

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

BARBARA BADER,

Plaintiff and Appellant,

v.

BANK OF AMERICA, N.A. et
al.,

Defendants and
Respondents.

2d Civil No. B280551
(Super. Ct. No. NC059894)
(Los Angeles County)

Barbara Bader and her husband obtained a home loan. She made payments for six years and then stopped. About three years later, foreclosure proceedings were initiated. Bader sued the lenders, alleging they acted wrongfully when they issued the loan. The court sustained a demurrer without leave to amend on the ground the action was time-barred. Bader appeals the judgment of dismissal. We affirm.

FACTS AND PROCEDURAL HISTORY

In May 2006, Bader and her husband obtained a home loan from Bank of America, N.A. (BofA). Six years later, they filed Chapter 7 bankruptcy. The bankruptcy court granted them a discharge, and allowed Bader and her husband to retain the home (11 U.S.C. §§ 521(a)(2), 727). Bader's husband died the same year, and she stopped making payments on the loan.

U.S. Bank (USB) purchased the loan from BofA. In December 2014, it filed a notice of default, which initiated foreclosure proceedings.

In February 2015, Bader sued BofA and USB to stop the foreclosure. She alleged six causes of action: (1) a Truth in Lending Act (TILA) violation (15 U.S.C. § 1601 et seq.), (2) an Unfair Competition Law (UCL) violation (Bus. & Prof. Code, § 17200 et seq.), (3) fraud, (4) negligence, (5) breach of good faith and fair dealing, and (6) declaratory and injunctive relief. She alleged that BofA loaned her more than she could afford to repay and that USB "ratified [that] wrongful conduct" when it purchased the loan.

BofA filed an answer, and then moved for a judgment on the pleadings. The court granted the motion with leave to amend. USB demurred, and the court sustained the demurrer with leave to amend.

Bader filed a first amended complaint (FAC), adding allegations that she suffered from multiple sclerosis, which rendered her "incapacitated, and entirely without understanding such that she lacked the power" to contract at the time she took out the loan, and "at all relevant times since."

BofA and USB demurred to the FAC. They argued that Bader's claims were time-barred and that she failed to state a cause of action.

The trial court sustained both demurrers. It found the action was time-barred because Bader filed her complaint nine years after she took out the loan. The court also found that she failed to state a cause of action for fraud, negligence, and breach of good faith and fair dealing. With respect to BofA, the court granted leave to amend the TILA, UCL, and declaratory and injunctive relief causes of action. With respect to USB, the court denied leave to amend and dismissed USB from the case.

Bader filed a second amended complaint (SAC). She added two new causes of action for constructive fraud and financial abuse of dependent adult and amended the TILA, UCL, and declaratory and injunctive relief causes of action against BofA. She added allegations that she was "at all times" incapacitated during the loan process, "until her course of treatment and medication was changed after March, 2013." She also named USB as a defendant, although USB had been dismissed.

BofA demurred to the SAC. The trial court sustained the demurrer without leave to amend on the grounds that the action was time-barred and that Bader did not have leave to add two new causes of action. The court dismissed BofA from the case. USB did not respond to the SAC because it had already been dismissed from the case.

DISCUSSION

No Waiver of Appeal of USB's Dismissal

USB argues that when Bader filed the SAC, she waived her right to appeal the order sustaining its demurrer to the FAC because the SAC superseded the FAC. We disagree.

Bader did not waive her right to appeal because the FAC was the final operative complaint against USB. Because the trial court dismissed USB before the SAC was filed, the SAC had no legal effect on USB.

USB relies on cases that do not hold otherwise. (See *Singhania v. Uttarwar* (2006) 136 Cal.App.4th 416, 425; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884; *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 311; *Rolley, Inc. v. Merle Norman Cosmetics, Inc.* (1954) 129 Cal.App.2d 844, 852.) The orders in those cases were not final orders, and the plaintiffs chose to amend their pleadings after the court granted leave to do so. But that did not happen here. Thus, the filing of the SAC did not preclude Bader from appealing the final order in favor of USB.

Statute of Limitations

Bader contends the trial court erred when it sustained BofA and USB's demurrers on the ground that all causes of action were time-barred. We disagree.

A demurrer will be sustained where the complaint discloses an affirmative defense that would bar recovery. (Code Civ. Proc., § 430.10¹; *Balikov v. Southern Cal. Gas Co.* (2001) 94 Cal.App.4th 816, 819-820.) We review a judgment of dismissal

¹ Further unspecified statutory references are to the Code of Civil Procedure.

after an order sustaining a demurrer de novo. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1500-1501 (*Lazar*).) We treat the demurrer as admitting all material facts properly pled, but not contentions, deductions, or conclusions of fact or law. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) We reasonably interpret the complaint, reading it as a whole and its parts in context. (*Ibid.*)

The statute of limitations is an affirmative defense that operates to bar a plaintiff's recovery. (*PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 176.) A cause of action accrues "when [it] is complete with all of its elements." (*Poosh v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.) A constructive fraud cause of action must be commenced within three years of accrual. (§ 338, subd. (d).) A financial abuse of a dependent adult cause of action must be commenced within four years. (§ 343; Welf. & Inst. Code, § 15657.8.) A TILA cause of action must be commenced within one year. (15 U.S.C. § 1640(e).) A UCL cause of action must be commenced within four years. (Bus. & Prof. Code, § 17208.) In this case, a declaratory and injunctive relief cause of action must be commenced within four years. (*Snyder v. California Ins. Guarantee Assn.* (2014) 229 Cal.App.4th 1196, 1208 [the statute of limitations for declaratory relief depends on the nature of the underlying claims].)²

The gravamen of Bader's complaint was that BofA acted wrongfully when it issued the loan in 2006. Therefore, the

² Because Bader does not challenge the fraud, negligence, and breach of good faith and fair dealing causes of action alleged in the FAC, we do not address the statute of limitations for those causes of action.

time period for the statute of limitations on all causes of action began to run in 2006. However, Bader did not file her complaint until nine years later.

