Filed 6/21/17 Fee v. Select Portfolio Servicing CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DAVID FEE,

Plaintiff and Appellant,

v.

SELECT PORTFOLIO SERVICING, INC., et al.,

Defendants and Respondents.

2d Civil No. B276238
(Super. Ct. No. 16CV00902)
(Santa Barbara County)

David Fee appeals judgment after an order sustaining without leave to amend the demurrer of Select Portfolio Servicing, Inc. (SPS) and U.S. Bank National Association as Trustee for WAMU Mortgage Pass Through Certificate for WMALT Series 2007-OA3 (U.S. Bank). By his complaint Fee sought, among other things, to rescind a mortgage loan under the federal Truth in Lending Act (TILA). (15 U.S.C. § 1601 et seq.) We affirm.

## BACKGROUND

In February 2007, Fee borrowed $1.53 million from Washington Mutual Bank, FA (WaMu) to finance a property in Santa Barbara. The loan documents identify WaMu as lender and California Reconveyance Company (CRC) as trustee. The note states, "I understand that the Lender may transfer this Note."[1]

In 2008, JPMorgan Chase Bank, N.A. (Chase) acquired WaMu's assets. In 2009, Fee stopped making payments on the loan. In 2010, Chase assigned the note and deed of trust to U.S. Bank. CRC, as trustee, initiated nonjudicial foreclosure proceedings.

Fee sued WaMu, Chase, and CRC for wrongful foreclosure and attempted to enjoin the foreclosure sale. (*Fee v. JPMorgan Chase Bank, N.A., et al.* (Nov. 19, 2012, B236531) [nonpub. opn.] (*Fee I*).) In *Fee I*, the trial court granted the defendants' motion for judgment on the pleadings without leave to amend, finding the chain of title and authority to foreclose were clearly established. We affirmed. (*Ibid.*) We rejected Fee's contention that the alleged securitization of his loan deprived U.S. Bank of its right to foreclose. We also rejected his contention he should be granted leave to amend to add a claim that U.S. Bank violated TILA when it did not notify him it

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[1] We accept as true the facts as alleged in Fee's complaint and we consider matters which may be judicially noticed. (*Blank v. Kirwin* (1985) 39 Cal.3d 311, 318.) These include the recorded documents and court records submitted in support of the demurrer, of which the trial court took judicial notice, and the adjustable rate note between the parties of which Fee requests we take notice.

assigned his note in 2010, in part because we concluded his TILA claim was time-barred.

In 2011, Fee filed for Chapter 7 bankruptcy. He did not list a TILA claim on his bankruptcy schedule. He was discharged in 2013.

In 2016, Fee filed this action against U.S. Bank and SPS for (1) declaratory relief concerning authority to foreclose, (2) negligence, (3) violations of the Homeowner's Bill of Rights, and (4) rescission and declaratory relief under TILA. Fee challenges the trial court's order only with respect to the TILA claim in this appeal.

In his TILA cause of action, Fee alleged he "hereby rescinds" the note and deed of trust. He acknowledged the unconditional right to rescind expires three days after the loan is "consummated," but alleged it was never consummated because "it is impossible for [Fee] to identify the true 'lender.'" He alleged WaMu was not the true lender because "an incomplete and defective securitization attempt occurred almost immediately after origination of the loan," WaMu "failed and went into receivership very shortly after the origination," and investors "common[ly] . . . use[d] minions like [WaMu] and other 'pretender lenders' to foist predatory and toxic loans on an unsuspecting public . . . ." He did not allege any specific violation of TILA's disclosure requirements.

SPS and U.S. Bank demurred on the ground each cause of action is barred by Fee's bankruptcy filing and by the judgment in *Fee I*, among other things. They argued the fourth cause of action for relief under TILA also fails to state a claim because it is time-barred, Fee is unable to tender, and Fee alleged no violations of TILA.

The trial court sustained SPS and U.S. Bank's demurrer to all causes of action on the ground the bankruptcy deprived Fee of standing because the claims belong to the estate and can only be prosecuted by the bankruptcy trustee. It found the TILA claim is time-barred because Fee brought it more than three years after he consummated the loan. (15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3) (2017).) It did not determine whether the TILA claim is barred by the doctrine of res judicata, but it noted that "Fee could have brought" the TILA claim in *Fee I*, "as he acknowledged in his argument before the Court of Appeal."

DISCUSSION

Fee does not challenge the trial court's conclusion that he lacks standing to bring a cause of action under TILA. (11 U.S.C. § 541(a)(1); *United States v. Whiting Pools* (1983) 462 U.S. 198, 205, fn. 9.) But he contends the court should have granted him leave to amend to substitute the bankruptcy trustee as plaintiff. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1005.) It makes no difference, however, whether Fee or the trustee is named as the plaintiff because the TILA claim is untimely and barred by the doctrine of res judicata. (*Id.* at p. 1011.)

