffs sued defendant Wells Fargo, the loan servicer for WFFC in October 2015. Plaintiffs did not sue WFFC, the beneficiary on the deed of trust. Wells Fargo demurred to the complaint. The trial court sustained that demurrer and granted leave to amend.

Plaintiffs filed a first amended complaint against Wells Fargo in April 2016, alleging intentional misrepresentation and wrongful foreclosure. Plaintiffs' central allegation was that WFFC did not fund the loan; plaintiffs described this arrangement as a "table loan." Plaintiffs did not identify the party that loaned the funds or provide any other facts to support this allegation. Plaintiffs admitted they obtained the loan funds for their home, but complained that WFFC was merely "act[ing] as a broker for an unknown principal."

Wells Fargo demurred again and the trial court sustained the demurrer without leave to amend. The trial court found that plaintiffs failed to state a claim for fraud (misrepresentation) or wrongful foreclosure because they could not allege that they were damaged. The court stated: "Plaintiffs admit that their loan was funded, and they received the benefit of the loan. It is unclear

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[1] Under Civil Code section 2924, subdivision (a), the "trustee, mortgagee, or beneficiary, or any of their authorized *agents*" can initiate nonjudidical foreclosure proceedings. (Italics added.)

how [p]laintiffs were damaged." The court entered judgment in July 2016.[2]

DISCUSSION

1. *Standard of Review*

We review de novo the court's order sustaining the demurrer. (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 486.) "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.' Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [citations omitted].) When the demurrer "is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Ibid.*)

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[2] We observe that plaintiffs filed for bankruptcy in 2010, and the bankruptcy court granted plaintiffs' discharge that year. Wells Fargo requested that we take judicial notice of the bankruptcy filings as part of its judicial estoppel argument. As we decide this appeal on other grounds, we decline to take judicial notice of the bankruptcy papers.

2. *Plaintiffs Failed to Allege Facts Showing the Deed of Trust Was Void*

In support of their cause of action for wrongful foreclosure and their proposed amended cause of action for cancellation of instruments, plaintiffs assert that the deed of trust is void because it is based on a "table funded" loan. A "borrower may base a wrongful foreclosure claim on allegations that the foreclosing party acted without authority," like where the deed of trust is void. (*Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 929-930.) Similarly, "To prevail on a claim to cancel an instrument, a plaintiff must prove the instrument is void or voidable." (*U.S. Bank National Assn. v. Naifeh* (2016) 1 Cal.App.5th 767, 778.) Central to both causes of action is that the mortgage on plaintiffs' La Puente home was table funded, a practice that plaintiffs claim voids the deed of trust.

" 'Table-funding' is defined as a 'settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.' [Citation.] In a table-funded loan, the originator closes the loan in its own name, but is acting as an intermediary for the true lender, which assumes the financial risk of the transaction. The timing of the assignment is therefore sometimes pivotal in determining whether a residential mortgage loan is table-funded because the determinative question is who bears the risk of the transaction." (*Easter v. Am. West Fin.* (9th Cir. 2004) 381 F.3d 948, 955 (*Easter*).) Stated slightly differently, "[t]able funding occurs when a transaction is consummated with the debt obligation initially payable by its terms to one person, but another person provides the funds for the transaction at consummation and receives an immediate assignment of the

note, loan contract, or other evidence of the debt obligation." (*Compass Bank v. Petersen* (C.D. Cal. 2012) 886 F.Supp.2d 1186, 1191.) The single published California case defining table funding likewise describes " 'table funding' arrangements" as the situation "where the bank funds the loan at settlement when it takes assignment of the loan." (*Akopyan v. Wells Fargo Home Mortgage, Inc.* (2013) 215 Cal.App.4th 120, 152.)[3]

Plaintiffs' table funding allegations fail for two reasons. First, we observe that plaintiffs have not alleged assignment of the deed of trust to the "actual" lender. As explained by the 9th Circuit in *Easter, supra,* 381 F.3d at page 955, assignment appears to be an integral aspect of a table loan because assignments that occur quickly after or simultaneously with funding the loan evidence the existence of a table loan. According to plaintiffs' first amended complaint, the beneficiary remains WFFC on the deed of trust and the deed of trust was never assigned. Therefore, it is questionable whether plaintiffs have even alleged a table funded loan.

