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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

NICHOLAS WEIMER,

Plaintiff and Appellant,

v.

WELLS FARGO HOME MORTGAGE
et. al.,

Defendants and Respondents.

B236385

(Los Angeles County
Super. Ct. No. BC418613)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Mary Ann Murphy, Judge. Affirmed.

Nicholas Weimer, in pro. per., for Plaintiff and Appellant.

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

The trial court allowed plaintiff Nicholas Weimer to amend his complaint five times in an attempt to state a cause of action against defendant Wells Fargo. Weimer appeals from a judgment entered after the trial court sustained a demurrer to Weimer's fifth amended complaint without leave to amend. Weimer has failed to state a viable cause of action and has not demonstrated he can amend his complaint to do so. Accordingly, we affirm.

BACKGROUND

Demurrer to Fifth Amended Complaint

Weimer filed this action in July 2009. In February 2011, he filed his fifth amended complaint. We summarize the allegations set forth in the fifth amended complaint, and not the earlier complaints, because the fifth amended complaint was the operative complaint at the time the trial court entered judgment against Weimer.

In the fifth amended complaint, Weimer named as a defendant Wells Fargo Home Mortgage, a Division of Wells Fargo Bank, N.A. dba America's Servicing Company (Wells Fargo), erroneously sued as "ASC" and "Wells Fargo & Co." He asserted three causes of action against Wells Fargo, labeled breach of duty of good faith and fair dealing, fraud and intentional infliction of emotional distress.

As alleged in the fifth amended complaint, in or about 2005 Weimer borrowed \$1,275,000 from Countrywide (or its agent "Express Capital") under a loan agreement secured by a deed of trust on property located at 814 S. Rimpau Boulevard, Los Angeles, California (the property). Weimer claims, before the loan closed, Countrywide represented the interest rate would be one-half point lower. "[J]ust before closing," Weimer learned the interest rate would be higher than Countrywide represented. Weimer executed the loan documents reflecting the higher interest rate.

Weimer also claims, "just before closing," Countrywide's agent Express Capital "forced" Weimer to allow Express Capital "to hold \$7,400 (seven months reserve property taxes) in a special reserve account with a provision that it would pay the taxes when due." Although Weimer was opposed to Express Capital withholding these funds, he allowed the loan to close with Express Capital setting aside these reserve funds to pay

property taxes. Weimer also expressly agreed in the deed of trust (attached to the fifth amended complaint): “Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the ‘Funds’) to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security instrument as a lien or encumbrance on the Property These items are called ‘Escrow Items.’ . . . Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower’s obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower’s obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing.”

As alleged in the fifth amended complaint, “[i]n approximately March or April of 2006, or earlier,” Weimer sought a second mortgage on the property with GMAC. At that time, he learned Countrywide had not paid the property taxes or established a reserve (escrow) account. Weimer claims GMAC “held \$14,000.00 from the proceeds of the second [mortgage] to pay the property taxes.” Weimer requested Countrywide correct the issue. According to Weimer, Countrywide sold the loan to Wells Fargo. Weimer asserts Wells Fargo “is liable for the conduct committed by Countrywide” because it purchased the loan.

Weimer claims Wells Fargo “improperly set up an impound [escrow] account regarding property taxes.” Weimer refused to pay the amounts Wells Fargo demanded for the impound account. Wells Fargo sent delinquency notices to Weimer and caused a notice of default to be recorded. Although the deed of trust expressly allowed the lender to establish an escrow account and collect funds to pay taxes, Weimer asserts he signed a “real estate contract” in 2005 at the time of loan origination which provided no escrow account was to be established. This “real estate contract,” which Weimer alleges is separate and apart from the deed of trust and “note,” is not in the record. Weimer does not identify the parties to this purported written contract.

Weimer demanded Wells Fargo refund the \$7,400 Countrywide collected for property taxes but did not pay. In August 2006, Wells Fargo returned the \$7,400 to Weimer.