TILA requires lenders of certain loans to make written disclosures about the amount financed, finance charges, and payments, among other things. (15 U.S.C. § 1601 et seq.; 12 C.F.R. pt. 226 (2017).) If a lender does not satisfy TILA's disclosure requirements, the borrower may rescind the loan anytime within three years of the "date of consummation of the transaction" by giving written notice to the lender. (15 U.S.C. § 1635(f); *Jesinoski v. Countrywide Home Loans, Inc.* (2015) 574 U.S. ___ [135 S.Ct. 790, 792] (*Jesinoski*).) Fee's loan was

consummated in 2007. In his 2016 complaint, he alleges that he "hereby rescinds" the loan. The claim is untimely. Section 1635(f) of title 15 United States Code extinguishes the right of rescission at the end of the three-year period. (*Beach v. Ocwen Federal Bank* (1998) 523 U.S. 410, 412.)

There is no merit to Fee's contention that the transaction was not "consummated" in 2007 because the true lender was not identified. A transaction is "consummated" for purposes of TILA as soon as the consumer becomes contractually obligated on the credit transaction. (12 C.F.R. § 226.2(a)(13) (2017).) Fee became obligated when he signed the loan documents. WaMu was identified as the lender, and the note disclosed that WaMu could assign the loan. The right to rescind expires after three years, "[e]ven if a lender never makes the required disclosure." (*Jesinoski*, *supra*, 135 S.Ct. at p. 792, italics omitted.)

This case is unlike *Jackson v. Grant* (9th Cir. 1989) 890 F.2d 118, 119 (*Jackson*) in which no contract formed because the lender's name was left blank. (Civ. Code, § 1558 [it is essential to the validity of a contract that the parties can be identified].) Fee argues WaMu was not the true lender because the loan may have been funded by another, undisclosed, entity. (*Easter v. Am. West Fin.* (9th Cir. 2004) 381 F.3d 948, 957 [a broker who arranges a table-funded loan and puts none of its money at risk is not a "lender" for purposes of a license requirement under Washington state usury laws].) But *Jackson* did not hold that all loans remain unconsummated as long as the ultimate source of the lender's funding remains unknown. (See *Ramos v. U.S. Bank* (S.D.Cal. Sep. 4, 2012, No. 12-cv-1820-IEG) 2012 U.S.Dist. Lexis 131564, *3, fn. 1.) Federal district courts

persuasively find that the loan is "consummated" if the loan documents identify a lender, regardless of how or by whom the lender was ultimately funded. (*Id*. at p. *4; *Mohanna v. Bank of America, N.A.* (N.D.Cal. May 2, 2016, No. 16-cv-01033-HSG) 2016 U.S.Dist. Lexis 58291, *14 ["district courts have unanimously found that a lender's use of an undisclosed third party to complete a secured transaction is insufficient to preclude consummation under TILA"].)

Fee cannot avoid TILA's time limit by arguing there was no meeting of the minds because he did not understand the payment terms of the loan. The terms of the loan are set forth in the note and the deed of trust he signed. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710 [one who assents to a contract is bound by its provisions and cannot complain of unfamiliarity with the language of the instrument].) This case is unlike *Grimes v. New Century Mortgage Corporation* (9th Cir. 2003) 340 F.3d 1007, 1010 in which evidence that the parties did not agree to the same interest rate created triable issues of fact whether a contract had been formed.

Fee's claim is also barred by the doctrine of res judicata because it could have been litigated in *Fee I*. That case involved the same parties and a party in privity, and the same primary right, and it was conclusively determined against Fee on the merits. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202.)[2]

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[2] We do not reach the questions (1) whether Fee is judicially estopped from raising the TILA claim because he did not list it as an asset on his bankruptcy schedule (*Hamilton v. State Farm Fire & Cas. Co.* (2001) 270 F.3d 778, 784); (2) whether he failed to state a cause of action because he did not

DISPOSITION

The judgment is affirmed. We grant Fee's unopposed request for judicial notice of the adjustable rate note between the parties, but deny his request for judicial notice of an unrecorded and unauthenticated copy of a billing statement. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

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allege ability to tender (15 U.S.C. § 1635(b); 12 C.F.R. § 226.23 (2017); *Yamamoto v. Bank of New York* (9th Cir. 2003) 329 F.3d 1167, 1171; see *Long v. JPMorgan Chase Bank, N.A.* (D.Hawaii 2012) 848 F.Supp.2d 1166, 1178 [noting split of authority whether plaintiff must plead ability to tender the amount of the loan]); or (3) whether he fails to state a cause of action because he did not specify any provision of TILA with which the lender did not comply.

Donna D. Geck, Judge

Superior Court County of Santa Barbara

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David Fee, in pro. per.; Holman & Martin and John Holman, for Plaintiff and Appellant. [*Retained*.]

Kutak Rock LLP, Jeffrey S. Gerardo, Steven M. Dailey and Antoinette P. Hewitt, for Defendants and Respondents.