Second, plaintiffs have failed to provide a legal basis for voiding the deed of trust based on table funding allegations. Plaintiffs assert the alleged table funding voids the deed of trust pursuant to California law. Plaintiffs provide no competent authority for this contention. Rather, plaintiffs cite the California Department of Real Estate's Reference Book; Financial Code sections 22161, 22753, 22780, and 50003; Penal Code, section 1170; Civil Code, section 1667; California Code of

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[3] Plaintiffs assert that "Federal and California law are consistent with the definition of table funding but not identical." Plaintiffs provide no citation to California statutes or case law defining table loans.

Regulations, title 10, sections 1460 and 2841.5; and Business and Professions Code sections 10131.1, 10233.2, 10234, and 10234.5.

We find none of these authorities germane to this case. Although the California Department of Real Estate's Reference Book states that table funding by a real estate broker is unauthorized by California law, none of the statutes cited by the Reference Book or by plaintiffs stands for the principal that table loans provide a ground to void a deed of trust or enjoin a foreclosure sale. Financial Code section 50003, subdivisions (o) and (t) merely define the terms "makes or making residential mortgage loans" and "own funds." Financial Code section 22161 states that no person governed by the division shall make a false statement to a borrower. Financial Code sections 22753 and 22780 and Penal Code section 1170 describe fines and imprisonment terms for violating California financing laws. Civil Code section 1667 defines "unlawfulness" as contrary to law. California Code of Regulations, title 10, sections 1460 and 2841.5 discuss selling secured loans to institutional investors and recording trust deeds. Business and Professions Code section 10131.1, 10233.2, and 10234.5 describe a real estate broker, discuss servicing and delivering promissory notes, and mandate delivery of the deed of trust to particular parties. None of these statutes authorizes a borrower to void a deed of trust based on table funding.

Finally, Business and Professions Code section 10234 (the principal statute relied on by the Department of Real Estate for its authority to regulate table loans) requires real estate brokers who negotiate mortgage loans to close those residential mortgage loans in the name of the lender, rather than the real estate broker's own name. (See California Department of Real Estate,

Reference Book (2010) Real Estate Finance, Ch. 12, p. 237.) Notably, section 10234 provides no remedy for the borrower. In addition to not expressly providing a remedy to borrowers, the statutory scheme suggests that it is only regulatory in nature. (See Bus. & Prof. Code, § 10232.2, subd. (a)(1) [requiring real estate brokers to file reports with the Bureau of Real Estate at the end of each fiscal year about "the receipt and disposition of all funds of others to be applied to the making of loans and the purchasing of promissory notes or real property sales contracts"].) The legislative history of the section 10234 also indicates that table loan funding is a matter to be regulated by the Department of Real Estate. (See Assem. Com. on Banking and Financing, Bill Analysis on AB1203 (1997-1998 Reg. Sess.) January 12, 1998, pp. 1-2 [describing how in 1998, the Department of Real Estate changed its interpretation of section 10234 and its regulation of table funding transactions under that statute].)

Plaintiffs also assert that the loan is void under the Civil Code. Their argument is that because WFFC did not use its own funds, it failed to provide "sufficient consideration" in violation of the Civil Code. Yet, plaintiffs do not allege that they did not receive consideration for executing the note. On the contrary, they admit that they received $367,500.00 in loan funds. Plaintiffs' allegation that WFFC did not provide consideration is also contradicted by the exhibits attached to their complaint. As the reviewing court on a demurrer, we consider all evidentiary facts found in recitals or exhibits attached to the complaint, and "[i]f facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence." (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.) Here, the deed

of trust attached to the complaint specifically identifies WFFC as the "lender."

Assuming the loan here was table funded, we find nothing in California's statutory scheme that authorizes a borrower to void a deed of trust based on table funding. Federal courts in California addressing nearly identical claims have come to the same conclusion. In *Grieves v. MTC Financial Inc.* (N.D. Cal., July 25, 2017, No. 17-CV-01981-LHK) 2017 WL 3142179, at pages *1-2, the plaintiff sued the beneficiary and trustee on the deed of trust for wrongful foreclosure (among other causes of action), alleging that the loan was table funded and therefore the deed of trust was void *ab initio*. In granting the defendants' motion to dismiss, the district court held that plaintiff's claim lacked merit because "the Court is not aware of any authority suggesting that the remedy for a violation of [section] 10234 would be a cancellation of [plaintiff]'s Deed of Trust." (*Id.* at p. *12, fn. 1.)

