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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

HEATHER MADDEN,

Plaintiff and Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

2d Civil No. B241849  
(Super. Ct. No. 1379802)  
(Santa Barbara County)

Heather Madden appeals from the judgment entered after the trial court sustained without leave to amend the demurrer of respondent Bank of America to her first amended complaint for fraud, "lack of standing" to bring a foreclosure action and several other legal theories. Appellant obtained a loan, secured by a deed of trust on her house, from respondent's predecessor. Respondent initiated a nonjudicial foreclosure on the deed of trust after appellant defaulted on the loan. Appellant alleges, among other claims, that respondent refused to modify the loan unless she was in default. When she defaulted, respondent foreclosed without first offering to modify the loan. Appellant also alleges that respondent lacks standing to foreclose because there is no recorded document assigning the original promissory note and deed of trust to respondent. The trial court sustained respondent's demurrer without leave to amend after it concluded appellant failed to state a claim for relief on any of the theories

alleged in her complaint. Appellant contends the trial court erred because she properly alleged causes of action for fraud and "lack of standing" to bring a foreclosure action. We affirm.<sup>1</sup>

### *Facts*

In 2005, appellant obtained a loan for \$738,000 from respondent's predecessor, Countrywide Bank. The loan was evidenced by a promissory note and secured by a deed of trust on appellant's Carpinteria home. Appellant alleges that, after the interest rate on the loan adjusted upward, she requested a loan modification from respondent. Respondent refused to consider the modification request because her loan payments were current. Employees of respondent instructed appellant to default on the loan and represented that respondent would negotiate a loan modification after she did so. Appellant stopped making payments on the loan. Respondent did not, however, offer to modify the terms of the loan. Instead, it began nonjudicial foreclosure proceedings.

The beneficiary named in the deed of trust is Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for the lender, respondent's predecessor, Countrywide Bank. After appellant defaulted, MERS substituted Recontrust Company, N.A. (Recontrust), as the trustee of the deed of trust. Recontrust issued the notice of default and notice of trustee's sale for respondent, as beneficiary of the trust deed. Appellant alleges none of these entities have "standing" to initiate the foreclosure because there are no recorded documents assigning Countrywide's beneficial interest to respondent, Bank of America. Assignments by MERS have no effect, appellant contends, because MERS never owned a beneficial interest in the note or the deed of trust.

Appellant's first amended complaint attempts to allege causes of action for fraud, unfair business practices, breach of contract, breach of the covenant of good faith and fair dealing, violation of Civil Code section 2923.6, quiet title, declaratory

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<sup>1</sup> Appellant's eleventh hour request for dismissal of the appeal is denied.

relief and lack of standing. Respondent's demurrer contended that the complaint failed to state a cause of action on any of the theories alleged. When it sustained respondent's demurrer without leave to amend, the trial court agreed with respondent's analysis. In particular, it concluded that appellant failed to allege with specificity the factual misrepresentation required to state a claim for fraud. It further concluded that no cause of action exists to test the "standing" or authority of an entity to commence a nonjudicial foreclosure. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1155.)

Appellant's brief on appeal addresses only the claims for fraud and lack of standing. As a consequence, she has waived appellate review of the trial court's decision to sustain the demurrer to the remaining claims alleged in her first amended complaint. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 835-836; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.) Appellant has also abandoned that portion of her fraud claim in which she alleges that Countrywide defrauded her by failing to offer her a loan on more favorable terms and by failing to disclose to her all of the terms of the original loan (e.g., the adjustable interest rate, high fees and high prepayment penalty). The trial court concluded these allegations also failed to state a cause of action for fraud. Appellant's opening brief on appeal does not mention this aspect of her fraud claim and presents no argument that the trial court erred in sustaining respondent's demurrer to it. As a result, appellant has abandoned any claim based on these allegations. (*Fidelity National Title Ins. Co. v. Schroeder* (2009) 179 Cal.App.4th 834, 847, fn. 11; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685.)

