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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PAMELA BENNETT,

Plaintiff and Appellant,

v.

BANK OF AMERICA CORPORATION et
al.,

Defendants and Respondents.

B249521

(Los Angeles County
Super. Ct. No. BC477322)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary H. Strobel, Judge. Affirmed.

Pamela Bennett, in pro. per., for Plaintiff and Appellant.

McGuire Woods, Leslie M. Werlin, Blake S. Olson, for Defendants and Respondents Bank of America Corporation, Countrywide Financial Corporation, Countrywide Home Loans, Inc., and ReconTrust Company, N.A.

INTRODUCTION

Plaintiff and appellant Pamela Bennett and her husband, James Bennett,¹ brought an action against defendants and respondents Bank of America Corporation, Countrywide Financial Corporation, Countrywide Home Loans, Inc., and ReconTrust Company, N.A. (defendants) alleging various theories of fraud based on representations defendants allegedly made in connection with the Bennetts' attempt to refinance two home mortgages. The trial court sustained without leave to amend defendants' demurrer to the Bennetts' second amended complaint. Pamela appeals,² contending that the trial court's order sustaining defendants' demurrer to the first amended complaint without leave to amend and dismissing the action with prejudice as to James did not bar, under res judicata, the reassertion of James's claims in the second amended complaint through her joinder motion; she was entitled to file a third amended complaint under Code of Civil Procedure section 472³ without obtaining leave to amend; and the statute of limitations did not bar her fraud cause of action. We asked the parties to address whether we should affirm the judgment because Pamela failed to designate the reporter's transcript as part of the record on appeal. We affirm.

BACKGROUND

In their original complaint, filed on January 19, 2012, the Bennetts asserted a cause of action for fraudulent concealment and two causes of action for intentional misrepresentation concerning the Bennetts' efforts to lower their mortgage payments on Pamela's Rancho Santa Fe home by consolidating first and second mortgages into a single mortgage. In their first cause of action, the Bennetts alleged, among other things,

¹ Because they share a last name, we will refer to the Bennetts by their first names for clarity.

² Only Pamela filed a notice of appeal.

³ All statutory citations are to the Code of Civil Procedure.

that in or about February 2008, defendants approached them with a plan to consolidate the first and second mortgages into a single mortgage that would have a monthly payment that was much less than the Bennetts then paid. The Bennetts alleged that defendants falsely represented that because the Bennetts “had such substantial equity that income and assets were not a factor in the loan decision and that based on the current credit report on file along with their current review of comparable sales in the neighborhood, that [the Bennetts] were in fact qualified and only needed to give them the verbal okay and the consolidation would be completed within two weeks of the okay.” The Bennetts’ second and third causes of action concerned alleged representations and non-disclosure of information in violation of Civil Code section 2923.5.⁴

The trial court sustained with leave to amend defendants’ demurrer to the Bennetts’ complaint. As relevant here, the trial court ruled that any first amended complaint had to include allegations concerning James’s standing because each cause of action concerned the real property in Rancho Santa Fe and defendants had demonstrated that James was not on title to the property.

In their first amended complaint, the Bennetts again asserted a cause of action for fraudulent concealment and two causes of action for intentional misrepresentation concerning their efforts to refinance their first and second mortgages. They again alleged that Pamela was the owner of the property, and did not allege that James had an interest in the property.

Ruling that James had failed to allege standing, the trial court sustained without leave to amend defendants’ demurrer to all causes of action as to James, dismissed the action with prejudice as to him, and later entered a judgment of dismissal as to his action. As to Pamela, the trial court sustained with leave to amend defendants’ demurrer to the fraudulent concealment cause of action and sustained without leave to amend defendants’

⁴ Civil Code section 2923.5, “also known as the Perata Mortgage Relief Act, requires that, before a notice of default may be filed, the lender must contact the borrower to assess the borrower’s financial situation and explore options to prevent foreclosure.” (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1615.)

demurrer to the two causes of action for intentional misrepresentation. According to the notice of ruling, Pamela Bennett was not permitted to add new causes of action in her second amended complaint. If she wanted to assert new causes of action, she had to obtain the trial court's permission through a motion.⁵

