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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LEANDRA R. ALE, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A. et al., Defendants and Respondents.	B276864 (Los Angeles County Super. Ct. No. BC598837)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

MLG Law Group, Alexander Moussazadeh for Plaintiff and Appellant.

Nussbaum APC, Sandra Stevens, Severson and Werson, Jan T. Chilton, Kerry W. Franich, Elizabeth C. Farrell for Defendants and Respondents.

Plaintiff homeowner's legal strategy, initially to stave off foreclosure and then to unwind it and quiet title in her name, failed when the trial court sustained defendants' demurrers without leave to amend. Plaintiff appeals from the ensuing judgment. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In May 2006, in connection with home financing, plaintiff Leandra L. Ale signed a promissory note for $495,900, secured by a deed of trust on the property. Defendant Wells Fargo Bank, N.A. (Wells Fargo), as lender and beneficiary, recorded the deed of trust on May 10, 2006. The deed of trust was exhibit A to the FAC.

On January 29, 2014, Wells Fargo recorded an assignment of "all beneficial interest under that certain deed of trust, together with all interest, all liens, and any rights due or to become due thereon" to "HSBC Bank USA, National Association as Trustee for Wells Fargo Home Equity Asset-Backed Securities 2006-2 Trust, Home Equity Asset Backed Certificates, Series 2006-2 [HSBC]" That document was recorded on the same date and was exhibit B to the FAC.

Although it was not clear from the allegations in the first amended complaint (FAC), all parties agree plaintiff fell behind in her payments and was facing foreclosure. On August 26, 2015, plaintiff mailed Wells Fargo a rescission letter pursuant to the federal Truth in Lending Act (TILA) (15 U.S.C. § 1601 et seq.).[1]

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[1] Unless otherwise indicated, all statutory references are to TILA.

This letter was exhibit D to the FAC. In bold capital letters, the letter read:

> I HEREBY EXERCISE MY RIGHT TO RESCIND THE LOAN TRANSACTION IN ITS ENTIRETY UNDER THE USURY AND GENERAL CLAIMS THEORIES AND CAUSES OF ACTION. BY FAILING TO DISCLOSE THE TRUE LENDER AND USING SUBTERFUGE TO HIDE THE FACT THAT THE "LENDER" AT CLOSING WAS PAID TO POSE AS THE LENDER WHEN IN FACT AN UNDISCLOSED UNREGISTERED THIRD PARTY HAD RENTED THE CHARTER OR LENDING LICENSE OF THE "LENDER," THE LIMITATION ON MY RIGHT TO RESCIND WAS EXTENDED INDEFINITELY. UNDER STATE AND FEDERAL LAW, THE MORTGAGE IS NOW EXTINGUISHED AND YOUR RIGHTS UNDER THE TRUSTEE DEED, IF ANY HAVE TERMINATED.

Neither Wells Fargo nor HSBC responded to the letter.

Two months later, on October 23, 2015, plaintiff initiated this action against Wells Fargo and HSBC. The verified complaint included four causes of action: violation of TILA, quiet title, cancellation of instruments, and declaratory relief.

Plaintiff's home was foreclosed upon on November 13, 2015. DLI Properties, LLC (DLI) was the purchaser. On January 14, 2016, plaintiff filed the verified FAC (Code Civ. Proc., § 472),

adding DLI as a defendant to the quiet title, cancellation of instruments, and declaratory relief causes of action only.[2]

The TILA cause of action against Wells Fargo and HSBC was based on several theories. First, plaintiff alleged the failure by Wells Fargo and HSBC to initiate a lawsuit against her after she mailed the August 26, 2015 notice of rescission automatically validated the rescission. This meant "[p]laintiff's debt and security instruments were extinguished by operation of law and Defendants [had] no standing to challenge the already valid and effective rescission." Although plaintiff acknowledged Wells Fargo funded the loan, she alleged the transaction was never "consummated" because Wells Fargo did not reveal the source of the money she received. The assignment of the deed of trust was recorded in 2014, years after the closing date for the Wells Fargo securitized trust into which the debt was transferred and was, she alleged, accordingly void. Defendants addressed all the TILA theories and cited state and federal authority rejecting each of them.

Before the demurrers were argued, it appears plaintiff moved ex parte for a temporary restraining order to prevent defendants from selling the property or removing her and her family from the premises. The ex parte application was denied. Plaintiff then noticed an application for a temporary restraining order/preliminary injunction. That request was denied as "an improper Motion for Reconsideration."

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[2] Much of the FAC is written like a memorandum of points and authorities in support of a motion, with argument and citations. There are no paragraph numbers, for example, until page 15 of the pleading.

Defendants' demurrers were heard together. After a robust discussion on the record, which included arguments concerning whether amendments could cure the deficiencies, the trial judge sustained the demurrers without leave to amend. Judgment for defendants followed, and plaintiff timely appealed.

