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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ADAN ORELLANA et al., Plaintiffs and Appellants, v. JPMORGAN CHASE BANK, N.A., et al., Defendants and Respondents.	B256685 (Los Angeles County Super. Ct. No. BC491754)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

Graham • Vaage, Susan L. Vaage and Ann G. Lee for Plaintiffs and Appellants.

LeClairRyan, Robert S. McWhorter; Bryan Cave, Glenn J. Plattner and Andrea N. Winternitz for Defendants and Respondents.

Adan Orellana and Telma Villalobos appeal the dismissal of their complaint against U.S. Bank National Association (U.S. Bank). U.S. Bank acquired the assets of Downey Savings and Loan Association, F.A. (Downey Savings) after Downey Savings failed and the Federal Deposit Insurance Corporation (FDIC) was appointed as receiver. Plaintiffs were unaware of a claim against the failed financial institution at the time and filed no administrative claim with the FDIC.

The trial court concluded that plaintiffs failed to exhaust their administrative remedies and that the court therefore had no subject matter jurisdiction over their claims pursuant to 12 U.S.C., § 1821(d)(13)(D)(ii).[1] Plaintiffs contend the exhaustion requirement is inapplicable.

We conclude the exhaustion requirement applies and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*[2]

Plaintiffs own real property located at 5902 Colfax Avenue in North Hollywood (Colfax property). Jorge Andrade, a loan broker, had assisted plaintiffs in refinancing their property and obtaining a line of credit before 2007. Plaintiffs are originally from Central America and cannot read or speak English fluently. Andrade is a native Spanish speaker in whom plaintiffs reposed great trust and confidence.

Andrade offered to help plaintiffs refinance the Colfax property again in August 2007. Plaintiffs believed that they were only restructuring their existing loan and were not borrowing additional money. Orellana signed the loan documents resulting in a new loan (loan 1) from Downey Savings secured by a first deed of trust on the Colfax property.

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[1] All statutory references are to 12 United States Code unless stated otherwise.

[2] The facts stated are based on the allegations of plaintiffs' first amended complaint. We will assume the truth of the factual allegations in the complaint for purposes of this appeal.

Downey Savings failed and the FDIC was appointed as receiver in November 2008. U.S. Bank National Association (U.S. Bank) acquired the assets and liabilities of Downey Savings, including the plaintiff's loan.

Plaintiffs first learned of the existence in February 2012 that the Downey Savings loan was not a simple refinance. Rather, after investigation of their financial affairs, they discovered that their loan broker, Andrade, had opened a checking account in Orellana's name and deposited additional proceeds from the Downey Savings refinance. Plaintiffs had continued to make loan payments believing that they were paying off their prior loan secured by the Colfax property when actually they were making payments on a new loan secured by the Colfax property.

2. *Complaint*

Plaintiffs filed a complaint in September 2012 and a first amended complaint in March 2013 against Andrade and, *inter alia,* U.S. Bank.[3] They allege counts for (1) fraud, against Andrade; (2) rescission against U.S. Bank; (3) declaratory relief against U.S. Bank; (4) accounting against U.S. Bank; and (5) unjust enrichment, against U.S. Bank.

Plaintiffs allege in their first count for fraud that Andrade told them in August 2007 that he could help them obtain refinancing from Downey Savings that would allow them to pay off the first deed of trust on the Colfax property in four years by increasing their monthly payments. They allege that Andrade concealed the facts that the refinancing included a new loan secured by a first deed of trust on the Colfax property and that Andrade intended to misappropriate the loan proceeds. Plaintiffs allege that Orellana signed the loan documents, even though he was unable to read them, in reliance on Andrade's misrepresentations and concealment.

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[3] Appellants' complaint also sought to rescind a second "cash out" refinancing loan that Andrade and the Orellanas has obtained from Washington Mutual ("WaMu") on a different property. Like Downey Savings, WaMu failed in 2008 and the FDIC was appointed receiver. JPMorgan Chase Bank, N.A. (Chase) later acquired certain of the assets held by WaMu. Appellants settled with Chase and filed a request for dismissal of appeal on June 26, 2015.

Plaintiffs allege in their second count for rescission that they reasonably relied on Andrade's misrepresentations and concealment in signing the loan documents and that the notes and deeds of trust therefore should be rescinded. They also allege there are additional grounds for rescission because the loans resulted from their unilateral mistake or from the mutual mistake of plaintiffs and Downey Savings. They also allege that the consideration for the loans failed in a material respect (Civ. Code, § 1689, subd. (b)(4)) because Andrade, rather than plaintiffs, received the loan proceeds.