Weimer claims, for a period of about seven to nine months beginning in April 2006, Wells Fargo falsely reported to the credit bureaus that he was more than 30 days late in making monthly payments on the property even though he was current on his payments. Weimer alleges Wells Fargo falsely reported up to five or six payments as being more than 30 days late. Weimer acknowledges, at or around the end of 2006, this negative information was corrected and removed from Weimer's credit reports.

Weimer alleges the seven to nine months of false credit reporting by Wells Fargo prevented him from refinancing the property and purchasing a condominium. He had planned to lease the property and move into a condominium. He claims he could have used the rental income on the property to make his mortgage payments on the property. He also alleges the false credit reporting "resulted in a complete destruction of [his] business" as a real estate investor and prevented him from making payments on a duplex he owned. Weimer "estimates that he has lost 30 million to fifty [sic] million dollars in future earnings" due to Countrywide's and Wells Fargo's conduct. He bases this estimate on "the following calculation: [¶] From 1999 to 2006, plaintiff had taken a \$75,000.00 investment and turned it into approximately \$1,750,000.00 in equity. If plaintiff were to continue with the same success rate, he would have become very wealthy."

At some point, Weimer became unable to make the mortgage payments on the property and he defaulted on the loan. On April 8, 2009, a notice of default was recorded on the property indicating Weimer owed \$28,715.38. Apparently the property was sold during pendency of the trial court litigation in this matter.

In his first cause of action in the fifth amended complaint, labeled breach of duty of good faith and fair dealing, Weimer asserts: "Defendant's conduct as detailed above is a breach of the implied covenant of duty of good faith and fair dealing interfering with plaintiff's ability to perform under the contract." Weimer does not identify which contract is the basis of this cause of action or the parties to this contract.

In his second cause of action for fraud, Weimer asserts Wells Fargo is liable for Countrywide's "fraudulent conduct in changing the interest rate and demanding reserves for property taxes at the last moment," conduct which occurred before the loan closed

and prior to execution of the deed of trust. He also claims Wells Fargo is liable for Countrywide's conduct in failing to establish the escrow account and failing to pay the property taxes. Weimer also alleges Wells Fargo "committed fraud by improperly setting up an impound account and refusing to remove it, and sending improper notice of default notices and all of the other conduct set forth in plaintiff's First Cause of Action."

Finally, Weimer claims Wells Fargo committed fraud by falsely reporting late payments to the credit bureaus and by falsely reporting to Weimer it was correcting the negative credit information. Weimer alleges Wells Fargo knew its representations about the correction of negative credit information were false when made and Wells Fargo made these representations with the intent to defraud Weimer. Weimer asserts: "Plaintiff actually and justifiably relied on said representation and did not take further action to cure the false reporting and continued to seek refinancing. Said reliance was to plaintiff's detriment as Washington Mutual denied plaintiff's application [for refinancing] based upon said false reports which destroyed plaintiff's credit score. On subsequent occasions, representatives of ASC [Wells Fargo] further represented that negative information had been deleted from plaintiff's credit reports. Each time, after initially relying on said representations, to his detriment, plaintiff would eventually learn that the representation was false."

In his third cause of action for intentional infliction of emotional distress, Weimer alleges Countrywide and Wells Fargo committed intentional, "outrageous, malicious and disgusting conduct" in an effort to cause Weimer "great emotional distress." He claims their conduct caused him "sleepless nights, upset stomach and other related damages as a result of the stress." Weimer seeks an award of punitive damages against Wells Fargo.

Wells Fargo demurred to the fifth amended complaint on numerous grounds, including that Weimer had not alleged the elements of any cause of action against Wells Fargo. On May 12, 2011, after hearing oral argument, the trial court sustained the demurrer without leave to amend.

Motions for Leave to Amend Complaint to Allege New Causes of Action

On May 18, 2011, after the trial court sustained the demurrer to the fifth amended complaint, without leave to amend, Weimer filed a motion for leave to amend his complaint. He had been attempting to amend his complaint to allege additional causes of action since December 2009 when he filed a second amended complaint which the trial court later found exceeded the scope of the leave to amend. Weimer's proposed second amended complaint included several causes of action which he did not assert in his first amended complaint—declaratory relief to quiet title, negligent misrepresentation, unfair competition, unfair debt collection practices and tortious destruction of plaintiff's business.