DISCUSSION

1. Standard of Review

For this appeal, "we accept the truth of material facts properly pleaded . . . but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 (*Yvanova*).) Additionally, "facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence." (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.)

2. Leave to Amend

In the typical appeal after a demurrer is sustained without leave to amend, we also "decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).) Plaintiff recited the *Schifando* language in her opening brief, but failed to suggest how she might amend the FAC or that the trial court erred in denying her leave to amend. The reply brief was silent as to amending the pleading. At oral argument, however, plaintiff's counsel urged this court to reverse the judgment so that she may amend. We decline to do

so: "New issues cannot generally be raised for the first time in oral argument. [Citation.] Furthermore, [plaintiff] offered no authority demonstrating that these new causes of action are viable, nor did [she] offer any facts in support . . . ." (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1098; see also *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.)

3. Waiver of Issues on Appeal

In her opening brief, plaintiff did not challenge the sustaining of the demurrers to the second, third and fourth causes of action (quiet title, cancellation of "void documents," and declaratory relief). Defendants assert she has waived these issues in this court. We agree. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4; *Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007.) Accordingly, we do not discuss trial court's ruling on the second, third or fourth causes of action.

With the failure to address these issues, plaintiff has not asserted any appellate claims as to DLI. The only issue before this court is the viability of her lawsuit under TILA against Wells Fargo and HSBC for rescission and damages, as pleaded in the FAC.

4. TILA

Under certain circumstances, TILA authorizes a borrower to rescind the loan agreement and receive damages and attorney fees. Section 1635 describes the consumer credit transactions to which a right of rescission may apply. Section 1640 addresses damages. Plaintiff's Wells Fargo loan was a qualifying

transaction, and she sought both remedies. As the trial court found, however, she sought them too late.

A. Rescission

Section 1635 contains the rescission provisions for consumer credit transactions in which the borrower's principal dwelling is security for the loan. Rescission provides a powerful remedy for borrowers. A borrower who timely exercises this right to rescind "'is not liable for any finance or other charge, and any security interest given by [her], including any such interest arising by operation of law, becomes void' upon rescission. (§ 1635(b).) Within 20 days after receiving [a timely] notice of rescission, the lender must 'return to the [borrower] any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.' (§ 1635(b)." (*Beach v. Ocwen Federal Bank* (1998) 523 U.S. 410, 412-413 (*Beach*).)

The right to rescind must be in writing. (*Jesinoski v. Countrywide Home Loans, Inc.* (2015) ___ U.S. ___, ___ [135 S.Ct. 790, 792] (*Jesinoski*).) There is a three-day period within which "borrowers [have] an unconditional right to rescind." (*Ibid.*) After three days, the right to rescind is conditional and may be exercised "only if the lender failed to satisfy [TILA's] disclosure requirements." (*Ibid.*)

The conditional right to rescind is found in section 1635(f).[3] There are statutory exceptions, but none applies here. The

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[3] Section 1635(f) is the codification of section 125(f) of the Truth in Lending Act. Counsel have used the numbers interchangeably. To avoid confusion, we will use section 1635(f).

pertinent portion of section 1635(f) reads as follows: "An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter [15 USCS §§ 1631 et seq.] have not been delivered to the obligor . . . ."[4]

Jesinoski, supra, 135 S.Ct. 790 explained "this conditional right to rescind does not last forever. Even if a lender *never* makes the required disclosures, the 'right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever comes first.'" (*Id*. at p. 792.)

This statement in *Jesinoski, supra,* 135 S.Ct. 790 harkened back to *Beach, supra,* 523 U.S. 410. In *Beach,* the borrowers attempted rescission six years after their loan funded, asserting it as an affirmative defense to the lender's foreclosure proceedings. The Supreme Court held the borrowers' right to rescind lapsed before they gave the TILA notice: "Section 1635(f), however, takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the

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[4] "This right of rescission is further explained in Section 226.23(a)(3) of Regulation Z of the Federal Reserve Board: [¶] The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice [of the right to rescind], or delivery of all material disclosures, whichever occurs last. *If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation."* (*Jackson v. Grant* (9th Cir. 1989) 890 F.2d 118, 120 (*Jackson*).)

underlying right as well. The subsection says nothing in terms of bringing an action but instead provides that the 'right of rescission [under the Act] shall expire' at the end of the time period. It talks not of a suit's commencement but of a right's duration, which it addresses in terms so straight-forward as to render any limitation on the time for seeking a remedy superfluous." (*Beach, supra,* 523 U.S. at p. 417.) Leaving no doubt, the Supreme Court also wrote, "We . . . hold that § 1635(f) completely extinguishes the right of rescission at the end of the 3-year period." (*Id.* at p. 412.)

Plaintiff obtained the Wells Fargo loan in May 2006. She did not send the TILA rescission letter until August 2015. By that date, she no longer had any right to rescind.