Where an action appears time-barred on the face of the complaint, the plaintiff must plead specific facts that would avoid the statute of limitations defense. (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 824-825 (*Gentry*).) Under the version of section 352 that was in effect at the time Bader obtained the loan, a plaintiff could avoid the statute of limitations defense if he or she alleged sufficient facts to show he or she was “insane” at the time the cause of action accrued. The statutory time period was tolled “until the plaintiff is restored to sanity.” (Former § 352, subd. (a)³; *Feeley v. Southern Pacific Transportation Co.* (1991) 234 Cal.App.3d 949, 952 (*Feeley*).) An individual was considered “insane” for the purposes of this section if he or she was “incapable of caring for his [or her] property or transacting business, or understanding the nature or effects of his [or her] acts.” (*Hsu v. Mt. Zion Hospital* (1968) 259 Cal.App.2d 562, 571 (*Hsu*); see *Alcott Rehabilitation Hospital v. Superior Court* (2001) 93 Cal.App.4th 94, 100.)

Bader contends the statute of limitations was tolled because she pled sufficient facts to show she lacked legal capacity under the version of section 352 in effect at the time she obtained the loan. The SAC alleges she suffered from multiple sclerosis, which caused “memory loss, decreased attention span, and

³ The Legislature amended section 352 in 2015 to replace the term “insane” with “lacking the legal capacity to make decisions,” a “technical change[],” which did not change the meaning for the purposes of our analysis. (Stats. 2014, ch. 144, § 4.)

declining cognitive abilities, including the ability to reason.” It alleges that “at all times” during the loan transaction, she was “incapacitated, and entirely without understanding such that she lacked the power to make the contracts involved in said loan, . . . and was unable to care for herself or her financial affairs, and was mentally incompetent to contract or consent to contract.” Her condition continued “until her course of treatment and medication was changed after March, 2013.”

These conclusory allegations are insufficient. Bader did not allege specific facts sufficient to meet the standard for tolling under section 352. (*Gentry, supra*, 99 Cal.App.4th at pp. 824-825.) Although the SAC lists symptoms of her condition, it does not explain how they affected her ability to care for her property, transact business, or understand the nature or effects of her acts. (*Hsu, supra*, 259 Cal.App.2d at p. 571.) It merely states that she lacked the mental capacity to contract, which is a conclusion. Moreover, the SAC admits facts that demonstrate she understood and transacted business during the period in question. For example, the complaint admits she visited the property before the transaction, met with bank representatives, signed and entered the loan agreement, made loan payments for six years, and filed for bankruptcy.

This case is unlike *Feeley*, in which the plaintiff pleaded facts to show he was incapable of transacting business or understanding the nature of his acts during the 12 days he was unconscious and underwent cranial surgery to repair damage. (*Feeley, supra*, 234 Cal.App.3d at pp. 951-952.) This case is also unlike *Weinstock v. Eissler* (1964) 224 Cal.App.2d 212, 230-232, in which the plaintiff pleaded facts to show he was incapable of transacting business or understanding the nature of his acts

where the defendant's negligent acts caused him to suffer severe brain damage, partial paralysis, and loss of speech. Because Bader did not plead sufficient facts to prove her legal incapacity under section 352, the demurrer to each cause of action was properly sustained.⁴

Leave to Amend

Bader contends the trial court erred when it denied her leave to amend. We disagree.

A trial court abuses its discretion when it denies a plaintiff leave to amend a complaint where there is a reasonable possibility that an amendment would cure the defect. (*Lazar, supra*, 69 Cal.App.4th at p. 1501.) The plaintiff bears the burden to prove that an amendment would cure the defect. (*Ibid.*) Bader has not met her burden here because she has not proposed any amendment that would cure the defects in her pleadings.

⁴ Because we affirm on the ground that Bader's action was time-barred, we do not address her contention that she pled sufficient facts on each cause of action. We also do not reach USB's contention that Bader was judicially estopped from raising causes of action she did not disclose in her bankruptcy case. (*Hamilton v. State Farm Fire & Cas. Co.* (9th Cir. 2001) 270 F.3d 778, 782-785 [party is estopped from raising a cause of action not raised in reorganization plan].)

DISPOSITION

The judgment is affirmed. BofA and USB shall recover their costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Michael P. Vicencia, Judge

Superior Court County of Los Angeles

Freeland McKinley & McKinley, Steven A. McKinley
and Ryan O. McKinley, for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton, Jon D. Ives and
Kerry W. Franich, for Defendant and Respondent Bank of
America, N.A.

Wright, Finlay & Zak, Jonathan D. Fink, Jennifer A.
Brady and Magdalena Kovinska, for Defendant and Respondent
U.S. Bank, National Association.