In between rounds of demurrers, Weimer sought leave to amend his complaint to allege additional causes of action. On August 13, 2010, Weimer filed a motion for leave to file a fourth amended complaint to allege three new causes of action, negligent misrepresentation, unfair competition, and unfair debt collection practices. Weimer argued he should be granted leave to amend because he “was not aware of all appropriate causes of action when the original complaint was filed” in July 2009. Weimer also argued he should be permitted to name Bank of America as a defendant because he “became aware that defendant Wells Fargo is disputing its liability for the conduct of its predecessor Countrywide Home Loans.” Weimer had named Bank of America originally, but the trial court dismissed it from the action without prejudice because Weimer had not timely served Bank of America. Wells Fargo opposed the motion to amend, arguing Weimer had impermissibly delayed asserting these causes of action to the prejudice of Wells Fargo, and Weimer had failed to comply with California Rules of Court, rule 3.1324(a)(3) and (b)(3).¹ On September 21, 2010, the trial court denied Weimer's motion on grounds he had not complied with rule 3.1324(a)(3) and (b).

¹ California Rules of Court, rule 3.1324(a)(3) provides a motion to amend a pleading must “[s]tate what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located. Subsection (b)(3) of this rule provides the motion to amend must be accompanied by a

On January 11, 2011, Weimer filed a motion for leave to file a fifth amended complaint to allege four new causes of action, negligent misrepresentation, unfair competition, unfair debt collection practices and quiet title. The trial court took the motion off calendar, concluding it was moot because Weimer filed a fifth amended complaint on February 7, 2011, after the court sustained Wells Fargo's demurrer to the fourth amended complaint with leave to amend.

On April 7, 2011, Weimer filed a motion for leave to file a sixth amended complaint (erroneously titled motion to file fifth amended complaint) to allege five additional causes of action, defamation, negligent misrepresentation, unfair competition, unfair debt collection practices and quiet title, and to name Bank of America as a defendant. Weimer complied with rule 3.1324(a)(3) by listing the page, line and paragraph numbers of the proposed amendments, but he did not specify when he discovered the facts giving rise to the amended allegations as required under subdivision (b)(3). On May 12, 2011, the trial court denied Weimer's motion with prejudice as to the causes of action for negligent misrepresentation, unfair competition and unfair debt collection for noncompliance with rule 3.1324(b). The court noted it already had given Weimer an opportunity to comply with this rule as to these causes of action. The court denied the motion without prejudice as to the causes of action for quiet title and defamation for noncompliance with the rule.

As set forth above, on May 18, 2011, after the trial court sustained the demurrer to the fifth amended complaint, without leave to amend, Weimer filed a motion for leave to file a seventh amended complaint. Per the trial court's request, the parties briefed whether a plaintiff may amend a complaint after the court sustains a demurrer without leave to amend to all causes of action in the operative complaint. Weimer did not appear on September 13, 2011 for the hearing on his motion for leave to amend. The court placed the motion off calendar.

declaration specifying "[w]hen the facts giving rise to the amended allegations were discovered."

On September 13, 2011, the trial court entered an order dismissing Weimer's action with prejudice and entered judgment against Weimer.

DISCUSSION

Demurrer

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.]” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) “We also consider matters which may be judicially noticed.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. [Citation.]” (*City of Dinuba v. County of Tulare, supra*, 41 Cal.4th at p. 865.)

We need not set forth the elements of each of the causes of action Weimer has attempted to state against Wells Fargo. As discussed more fully below, there are defects in the complaint which prevent Weimer from stating any cause of action.

First, allegations regarding Countrywide's conduct prior to the loan closing do not state a cause of action against Wells Fargo. As alleged in the fifth amended complaint, before the loan closed, Weimer knew the interest rate he was going to be required to pay was one-half point higher than Countrywide had originally represented, and he knew Countrywide was going to require him to pay funds into an escrow account to cover the property taxes. Within a few months of Wells Fargo purchasing the loan, Wells Fargo refunded the \$7,400 Weimer had paid into the escrow account because Countrywide did not use the funds to pay property taxes as promised. Weimer has no claim against Wells Fargo based on allegations he found Countrywide's terms objectionable, but nonetheless allowed the loan to close with knowledge of those terms.