Plaintiff, however, ignores the clear language in section 1635(f) and the directives in *Beach, supra,* 523 U.S. 410 and *Jesinoski, supra,* 135 S.Ct. 790. Instead, without citation to authority, she maintains the timing of a notice of rescission is irrelevant. She argues defendants' failure to respond to the years-late notice completely revives and validates her right to rescind: "The trial court and Appellees have made arguments that the time for Appellant to rescind has expired, that the three years has run, or that the rescission is faulty because of other restrictions in TILA. Regardless of their reasons, the rescission is nonetheless effective and requires no judge to rule upon its effectiveness. The burden of proof of its effectiveness rests completely on the party seeking to vacate the rescission. Appellees WELLS FARGO and/or HSBC failed to file a lawsuit against Appellant within the mandatory twenty days. Because Appellees failed to take mandatory actions, Appellant's rescission stands and since Appellees have failed to comply with the statute

for over a year, they have lost any right to collect on the debt because there is no debt. It is eradicated and the foreclosure that occurred on November 12, 2015 is void."

Essentially, plaintiff argues a borrower can send a written rescission at any time and if the lender ignores it, then the conditional right to rescind, which is extinguished by operation of law after three years, is brought back to life. We disagree.

Alternatively, plaintiff seeks to avoid this outcome by arguing the three-year rescission period was equitably tolled. She cites no apt authority for this contention, which runs afoul of *Beach, supra,* 523 U.S. 410 and *Jesinoski, supra,* 135 S.Ct. 790.

She also argues the Wells Fargo loan was never "consummated" within the meaning of TILA, so the three-year statute of limitations never started to run. The argument contradicts the verified allegations in the FAC, but it too fails for a fundamental reason: If there were no loan, there would be nothing to rescind and TILA simply would not apply.

In any event, "consummation" is a defined word in the federal regulations. It means "the time that a consumer becomes contractually obligated on a credit transaction." (12 C.F.R. § 1026.2(a)(13).) Consummation is determined according to state law. (*Jackson, supra,* 890 F.2d 118 at p. 120.) For this California plaintiff, consummation occurred on the date the loan closed and funded. (See, e.g., *Raceway Ford Cases* (2016) 2 Cal.5th 161, 171.)

On appeal, plaintiff makes only passing reference to the legal conclusion in the FAC that the 2014 assignment of the deed of trust was void. Her argument is based on an assumption that an assignment of the promissory note "was executed on the same date as the Assignment of Deed of Trust. . . . A review of the

records in the Los Angeles County Recorder's Office revealed no evidence of any Assignment of Note ever being recorded."

One fallacy of this argument is that there is no requirement to record an assignment of a promissory note. The absence of a recording suggests nothing in terms of when a promissory note is assigned. A second is that the recording date of an assignment of a deed of trust need not bear any relationship to the date of the assignment. (Civ. Code, § 2934.) And finally, the argument contradicts allegations in the verified FAC, where plaintiff alleged Wells Fargo timely sold the note to the securitized trust (HSBC) in June 2006.

The securitized trust issue has been the subject of several published decisions, most notably *Yvanova, supra,* 62 Cal.4th 919. There, the Supreme Court observed, "the deed of trust . . . is inseparable from the note it secures, and follows it even without a separate assignment." (*Id.* at p. 927.) After foreclosure, a borrower may challenge a void assignment, but not one that is merely voidable. (*Id.* at p. 939.)

We do not accept plaintiff's bare conclusion that the assignment to the securitized trust was void. Plaintiff has not suggested any facts to support that conclusion, nor has she attempted to distinguish the appellate decisions that uniformly find these assignments voidable, not void. (See, e.g., *Yhudai v. IMPAC Funding Corporation* (2016) 1 Cal.App.5th 1252; *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808.)

B. Damages

TILA authorizes individual actions for damages and attorney fees against "any creditor who fails to comply with any

requirement imposed under this chapter [15 USCS § 1631], including any requirement under section 125 [15 U.S.C. § 1635], subsection (f) or (g) of section 131 [15 USCS § 1641] or chapter 4 or 5 of this title . . . ." (15 U.S.C. § 1640(a).) State courts have concurrent jurisdiction with federal courts. The statute of limitations for these lawsuits is one year "from the date of the occurrence of the violation." (15 U.S.C. § 1640(e).)

Section 1641(g)(1) provides in part, "In addition to other disclosures required by this title, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer . . . ." This provision was enacted and became effective in 2009. It does not apply to sales or transfers of loans made before its effective date. (*Talaie v. Wells Fargo Bank, NA* (9th Cir. 2015) 808 F.3d 410, 412 (*Talaie*).)

If, as the verified FAC alleges, Wells Fargo transferred the loan into the securitized trust in June 2006, then the transfer predated the amendment by three years and is not subject to TILA. (*Talaie, supra,* 808 F.3d at p. 413) If the recording of the assignment of the deed of trust on January 29, 2014 were the triggering event, then plaintiff had only one year from that date to initiate this action. The original complaint was not filed until October 23, 2015.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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