Plaintiffs allege in their third count for declaratory relief that an actual controversy has arisen and a judicial determination is appropriate and necessary concerning the rights and duties of plaintiffs and U.S. Bank with respect to the loan. In their fourth count for accounting, plaintiffs allege that the amounts they paid U.S. Bank based on Andrade's misrepresentations should be credited to them, and they seek an accounting of those amounts. Plaintiffs allege in their fifth count for unjust enrichment that U.S. Bank has received payments on loan 1 and that it would be unjust for U.S. Bank to retain those benefits.

3. *Bankruptcy and Judgment Against Andrade*

Andrade filed a chapter 7 bankruptcy petition. Plaintiffs commenced an adversary proceeding in the bankruptcy litigation and were awarded a default judgment against Andrade in the amount of $491,945.03 in September 2013. The award included damages for funds Andrade misappropriated from the Downey Savings loan.

4. *Demurrer, Motion to Dismiss, and Appeal*

U.S. Bank demurred to the complaint. The trial court sustained without leave to amend the demurrer to the fourth count for accounting and overruled the demurrer to the other counts.[4] U.S. Bank then answered the complaint.

In December 2013, U.S. Bank filed a motion to dismiss the complaint for lack of subject matter jurisdiction. It argued plaintiffs had not exhausted their administrative remedies under the Financial Institutions Reform, Recovery, and Enforcement Act

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[4] Plaintiffs do not challenge the sustaining of the demurrer to the fourth count.

(§ 1811 et seq.) (FIRREA), as required by section 1821(d)(13)(D), because they had failed to file a claim with the FDIC.

The trial court filed a signed order granting the dismissal motion on April 23, 2014. The order stated that plaintiffs' claims were based on the acts or omissions of the failed financial institutions and that the court therefore lacked subject matter jurisdiction. Plaintiffs timely appealed the judgment.[5]

CONTENTIONS

Plaintiffs contend (1) the exhaustion requirement under section 1821(d)(13)(D)(i) is inapplicable because the FDIC no longer holds the notes and deeds of trust and is not a defendant in this action; and (2) the exhaustion requirement under section 1821(d)(13)(D)(ii) is inapplicable because their claims are based on Andrade's fraudulent conduct, not the acts or omissions of the failed lenders.

DISCUSSION

1. *Standard of Review*

Subject matter jurisdiction is the court's power to hear and resolve a particular dispute or cause of action. (*Donaldson v. National Marine, Inc.* (2005) 35 Cal.4th 503, 512.) The existence of subject matter jurisdiction is a question of law if, as here, the determination does not turn on a factual dispute. Accordingly, our review is de novo. (*Saffer v. JP Morgan Chase Bank, N.A.* (2014) 225 Cal.App.4th 1239, 1248 (*Saffer*).)

2. *The Trial Court Properly Dismissed the Complaint*

FIRREA provides for the FDIC to be appointed as receiver for failed financial institutions and requires certain claims relating to the failed entities to be presented to the FDIC. (*Benson v. JPMorgan Chase Bank, N.A.* (9th Cir. 2012) 673 F.3d 1207, 1211 (*Benson*).) "Following the savings and loan crisis of the 1980s, Congress passed FIRREA ' "to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default." ' [Citation.] The statute grants the FDIC authority to 'act as receiver or conservator of a failed institution for the protection of

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[5] A signed order of dismissal is an appealable judgment. (Code Civ. Proc., § 581d.)

depositors and creditors.' [Citation.] It provides detailed procedures to allow the FDIC to consider certain claims against the receivership estate, *see* 12 U.S.C. § 1821(d)(3)-(10), 'to ensure that the assets of a failed institution are distributed fairly and promptly among those with valid claims against the institution, and to expeditiously wind up the affairs of failed banks,' [citation]." (*Ibid.*)

A plaintiff must exhaust his or her administrative remedies by filing a claim with the FDIC before seeking judicial relief. (*Saffer*, *supra*, 225 Cal.App.4th at pp. 1248-1249; *Westberg v. F.D.I.C.* (D.C. Cir. 2014) 741 F.3d 1301, 1303 (*Westberg*).) The exhaustion requirement is expressed in part in section 1821(d)(13)(D), which states:

"Except as otherwise provided in this subsection, no court shall have jurisdiction over—

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation [FDIC] has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver."[6]

The principal distinction for purposes of section 1821(d)(13)(D)(ii) is between a claim relating to an act or omission of the failed entity or the FDIC as receiver and a claim relating to an act or omission of a successor. The exhaustion requirement applies to a claim relating to an act or omission of the failed entity, but does not apply to a claim relating to the independent conduct of a successor. (*Saffer*, *supra*, 225 Cal.App.4th at pp. 1255-1256; *Benson*, *supra*, 673 F.3d at pp. 1214-1216.)