The Bennetts filed two second amended complaints—the first on December 3, 2012, and the second on December 10, 2012. The first of these two second amended complaints asserted a cause of action for fraudulent concealment and two causes of action for intentional misrepresentation. The second of the two second amended complaints—the operative pleading on appeal—asserted a single cause of action for fraudulent concealment. Notwithstanding the trial court's order on defendants' demurrer to the Bennetts' first amended complaint—i.e., sustaining the demurrer without leave to amend on all causes of action and dismissing the action with prejudice as to James—the Bennetts' second amended complaint named James as a plaintiff.

On December 18, 2012, defendants filed a demurrer to the second amended complaint. In a declaration supporting defendants' demurrer, defendants' counsel represented that he had received a copy of a third amended complaint in the mail on or about December 14, 2012. Defendants also filed a motion to strike the second amended complaint as to James and the third amended complaint in its entirety. Defendants argued in their motion to strike the second amended complaint that the trial court had already decided James's causes of action against him and his reasserted claims were thus

⁵ Citing the trial court's tentative ruling on defendants' demurrer to the first amended complaint, which became a part of the trial court's final order, Pamela contends that the trial court did not rule on her ability to bring new causes of action. Although the tentative ruling did not address the issue, Pamela failed to include the reporter's transcript of the hearing as part of the record on appeal, and we thus cannot determine whether the trial court made such a ruling at oral argument. Because Pamela did not include the reporter's transcript, she may not contend that the trial court's rulings were limited to those expressed in the trial court's tentative ruling. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 [“Failure to provide an adequate record on an issue requires that the issue be resolved against plaintiff”].) Pamela does not specify this contention as one of the issues to be decided.

barred by res judicata. They moved to strike the third amended complaint on the ground that Pamela had not received leave from the trial court to file a third amended complaint.

On March 12, 2013, before the hearing on defendants' demurrer and motion to strike, Pamela filed a request for leave to file a third amended complaint. In her request, she stated that she had attempted to file the third amended complaint in December 2012. She attached a form purportedly from the Superior Court of Los Angeles County dated December 13, 2012, that returned the third amended complaint with the notation, "need a copy of minute order allowing the filing of your third amended complaint." In the third amended complaint, the Bennetts asserted a cause of action for fraudulent concealment and a cause of action for failing to comply with Civil Code section 2923.5.

At the same time, Pamela filed a motion for joinder, seeking to join James as a plaintiff in the action. The motion stated that the trial court had sustained one of defendants' prior demurrers and removed James from the action because James had failed to allege facts to support his standing as a plaintiff. Attached to the third amended complaint was an April 24, 2012, grant deed pursuant to which Pamela had granted to James a one percent separate property interest in the Rancho Santa Fe property.⁶ The motion claimed that James previously had been unable to locate the "crucial" grant deed which established James's standing.

The trial court denied Pamela's motions for leave to amend and joinder. It granted defendants' demurrer and motion to strike the second amended complaint as to James on the ground that its prior order sustaining without leave to amend the first amended complaint as to James was a res judicata bar to the second amended complaint. It sustained without leave to amend defendants' demurrer to all causes of action in the second amended complaint as to Pamela, ruling that the fraudulent concealment cause of action asserted that defendants had made affirmative fraudulent representations and that Pamela had not alleged damages with requisite specificity. It also ruled that the cause of

⁶ The grant deed was dated some four years after defendants allegedly made the fraudulent representations that served as the basis for the Bennetts' action, and some three months after the Bennetts filed their original complaint in this action.

action was barred by the statute of limitations. Finally, the trial court ruled that defendants' motion to strike the third amended complaint was moot. The trial court entered judgment of dismissal on Pamela's action.