Similarly, in *Palmer v. MTC Financial, Inc.* (E.D. Cal., May 26, 2017, No. 1:17-CV-00043-DAD-SKO) 2017 WL 2311680, at pages *1-2, the plaintiffs sued for wrongful foreclosure and cancellation of instruments. The plaintiffs claimed "the foreclosure sale of their home was wrongful and void because the original deed of trust was invalid and the product of an illegal table-funded loan whereby [the beneficiary on the deed of trust] was not the actual lender, but instead acted as a broker to bring in anonymous outside funding from a third party." (*Id*. at p. *2.) The district court concluded that the legislative history of Business and Professions Code section 10234 indicated that there were "no consumer implications" for the statute. (*Id.* at p. *4.)

We also observe that where the table funding results in a kickback from the true lender to the ostensible lender, the transaction may violate the Real Estate Settlement Procedures Act (RESPA). (12 U.S.C. § 2607(a), (b) [Congress enacted RESPA to protect home buyers "from unnecessarily high settlement charges caused by certain abusive practices" by eliminating "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services."].) Violations of RESPA can result in damages, a fine, or a year of imprisonment. (12 U.S.C.A. §§ 2605, 2607.) Nothing in RESPA suggests that borrowers may void the deed of trust or stop the foreclosure sale.[4] (*Tamburri v. Suntrust Mortg., Inc.* (N.D. Cal. 2012) 875 F.Supp.2d 1009, 1013 [RESPA does not provide for injunctive relief; RESPA provides relief via damages]; see also *Palmer v. MTC Financial, Inc., supra,* 2017 WL 2311680 at p. *5 [civil remedies under RESPA are limited to treble damages and attorneys fees].)

Plaintiffs' sole theory for their wrongful foreclosure and cancellation of instrument causes of action is that the alleged table loan voided the deed of trust. We conclude neither of plaintiffs' allegations nor existing law supports their theory to amend.

3. *Plaintiffs Failed to Allege Damage to Support a Claim for Fraud*

Lastly, we address plaintiffs' fraud claim. The elements of fraud are " ' (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Lazar v.*

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[4] Plaintiffs do not allege a cause of action under RESPA.

Superior Court (1996) 12 Cal.4th 631, 638.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] 'Thus " 'the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect." ' [Citation.] [¶] This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' " (*Id. at p.* 645.)

Plaintiffs solely stated in their first amended complaint that they "reasonably relied upon [the notice of default's] genuineness as a public record," that "they have been harmed as a direct and proximate result of Defendant's acts and material omissions," and that they "were harmed by the unauthorized acceleration of their debt and by their making of all payments to a fictitious payee [Wells Fargo]." On appeal, plaintiffs assert that they "were damaged by being induced into a transaction with an unknown party, which is considered a deceptive and unfair business practice and a violation of California law. Prejudice and harm arises when the wrong party demands payments, and seeks to foreclose when they are not in fact, the beneficial holder of the debt."

Plaintiffs failed to state facts that show a specific injury to support their fraud claim. (*Furia v. Helm* (2003) 111 Cal.App.4th 945, 956.) Even if we assume the loan is table funded and that table funding theoretically could invalidate a deed of trust, plaintiffs have suffered no harm by any so-called fraudulent conduct even if the "wrong" party initiated foreclosure. Plaintiffs have no basis to void their deed of trust. The deed of trust attached as exhibit one to their first amended complaint shows that WFFC is the named beneficiary of this loan. Plaintiffs admit

that the loan has not been assigned to another beneficiary. WFFC is therefore the only entity who can direct the trustee to foreclose and hold plaintiffs accountable for their loan. As the trial court aptly found, "Plaintiffs admit that their loan was funded, and they received the benefit of the loan. It is unclear how Plaintiffs were damaged." We agree. Since plaintiffs cannot allege damage, the trial court properly sustained the demurrer without leave to amend on the fraud cause of action as well.

DISPOSITION

We affirm the judgment. Defendant Wells Fargo, N.A. is awarded costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.