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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FRANK DEVILLE et al.,

Plaintiffs and Appellants,

v.

WELLS FARGO HOME
MORTGAGE et al.,

Defendants and Respondents.

B293129

(Los Angeles County Super. Ct.
No. BC678763)

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

Frank Deville, in pro. per., and Dee Deville, in pro. per., for Plaintiffs and Appellants.

Severson & Werson, Jan T. Chilton, Kerry W. Franich for Defendants and Respondents.

Frank Deville and another fell behind on mortgage payments to Wells Fargo Home Mortgage. They modified their mortgage. The bank has not foreclosed on their home.

Deville sued the bank and two of its employees. We refer to all defendants as Wells. Deville alleged Wells unlawfully increased the term of the mortgage from 30 to 50 years, failed to record some mortgage payments, and placed payments in a suspense account.

Deville did not sue for breach of contract. Rather his first amended complaint alleges causes of action for negligence, fraud, and relief under Business and Professions Code section 17200.

The trial court rightly sustained Wells's demurrer against this first amended complaint without leave to amend.

On the first cause of action for negligence, the trial court ruled Wells did not owe Deville a tort duty of care. Deville argued *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941 (*Alvarez*) imposes a tort duty of care which Wells violated for the reasons stated in the first amended complaint. We recently disagreed with *Alvarez* and held a lender does not owe a borrower a tort duty of care during a loan modification negotiation. (*Sheen v. Wells Fargo Bank, N.A.* (2019) 38 Cal.App.5th 346, 348.) We stand by this precedent, which dooms this negligence count.

On count two, the trial court correctly dismissed the fraudulent concealment cause of action because Deville did not properly allege its elements. Plaintiffs must allege fraud with particularity. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.) The earmark of fraud is scienter—the intention to trick. Deville's first amended complaint did not include even a general allegation about this element. That complaint likewise

did not allege who made what statements when. The trial court rightly sustained the demurrer to this cause of action.

The unfair competition claim failed for lack of a surviving underlying claim. (*AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.* (2018) 28 Cal.App.5th 923, 950.)

Deville's opening brief did not request leave to amend the pleadings.

The motion to augment is granted.

DISPOSITION

The judgment is affirmed. Costs to Wells.

WILEY, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.