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[6] Section 1821(d)(6) provides for administrative review or judicial review of a claim either after the FDIC has disallowed the claim or after the time for the FDIC to allow or disallow the claim has expired. The language "[e]xcept as otherwise provided in this subsection" in section 1821(d)(13)(D) refers to section 1821(d)(6). Sections 1821(d)(6) and 1821(d)(13)(D) together set forth "a 'standard exhaustion requirement' that ' "routes claims through an administrative review process, and . . . withholds judicial review unless and until claims are so routed." ' [Citations.]" (*Westberg*, *supra*, 741 F.3d at p. 1303.)

Plaintiffs contend their claims do not relate to an act or omission of Downey Savings within the meaning of section 1821(d)(13)(D)(ii) because they allege wrongdoing only by Andrade and allege no wrongdoing by the failed lenders. They note that the claims against the successor in *Benson, supra,* 673 F.3d 1207, arose from alleged wrongdoing by the failed lender.

We are not persuaded. Section 1821(d)(13)(D)(ii) refers to "*any* claim relating to *any* act or omission" of a failed financial institution. (Emphasis added.) This broad language is not limited to wrongdoing. Plaintiffs cite nothing in FIRREA suggesting that the quoted language should be so construed.

Benson, supra, 673 F.3d at page 1214, stated that section 1821(d)(13)(D)(ii) "applies to claims asserted against a purchasing bank when the claim is based on the conduct of the failed institution." The *Benson* court noted that the plaintiffs' claims there were "based almost exclusively on alleged malfeasance by WaMu" and, "[b]y relying on WaMu's alleged wrongdoing, plaintiffs' claims plainly 'relat[e] to any act or omission' of 'a depository institution for which the [FDIC] has been appointed receiver." (*Benson, supra,* at p. 1215, quoting section 1821(d)(13)(D)(ii).) *Benson* did not discuss whether the exhaustion requirement of section 1821(d)(13)(D)(ii) applied to claims based on an act or omission of a failed financial institution not constituting wrongdoing, nor did the opinion suggest that the exhaustion requirement would not apply in those circumstances.

Plaintiffs' claims here relate to both Andrade's fraud and the acts and omissions of Downey Savings in connection with its loan. Plaintiffs allege in their second count that the notes and deeds of trust should be rescinded based on their unilateral mistake, the mutual mistake of plaintiffs and the failed lender, and the fact that Andrade received the loan proceeds (i.e., failure of consideration). These allegations concern the acts and omissions of Downey Savings in making the loans, disbursing the loan funds, and recording the deeds of trust, rather than any acts or omissions of U.S. Bank. This is true regardless of whether Downey Savings committed any wrongdoing.

The allegations in plaintiff's third count that an actual controversy has arisen concerning the rights and duties of plaintiffs and U.S. Bank with respect to the loan also relate to the circumstances surrounding the making of that loan, including the acts and omissions of Downey Savings. They do not relate to any acts or omissions of U.S. Bank. In their fifth count for unjust enrichment, plaintiffs allege that it would be unjust for U.S. Bank to retain payments it has received on the Downey Savings loan because the loan was procured by fraud. These allegations also concern Andrade's misconduct and therefore relate to the acts and omissions of Downey Savings in making the loan, rather than any acts or omissions of U.S. Bank. Although plaintiffs seek to recover amounts they paid to U.S. Bank, they do not allege that they are entitled to restitution based on any act or omission of U.S. Bank independent of Andrade's fraud. Plaintiffs therefore cannot avoid the exhaustion requirement.

Plaintiffs also argue that their claims were not susceptible of resolution by the FDIC, and therefore are not subject to the exhaustion requirement, because the FDIC immediately transferred the Downey Savings loan to U.S. Bank, before plaintiffs discovered their claims against the failed lenders. Plaintiffs argue that, as a result, the FDIC could not grant the relief they seek in this action: the reconveyance of the deeds of trust. Plaintiffs cite no authority for the proposition that their failure to discover their claims against the failed lender at the time of the receivership relieves them of the exhaustion requirement. In addition, plaintiffs also seem to assume -- but fail to show -- that the FDIC could have provided no effective relief if they had filed administrative claims and established a right to relief. Plaintiffs have not demonstrated that exhaustion would have been futile. (*Benson*, *supra*, 673 F.3d at p. 1213.)

We conclude the trial court properly dismissed the complaint for lack of subject matter jurisdiction based on plaintiffs' failure to comply with the exhaustion requirement under section 1821(d)(13)(D)(ii). In light of our conclusion that the exhaustion requirement under section 1821(d)(13)(D)(ii) applies, we need not decide whether the exhaustion requirement under section 1821(d)(13)(D)(i) also applies.

DISPOSITION

The judgment is affirmed. U.S. Bank is entitled to recover its costs on appeal.

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JONES, J.[*]

WE CONCUR:

EDMON, P. J.

KITCHING, J.

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