Second, the allegations about Wells Fargo's establishment of an escrow account do not state a cause of action. The deed of trust (attached to Weimer's fifth amended complaint) expressly provides the lender may establish an escrow account and require Weimer to pay funds into the account to cover property taxes. Weimer alleges the existence of some "real estate contract," separate and apart from the deed of trust and the note, which contradicts the deed of trust and provides the lender may not establish such an escrow account. The purported real estate contract is not in the record. Weimer does not identify the parties to this contract or explain how Wells Fargo would be bound under this contract, apparently executed at loan origination. Weimer does not even allege Wells Fargo was aware of this "real estate contract." Thus, Weimer has not stated a cause of action against Wells Fargo based on allegations Wells Fargo demanded Weimer pay funds into an escrow account to cover property taxes pursuant to the terms of the deed of trust. Nor has he demonstrated he can amend his complaint to state a cause of action based on such allegations.

Third, Weimer has not alleged a nexus between Wells Fargo's alleged false credit reporting and his alleged damages. It appears based on the allegations of the complaint that the negative credit reporting was not false. As discussed above, Weimer refused to pay the amounts demanded to cover the property taxes pursuant to the deed of trust. Therefore, Wells Fargo reported Weimer as late on his payments as he was not paying the full amounts due.

Even assuming Wells Fargo incorrectly reported Weimer as making late payments, Weimer has not alleged this negative credit reporting caused his alleged damages. He acknowledges the negative information on his credit reports was corrected within about nine months. He does not allege he attempted to obtain refinancing in 2007, after the information was corrected. He does not explain how negative credit information, which was corrected by early 2007 at the latest, caused him to be unable to make mortgage payments in 2009 when the notice of default was recorded against the property. Nor does he explain how nine months of incorrect credit reporting caused him \$30 to \$50 million in damages.

All of the causes of action asserted against Wells Fargo fail because of these defects. Weimer has not demonstrated he can further amend his complaint to cure these defects.

On appeal, Weimer contends he stated valid causes of action for breach of the implied covenant of good faith and fair dealing, fraud and intentional infliction of emotional distress based on allegations Wells Fargo ruined his credit by reporting late payments to the credit bureaus and thereby prevented him from refinancing the property. As discussed above, Weimer has not alleged a nexus between nine months of negative credit reporting, on the one hand, and his inability to refinance the property and his loss of the property years later, on the other hand.

Weimer also contends he stated a valid RICO cause of action in his fourth amended complaint but the trial court sustained Wells Fargo's demurrer without leave to amend as to this cause of action. In his RICO cause of action, Weimer alleged the same conduct discussed above: (1) Countrywide's conduct prior to the loan closing, (2) Wells Fargo's establishment of the escrow account and demand for funds to cover the property taxes and (3) Wells Fargo's "two to five false reports to credit agencies that plaintiff was more than 30 days late in making mortgage payments." For the reasons already discussed, these allegations do not state a cause of action against Wells Fargo.

Leave to Amend Complaint to Allege Additional Causes of Action

Weimer contends the trial court abused its discretion in refusing to allow him to amend his complaint to assert additional causes of action against Wells Fargo. He does not dispute he failed to comply with the California Rules of Court in his motions for leave to file a fourth amended complaint and a sixth amended complaint. He argues the trial court abused its discretion in refusing to allow him to file a seventh amended complaint after the trial court sustained his demurrer to the operative complaint without leave to amend. He asserts the court had previously granted him leave to amend his complaint to assert causes of action for defamation and quiet title. He is incorrect. The court denied his motion for leave to file a sixth amended complaint without prejudice as to those two causes of action. Weimer did not make a proper motion for leave to amend

by the time the trial court sustained his demurrer to the operative complaint without leave to amend, nearly two years after he filed this action. Weimer has not demonstrated abuse of discretion.

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.