DISCUSSION

I. Adequacy of Record

We asked the parties to address whether we should affirm the judgment because Pamela failed to designate the reporter's transcript as part of the record on appeal. Because we decide purely legal issues based on the filings before the trial court and none of the parties relies on oral argument before the trial court, the record on appeal is adequate. (*Chodos v. Cole* (2012) 210 Cal.App.4th 692, 699.)⁷

II. Pamela's Joinder Motion

Pamela contends that the trial court erred when it relied on the doctrine of res judicata to deny her section 389 motion to join James as a plaintiff. Because the trial court sustained without leave to amend the first amended complaint and dismissed with prejudice and entered judgment on James's action, it properly denied Pamela's joinder motion.

Section 389, subdivision (a) provides, "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

⁷ See footnote 5, post.

“Res judicata gives conclusive effect to a former judgment only when the former judgment was in a different action” (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 334, p. 939; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701-702.) Because the trial court’s rulings sustaining defendants’ demurrer to the first amended complaint without leave to amend and dismissing the first amended complaint with prejudice as to James were issued in this and not a different case, the trial court should not have denied Pamela’s joinder motion on res judicata grounds. Although the trial court relied on the wrong legal principle in denying Pamela’s joinder motion, it nevertheless properly denied the motion. (*Union Pacific Railroad Company v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 182 [“We review the correctness of the judgment, not the reasoning or grounds assigned for the ruling, and will affirm a judgment correct on any theory”].)

Joinder of James as a plaintiff pursuant to section 389 was not proper. Section 389 requires the joinder of persons who are necessary to the resolution of an action. Even if it was necessary to join James as a plaintiff for the resolution of the action against defendants,⁸ he was a party to this action when it commenced. Thereafter, however, the trial court sustained without leave to amend defendants’ demurrer to the first amended complaint as to James, finding that he lacked standing. The trial court dismissed the first amended complaint with prejudice as to James and subsequently entered judgment against him. James did not appeal from that judgment. By James’s failure to appeal from the judgment, the judgment became final as to him. Section 389 does not operate to resuscitate claims that have been dismissed with prejudice and on which judgment has been entered.

⁸ That James was necessary is a dubious proposition as he was not on title to the Rancho Santa Fe property at the time defendants allegedly made the misrepresentations, and Pamela did not make him a one percent owner of the property until after the Bennetts filed their original complaint.

III. Pamela's Right to File a Third Amended Pleading Under Section 472

Pamela contends that section 472 required the trial court to permit her to file and proceed on the third amended complaint she attempted to file in December 2012. She does not contend that the trial court erred in denying her March 12, 2013, motion for leave to file a third amended complaint. Because the Bennetts filed two second amended complaints, Pamela was not entitled to file a third amended complaint without leave of the trial court.

Section 472 provides, "Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, and the time in which the adverse party must respond thereto shall be computed from the date of notice of the amendment." The Bennetts filed a second amended complaint on December 3, 2012.⁹ Then, on December 10, 2012, they filed another amended pleading which they should have called the "third amended complaint" but which they called the "second amended complaint." Even if section 472 applies to amended pleadings and not just to original pleadings (see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 6:610.5, pp. 6-156 to 6-156.1 [although it has been argued that section 472 applies to amended pleadings, "there is no known case permitting this"]), the Bennett's exercised their right to amend their second amended complaint "once" under section 472 when they filed their second second amended complaint. Thereafter, Pamela needed leave of the trial court to file a third amended complaint. Accordingly, Pamela properly was not permitted to file the third amended complaint.

IV. Pamela's Fraudulent Concealment Cause of Action

Pamela contends that the trial court erred in sustaining without leave to amend defendants' demurrer to the fraudulent concealment cause of action in the second

⁹ Based on the trial court's ruling on defendants' demurrer to the Bennett's first amended complaint, only Pamela was granted leave to file a second amended complaint.

amended complaint on the ground that it was barred by the statute of limitations in section 338, subdivision (d). The fraudulent concealment cause of action was barred by the statute of limitations.¹⁰

A. Allegations in the Second Amended Complaint

In their second amended complaint, the Bennetts alleged that on or about February 27, 2008, doe defendant number one, who said he was a loan agent representing Countrywide Home Loans, called them with a plan to consolidate their first and second mortgages into a single mortgage that would have a monthly payment that was significantly less than the Bennetts' then current combined mortgage payments. He told the Bennetts that because they "had such substantial equity that income and assets were not a factor in the loan decision and that it was based on the current credit report on file along with their current review of comparable sales in the neighborhood." Doe defendant number one said that Countrywide had a no documentation mortgage consolidation loan approved and ready to fund for the Bennetts. If the Bennetts gave doe defendant number one "the okay that day [they] did not have to make another payment on the existing first and second mortgages and the new loan would be funded, without documentation, within two weeks." Relying on doe defendant number one's representations, the Bennetts stopped making payments on their first and second mortgages, but the consolidation loan never funded.

