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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CINDY JACOBS-SOTO, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A., et al., Defendants and Respondents.	2d Civil No. B268242 (Super. Ct. No. 1470043) (Santa Barbara County)

Cindy Jacobs-Soto appeals from a judgment on demurrer, entered after the trial court sustained, without leave to amend, respondent's Wells Fargo Bank, N.A. (Wells Fargo) demurrer to appellant's First Amended Complaint for predatory lending practices. We affirm and conclude appellant lacks standing to sue and is judicially estopped from bringing the action.[1]

[1] At oral argument, appellant, appearing in propria persona, said she was not ready to proceed and requested a continuance. This oral motion is denied.

Facts and Procedural History

In 2006, appellant obtained a $540,000 loan from Wells Fargo, secured by a deed of trust on her house at 41 Tinker Way, Santa Barbara. After appellant defaulted on the loan, a notice of default was recorded by the trustee, First American Title Insurance Company, on September 14, 2011.[2] Two notices of trustee's sale were recorded: the first on February 6, 2012 and the second on June 5, 2013. To date, no trustee's sale has occurred.

In February 2013, appellant filed a Chapter 7 bankruptcy petition listing Wells Fargo as a secured creditor. (United States Bankruptcy Court, Central District of California (Santa Barbara), Case No. 9:13-bk-10304-RR.) On May 20, 2013, appellant obtained a Chapter 7 discharge.

Appellant sued more than a year later, alleging that Wells Fargo wrongfully denied her a loan modification and had a practice of making loans to homeowners who cannot afford to repay them. The First Amended Complaint alleged causes of action for predatory servicing of the loan, unfair business practices, breach of covenant of good faith and fair dealing, cloud

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[2] First American Title Insurance Company was named as a defendant and filed a declaration of nonmonetary status pursuant to Civil Code section 2924l. As a trustee, it is a neutral in the litigation and is shielded from liability for damages, attorney's fees, or costs. (See Civil Code, § 2924l, subd. (d); *Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 104-105; 5 Miller & Starr, Cal. Real Estate (4th ed 2016) § 13:5, p. 13-36.) First American Title Insurance Company is not a party to the appeal but "joins" in Wells Fargo's brief and requests that the judgment be affirmed.

on title, declaratory relief, lack of standing to bring a trustee's sale, and declaration of lien priority.

Wells Fargo demurred to the First Amended Complaint, requesting that the trial court take judicial notice of the Chapter 7 bankruptcy petition, schedules, and discharge order. Sustaining the demurrer, the trial court ruled that appellant lacked standing to bring the action and the civil claims are part of the bankruptcy estate.

Standard of Review

The function of a demurrer is to test whether, as a matter of law, the facts alleged in the complaint state a cause of action under any legal theory. (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.) We assume the truth of all facts properly pleaded, as well as facts of which the trial court properly took judicial notice. (*Ibid.*) But we do not assume the truth of contentions, deductions or conclusions of law. (*Ibid.*) Our review of the trial court's decision is de novo. (*Ibid.*)

Standing to Sue

The trial court correctly ruled that the civil claims are part of the bankruptcy estate and that appellant lacks standing to sue. The filing of a bankruptcy petition "creates an estate . . . [which] is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case," including the debtor's causes of action. (11 U.S.C. § 541, subd. (a)(1); *Sierra Switchboard Co. v. Westinghouse Electric Corp.* (9th Cir. 1986) 789 F.2d 705, 707.) Pursuant to 11 U.S.C. § 541(a), lender liability claims that accrue prior to the filing of a bankruptcy petition are part of the bankruptcy estate and must be prosecuted by the bankruptcy trustee. (*Chanthavong v. Aurora Loan Servs.* (E.D.Cal. 2011) 448 B.R. 789, 797-798 [debtor

had no standing to pursue foreclosure claims arising prior to close of bankruptcy proceeding].)

The First Amended Complaint is based on pre-petition events in which appellant received a loan she could not repay and was denied a loan modification. The bankruptcy code placed an affirmative duty on appellant to list those civil claims in the bankruptcy schedules. (11 U.S.C. § 521(a); *Cusano v. Klein* (9th Cir. 2001) 264 F.3d 936, 945.) "If [appellant] failed properly to schedule an asset, including a cause of action, that asset continues to belong to the bankruptcy estate and [does] not revert to [appellant]. [Citations.]" (*Id.*, at pp. 945-946.) The trial court ruled that "[appellant's] bankruptcy schedules make absolutely no mention of her causes of action against Wells Fargo, although the claims clearly arose before [appellant] received her discharge in May 2013. Because [appellant's] causes of action against Wells Fargo remain part of the bankruptcy estate, [appellant] has no standing to assert the claims individually."

