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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DORIS KEATING,

Plaintiff and Appellant,

v.

CALIBER HOME LOANS, INC.,

Defendant and Respondent.

2d Civ. No. B291806
(Super. Ct. No. 56-2017-
00503649-CU-OR-VTA)
(Ventura County)

Doris Keating owns a nine-acre farm in the City of Fillmore. Caliber Home Loans, Inc. (Caliber) services a loan secured by a deed of trust on that property. In 2008, Keating defaulted on the loan and nonjudicial foreclosure proceedings were commenced. After Caliber denied Keating's request for a loan modification in 2017, she brought this action for (1) violations of the California Homeowner's Bill of Rights (Civ. Code, §§ 2923.6, 2923.7, 2924.12), (2) violation of California's Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et

seq.), (3) undue influence, (4) fraud, (5) defamation, (6) financial elder abuse (Welf. & Inst. Code, § 15610.30), (7) conspiracy and (8) declaratory relief. The trial court sustained Caliber's demurrer to these causes of action, but granted Keating leave to amend all but the defamation and conspiracy claims.

Keating, who was then self-represented, chose not to amend. Instead, she dismissed the complaint without prejudice. At Caliber's request, the trial court vacated that dismissal and dismissed the action with prejudice pursuant to Code of Civil Procedure section 581, subdivision (f)(2).¹

Keating appeals the dismissal of her fraud, financial elder abuse and UCL causes of action. She contends her complaint alleged sufficient facts to survive a demurrer to those claims. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Keating purchased the Fillmore property in May 2007 for \$1.8 million. She put \$500,000 down and financed the rest. Six months later, Keating refinanced the property with a \$1,302,000 loan from Washington Mutual Bank. She defaulted on the loan in 2008. By 2009, she was \$48,946 in arrears.

After eight years of foreclosure sale postponements, Keating's debt accelerated to \$2,034,307. Keating made no attempt to cure the arrearages, but in 2017,² she contacted Caliber, the new loan servicer, to request a loan modification. Keating submitted a loan modification application on July 27. On August 7, Caliber advised Keating that her "documents

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

² All relevant dates are in 2017 unless otherwise stated.

package is considered complete.” On September 14, Caliber denied Keating’s loan modification application as incomplete. Caliber asked Keating to contact its office “to discuss other foreclosure prevention options that may be available to [her], including a short sale, deed in lieu of foreclosure, or repayment plan.”

On September 26, Caliber sent Keating a letter thanking her for her “prompt response to [its] recent request for additional documents necessary to proceed with [her] modification review.” Caliber stated that, as of September 21, her “documents package is considered complete” and will be reviewed.

Caliber denied the loan modification application on October 11. It determined Keating was ineligible due to “[e]xcessive obligations in relation to income. As of the date of [her] request, [Keating’s] current total monthly debts exceeded [her] gross monthly income.” Again, Caliber invited a discussion of other foreclosure prevention alternatives.

Although the October 11 letter did not advise Keating of her right to submit an appeal to Caliber contesting its decision, Keating sent an “official Appeal Letter” to Caliber on November 3. She claimed she relied to her detriment on the loan modification “‘shell game’ in the sense that she did not seek alternatives such as ‘short sale’ or ‘refinance elsewhere.’” Caliber denied the appeal on December 7. To date, no foreclosure sale has occurred.

On November 7, Keating filed this action. The trial court sustained Caliber’s demurrer to all eight causes of action, but granted leave to amend on six of them. Keating did not file an amendment by the May 8, 2018 deadline. Instead, on May 10, 2018, she requested and obtained a dismissal of the complaint

without prejudice. Caliber moved for an order vacating that dismissal and entering a dismissal with prejudice pursuant to section 581, subdivision (f)(2).³ The court granted the motion and entered judgment accordingly.

DISCUSSION

Standard of Review

Where, as here, “a demurrer is sustained *with* leave to amend but [the] plaintiff elects not to amend, it is presumed on appeal that the complaint states as strong a case as is possible.” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶ 8:136.3e, p. 8-109.) “The judgment of dismissal must be affirmed if the unamended complaint is objectionable on any ground raised by the demurrer.” (*Ibid*; *Holcomb v. Wells Fargo Bank, N.A.* (2007) 155 Cal.App.4th 490, 495-496 (*Holcomb*); *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 457 (*Otworth*).)

Keating’s appeal is limited to the dismissal of her fraud, financial elder abuse and UCL causes of actions. Our task, therefore, is to review the allegations supporting those claims and to determine if any of the grounds raised in Caliber’s demurrer apply. (*Holcomb, supra*, 155 Cal.App.4th at pp. 495-496; *Otworth, supra*, 166 Cal.App.3d at p. 458.) “[W]e do not consider the possibility that any defects in [the claims] could be

³ Section 581, subdivision (f)(2) “gives the defendant the right to obtain a court order dismissing the action with prejudice once the court sustains a demurrer with leave to amend and the plaintiff has not amended within the time given.” (*Parsons v. Umansky* (1994) 28 Cal.App.4th 867, 870; *Cano v. Glover* (2006) 143 Cal.App.4th 326, 329-330.)

cured by amendment”⁴ (*Ibarra v. California Coastal Com.* (1986) 182 Cal.App.3d 687, 692; *Holcomb*, at p. 496.)

Fraud Cause of Action

To state a claim for fraud, the plaintiff must allege “(1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages.” (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 78 (*Lueras*), citing *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) “[F]raud must be pled specifically; general and conclusory allegations do not suffice.” (*Lazar*, at p. 645.)