The Bennetts alleged that doe defendant number one had "exclusive knowledge of the truth that there never was a 'no documentation loan' ready to fund at Countrywide for [them]. And, since the [Bennetts] had no access to the internal records of the company,

¹⁰ Pamela contends that the sole reason that the trial court sustained without leave to amend defendants' demurrer was its determination that the second amended complaint failed to demonstrate that it was filed within the period of the applicable statute of limitations. Thus, she does not challenge the trial court's ruling that the second amended complaint failed to plead damages with the required specificity. Because the fraudulent concealment cause of action was barred by the statute of limitations, we need not decide whether damages were adequately pleaded.

they were not aware that their promise of a mortgage consolidation ready to fund was not true” They alleged that “[i]t would be over a year before [they] discovered the plan was a sham.” The Bennetts discovered that doe defendant number one’s representations were false when he “confess[ed]” to them that defendants’ “underwriting parameters” at the time that doe defendant number one contacted the Bennetts required “income, asset, property appraisal and credit report” Doe defendant number one’s statements to the Bennetts to the contrary were designed to lure them into a full loan review. The Bennetts had intended to sell their house to “pull their equity” out of it, but were convinced not to sell by doe defendant number one’s representations. The Bennetts alleged that doe defendant number one’s false representations caused them to “lose equity, fall behind on payments, and to enter a downward spiral which has not only created loss of equity and other financial damages, but also illness related to stress along with other mental and physical damages as well.”

B. The Trial Court’s Ruling

The trial court ruled that in their cause of action for fraudulent concealment, the Bennetts did not simply allege concealment, but alleged that defendants made affirmative misrepresentations regarding the need for financial documentation. Relying on *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645, the trial court ruled that the Bennetts were required to allege such misrepresentations with “specificity, including what was said, when it was said, by what means, and the authority of that person to speak on behalf of the company.” They also had to allege how they reasonably relied on the misrepresentations and how they were damaged. The trial court ruled that the Bennetts adequately alleged all the elements of a fraud cause of action for misrepresentation except for damages.

The trial court also ruled that the fraud claim as pleaded in the second amended complaint was barred by the statute of limitations. It stated that the fraudulent concealment cause of action alleged that defendants approached the Bennetts on February 27, 2008, about a plan to consolidate the Bennetts’ loans. Defendants represented that

the consolidation had been approved and that it would be finalized within two weeks. Thus, the trial court reasoned, the “violations had to occur no later than March of 2008.” Because the statute of limitations for fraud is three years (§ 338, subd. (d)), the Bennetts had to file their action not later than March 2011. The Bennetts filed their initial complaint nearly four years later on January 18, 2012. Thus, their complaint showed on its face that it was time-barred. When a complaint for fraud is time-barred on its face, the trial court ruled, the plaintiff must plead facts that bring the complaint within the discovery rule.¹¹ The trial court ruled that the Bennetts failed to allege facts showing “(1) the time and manner of discovery, and (2) the inability to have made earlier discovery despite reasonable diligence” that would have brought them within the discovery rule.

The trial court observed that the only fact the Bennetts alleged that was relevant to the discovery rule was that “‘it would be over a year before [they] discovered the plan was a sham.’” Such an allegation, the trial court ruled, was insufficient as a matter of law to trigger the discovery rule. It reasoned that the Bennetts “alleged that the new loan was to fund within two weeks, and that it never funded. Any amended complaint could not plead around the fact that [the Bennetts] were on notice no later than March 2008 that the loan had not funded as promised. [The Bennetts] have not, and reasonably could not plead facts showing they could not have discovered the misrepresentation for a year after the loan was promised to close.” Thus, the trial court sustained without leave to amend defendants’ demurrer to the fraud cause of action.