Appellant argues that she did not learn of the facts underlying the lender liability claim until after the bankruptcy petition was filed. This goes to the issue of when the cause of action accrued. (See, e.g., *Cusano v. Klein*, *supra*, 264 F.3d at p. 947.) To determine accrual, the courts look to the applicable state law. (*Ibid.*) Under California law, "[a] cause of action accrues 'when [it] is complete with all of its elements'—those elements being wrongdoing, harm, and causation. [Citation.]" (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.) Under this rule, a cause of action can accrue even if a party is ignorant of the fact that he has a cause of action or the statute of limitations is tolled. (See *Cusano v. Klein*, *supra*, 264 F.3d at p. 47; *State Farm Life Ins. Co. v. Swift* (5th Cir. 1997) 129 F.3d 792,

795-796; *Rose v. Dunk–Harbison Co.* (1935) 7 Cal.App.2d 502, 505–506.)

Here the action is based on alleged predatory lending and loan servicing activities that occurred years before appellant filed the bankruptcy petition. The First Amended Complaint alleges that Wells Fargo induced appellant to default on the mortgage and that the default occurred in September 2011, more than a year before the bankruptcy petition was filed. The trial court did not err in ruling that the causes of action are assets of the bankruptcy estate and appellant lacks standing to sue.

Judicial Estoppel

Appellant is judicially estopped from bringing the action because the lender liability claim is not listed in the bankruptcy schedules. (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1609-1610.) Judicial estoppel is an equitable doctrine that precludes a party from taking a position in a legal proceeding inconsistent with one previously asserted. (*Ibid.*; *Hamilton v. State Farm Fire & Cas. Co.* (9th Cir. 2001) 270 F.3d 779, 782-783.) It precludes a debtor from suing on a lender liability claim that was not previously disclosed in the debtor's bankruptcy proceeding. (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 160; *Billmeyer v. Plaza Bank of Commerce* (1995) 42 Cal.App.4th 1086, 1091-1092.)

The bankruptcy petition named Wells Fargo as a secured creditor, but failed to list any claim for lender liability. Appellant was represented by counsel in the bankruptcy proceeding and signed the petition and schedules under penalty of perjury. It is settled that a debtor seeking the benefits of bankruptcy must disclose and schedule all property interests and rights so the bankruptcy court and creditors can make an

informed decision about the debtor's proposed reorganization plan. (See *Billmeyer v. Plaza Bank of Commerce*, *supra*, 42 Cal.App.4th at p. 1092.) After the bankruptcy discharge order was issued, appellant sued on the same lender practices that allegedly caused the loan default and bankruptcy. Appellant is judicially estopped, having taken inconsistent positions in the bankruptcy proceeding to gain unfair advantage in the bankruptcy forum. (*Id.*, at pp. 1090-1092.)

Appellant claims that she did not discover all the facts before the bankruptcy discharge and points out that a notice of trustee's sale was not recorded until after the May 20, 2013 bankruptcy discharge order. Wells Fargo, however, recorded two notices of trustee's sale. The first notice was recorded February 6, 2012 more than a year before the bankruptcy discharge. Clearly appellant knew the factual basis for the lender liability claim before the bankruptcy proceeding concluded.

Fraud

Appellant contends that the trial court abused its discretion in not granting leave to amend to state a cause of action for fraud. We reject the argument because the fraud claim is barred by the three year statute of limitations and no facts are alleged to support a fraud claim. (Code Civ. Proc., § 338, subd. (d).) In California, fraud must be pled specifically; general and conclusory allegations do not suffice. (*Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1268; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 711, pp. 126-128.) "This particularity requirement necessitates pleading *facts* which 'show how, when, where, to whom, and by what means the representations were tendered.' [Citation.]" (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.) "A plaintiff's burden in asserting a fraud claim against a

corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.' [Citation.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.)

Assuming misrepresentations were made by Wells Fargo, they occurred well before the notice of default was recorded in September 2011. The First Amended Complaint states that the "predatory" servicing of appellant's loan occurred as early as 2009, four years before the bankruptcy petition was filed (February 6, 2013). Appellant stopped making mortgage payments and suffered financial harm but did not sue until December 22, 2014, more than three years after the fraud cause of action accrued.

Granting appellant leave to amend would be futile because the fraud claim is part of the bankruptcy estate. Appellant lacks standing to sue and the action is time barred. "The burden is on the plaintiff to demonstrate how he or she can amend the complaint. It is not up to the judge to figure that out. [Citation.]" (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 322.) This court cannot rewrite the complaint. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44.) The trial court did not abuse its discretion in sustaining the demurrer without leave to amend. (*Ibid.*)

Disposition

The judgment is affirmed. Wells Fargo is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN J.

James E. Herman, Judge

Superior Court County of Santa Barbara

Cindy Jacobs-Soto in Pro Per; Michie Law Firm, Dave Michie and Doug Michie, for Plaintiff and Appellant.

Severson & Werson, Kerry W. Franich and Jan T. Chilton, for Defendant and Respondent, Wells Fargo Bank, N.A.

First American Law Group, L. Bryant Jaquez and Patrick Reider, for Respondent, First American Title Ins. Co.