Keating’s complaint alleged Caliber knew its denial of her loan modification application “was fraudulent” and that Caliber deliberately excluded the mandatory appeal clause in its denial letter. Caliber’s demurrer asserted Keating had failed to allege sufficient facts showing Caliber’s knowledge of the false representation, its fraudulent intent, Keating’s detrimental reliance and any resulting damages. The trial court agreed Keating had not adequately pled detrimental reliance, noting “she did not rely on the denial letter’s lack of an ‘appeal clause’ because she actually submitted an ‘official Appeal Letter’” to Caliber.

Keating contends the heightened pleading requirements for fraud do not apply on the issue of detrimental reliance. She is

⁴ Given these restraints on our review, we reject Keating’s assertion in her reply brief that she should be allowed to amend her complaint on appeal.

incorrect. In *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, the plaintiff alleged he detrimentally relied on forged documents and lost his home as a result. (*Id.* at p. 1091.) The court determined this allegation was “insufficient under the rules of law that require fraud to be pled specifically” because it “is a general allegation of reliance and damage. It does not identify the particular acts [the plaintiff] took because of the alleged forgeries. Similarly, it does not identify any acts that [the plaintiff] did not take because of his reliance on the alleged forgeries.” (*Ibid.*)

Keating cites no contrary authority, but argues her case is analogous to *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780. The lender in that case denied the plaintiff’s request for a loan modification but promised that her home would not be sold while a loan re-evaluation occurred. (*Id.* at pp. 789-790, 793.) Two days later, the lender secretly sold the home. (*Id.* at p. 790.) In contrast, Keating, who has been in default since 2008, has not lost her home. She also has not alleged any specific promises by Caliber.

Keating concedes her fraud claim focused on Caliber’s failure to advise her of her appeal rights, which she nevertheless invoked, but contends her alleged reliance extended beyond that issue. Keating points to her allegation that she detrimentally relied on the loan modification “shell game” because it prevented her from seeking a short sale, refinancing or other foreclosure alternatives.

Even if we accept this assertion, Keating has not pled any facts demonstrating “resulting damages.” (*Lueras, supra*, 221 Cal.App.4th at p.78.) Specifically, she has failed to allege that foregoing the foreclosure alternatives during the five-month loan

modification process caused her actual harm. (See *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062-1065.) Not only were there no facts suggesting those alternatives were even viable at that time, but Keating's claim of detrimental reliance is undermined by her failure to allege she was somehow prevented from pursuing those same foreclosure alternatives in the years before and after the relatively brief loan modification process.

We conclude the trial court properly sustained Caliber's demurrer to the fraud claim. Caliber correctly asserted the complaint failed to state facts sufficient to constitute an action for fraud, especially on the issues of detrimental reliance and damages. (See *Otworth, supra*, 166 Cal.App.3d at p. 458.)

Financial Elder Abuse Cause of Action

The Elder Abuse Act makes certain enhanced remedies available to a plaintiff who proves abuse of a person who is an elder (age 65 or older) or dependent adult. (Welf. & Inst. Code, § 15610.27.) Financial abuse occurs when a person or entity "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." (*Id.*, § 15610.30, subd. (a)(1).) Such a claim must be alleged with particularity. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) In addition, the "plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than mere negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31.)

Keating's complaint alleged "she was deprived of her property rights by having [Caliber] entice her into a crooked Loan Modification Scheme, by which [it] appropriated her property to

such a scheme, intending to confuse the Elder Plaintiff, not make her deadline, deny her the legal right to appeal, then sell the property at an upcoming Trustee Sale, fully intending to defraud the Elder Plaintiff by violating her legal rights to a full, and honest Loan Modification process.” Caliber’s demurrer argued the claim was improperly premised on the nonjudicial foreclosure proceedings and was not pled with particularity. The trial court agreed the alleged facts “fail to establish that foreclosing on [Keating’s] delinquent loan is abusive or egregious behavior.”

In *Stebly v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522 (*Stebly*), the Court of Appeal affirmed an order sustaining a demurrer without leave to amend as to the plaintiffs’ claims for wrongful foreclosure and dependent adult abuse (Welf. & Inst. Code, § 15610.30). (*Stebly*, at pp. 524-525.) The court determined a lender does not engage in dependent adult abuse by properly exercising its rights under a contract, even though that conduct is financially disadvantageous to the dependent adult. (*Id.* at pp. 527-528.) “It is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid. . . . [A] commercial lender is privileged to pursue its own economic interests and may properly assert its contractual rights.’ [Citation.]” (*Id.* at p. 528.)

Keating defaulted on her loan years before she submitted the 2017 loan modification application. The denial of that application did not affect the lender’s contractual right to foreclose under the loan documents. (*Stebly, supra*, 202 Cal.App.4th at pp. 527-528.) Since “a viable claim for [elder] abuse” may not be “predicated on the foreclosure of [the plaintiff’s] residence,” Caliber’s demurrer was properly sustained. (*Stebly*, at p. 528.)

UCL Cause of Action

UCL claims are derivative of other substantive causes of action, and thus “stand or fall depending on the fate of the antecedent substantive causes of action.” (*Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 178; *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1185.) Having concluded Keating’s fraud and financial elder abuse causes of action fail as a matter of law, we also affirm the dismissal of her UCL claim.

DISPOSITION

The judgment of dismissal is affirmed. Caliber shall recover its costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Mark S. Borrell, Judge
Superior Court County of Ventura

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