¹¹ The “discovery rule” is an “important exception” to the general rule that “a cause of action accrues at ‘the time when the cause of action is complete with all of its elements.’” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806-807.) The discovery rule “postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citation.]” (*Id.* at p. 807.)

C. *Application of Relevant Principles*

1. Standard of Review

“On appeal from a judgment after an order sustaining a demurrer, our standard of review is de novo. We exercise our independent judgment about whether, as a matter of law, the complaint states facts sufficient to state a cause of action. [Citations.] We view a demurrer as admitting all material facts properly pleaded but not contentions, deductions, or conclusions of fact or law. [Citation.] When the demurrer is sustained without leave to amend, we determine whether there is a reasonable possibility that the defect can be cured by amendment. If it can, we reverse on the ground that the trial court abused its discretion. [Citations.] If a complaint is insufficient on any ground set forth in the demurrer, we uphold the order sustaining the demurrer even if that ground was not the ground relied upon by the trial court. If there are sufficient facts pled or that can be inferred reasonably to state a cause of action under any theory, the demurrer must be overruled. [Citation.]” (*Lin v. Coronado* (Dec. 18, 2014, B248848) ___ Cal.App.4th ___, ___ [2014 Cal.App. Lexis 1161, pp. *7-8].)

2. Statute of Limitations

Section 338, subdivision (d) sets a three year statute of limitations for “[a]n action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

“In order to rely on the discovery rule for delayed accrual of a cause of action, ‘[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.’ [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to ‘show diligence’; ‘conclusory allegations will not withstand demurrer.’ [Citation.] [¶] Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential

plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light. In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period.” (*Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, 35 Cal.4th at pp. 808-809.)

The trial court correctly ruled that the Bennetts did not plead facts that brought their fraudulent concealment cause of action within the discovery rule, and thus within the three year statute of limitations. The Bennetts alleged that doe defendant number one had told them on or about February 27, 2008, that a no documentation mortgage consolidation loan had been approved for them and was ready to fund in two weeks, but the loan did not fund as promised. The Bennetts filed their original complaint on January 19, 2012, or just short of three years and 11 months after doe defendant number one’s alleged misrepresentations—i.e., outside of the three year statute of limitations in section 338, subdivision (d). Pamela contends that the fraudulent concealment cause of action did not accrue until the Bennetts discovered that doe defendant number one had made fraudulent representations “over a year” after he made those representations. The Bennetts alleged that doe defendant number one had “exclusive knowledge of the truth that there never was a ‘no documentation loan’ ready to fund at Countrywide for [them]. And, since the [Bennetts] had no access to the internal records of the company, they were not aware that their promise of a mortgage consolidation ready to fund was not true” They alleged that they “discovered the plan was a sham” when doe defendant number one confessed to them that defendants’ “underwriting parameters” at the time that doe defendant number one contacted the Bennetts required “income, asset, property appraisal and credit report”

In order to adequately allege facts bringing their fraudulent concealment cause of action within the discovery rule, the Bennetts had to allege “that, despite diligent investigation of the circumstances of the injury, [they] could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period.” (*Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, 35 Cal.4th at pp. 808-809.) After the mortgage consolidation loan did not fund in early March 2008 as promised, the Bennetts were on notice that something had gone wrong with their loan and had a duty to investigate the reason that the loan did not fund. (*Ibid.*) The Bennetts did not allege, however, that they undertook an investigation after their loan did not fund in March 2008 to determine the reason why the loan did not fund or explain why a reasonable investigation would not have revealed doe defendant number one’s allegedly fraudulent representations. (*Ibid.*) Accordingly, the Bennetts did not allege facts that brought them within the discovery rule and the trial court correctly sustained without leave to amend defendants’ demurrer to the Bennetts’ fraudulent concealment cause of action as barred by the three year statute of limitations in section 338, subdivision (d).

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.
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MOSK, Acting P. J.

We concur:

KRIEGLER, J.

GOODMAN, J.*

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