#### *Standard of Review*

We independently review the trial court's order sustaining the demurrer to determine whether the facts alleged in appellant's first amended complaint state a cause of action under any legal theory. (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 998; *Montclair Parkowners Assn. v. City of Monclair*

(1999) 76 Cal.App.4th 784, 790.) In doing so, we give the complaint a reasonable interpretation, assuming the truth of all facts properly pleaded and of any facts that may reasonably be implied or of which judicial notice may be taken. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We will affirm the order sustaining the demurrer if it is correct on any legal theory. (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 637.)

We review the trial court's decision to deny leave to amend for abuse of discretion. "[W]e 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; if not, there has been no abuse and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

#### *Discussion*

To state a cause of action for fraud, a pleading must allege: (1) a misrepresentation; (2) knowledge that the statement is false; (3) intent to defraud (e.g., to induce reliance on the misrepresentation); (4) justifiable reliance; and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Fraud must be pled with specificity. " ' "This particularity requirement necessitates pleading facts which show how, when, where, to whom and by what means the representations were tendered." ' ' (*Id.* at p. 645.)

Appellant contends she properly alleged a cause of action for fraud because her first amended complaint alleges that respondent's employees induced her to default on her loan by representing that respondent would not consider modifying the loan until she was at least two months behind on her payments. The representation was false, she alleges, because respondent never offered to modify the loan and instead began foreclosure proceedings.

The trial court correctly concluded these allegations fail to state a cause of action for fraud. First, the allegations lack the requisite specificity. "The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153,157.) The first amended complaint contains none of these specific facts. Second, the complaint fails to allege that respondent knowingly made a false statement of fact to appellant. She alleges that employees of respondent told her the bank would not consider modifying her loan unless she was at least two months behind in her payments. She does not allege that the unnamed employee who made the statement knew or believed it to be false at the time it was made. Nor does appellant allege that, when the representation was made, respondent actually permitted loan modifications for borrowers who were not in default or at risk of default. Without an allegation that respondent knowingly made a misrepresentation of fact to her, appellant cannot state a cause of action for fraud.

Appellant next contends the trial court erred in sustaining the demurrer on her claim for "lack of standing." There was no error. This purported cause of action alleges that respondent lacked standing to initiate the foreclosure proceedings because there is no recorded document demonstrating its beneficial interest in the promissory note and deed of trust. But these allegations do not state a claim for relief. California's nonjudicial foreclosure law contains no provision allowing a borrower to pursue "a judicial action to determine whether the person initiating the foreclosure process is indeed authorized" to do so. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1155; see also, Civ. Code, §§ 2924-2924k; *Herrera v. Fed. Nat'l Mortg. Assn.* (2012) 205 Cal.App.4th 1495, 1503-1505; *Debrunner v. Deutsche BankNat'l Trust Co.* (2012) 204 Cal.App.4th 433, 441.) Nor does the Civil Code require that an assignment of a promissory note or a deed of trust be recorded.

(See Civ. Code, § 2934; *Herrera, supra*, 205 Cal.App.4th at p. 1509-1510 [Civil Code section 2932.5, requiring that assignment of a mortgage be recorded, does not apply to a deed of trust].)

Finally, the trial court did not abuse its discretion when it denied leave to amend. The party seeking leave to amend has the burden to demonstrate how deficiencies can be cured by amendment. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 274-275.) Although she requested leave to amend, appellant did not explain how she would add greater specificity to her allegations or whether she would be able to cure the other defects in her fraud claim. Under these circumstances, the trial court properly sustained the demurrer without leave to amend.

*Conclusion*

The judgment is affirmed. Costs on appeal to respondent.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Thomas P. Anderle, Judge  
Superior Court County of Santa Barbara

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Dough Michie, for Appellant.

McCarthy & Holthus, Matthew Podmenik and Melissa Robbins Coutts,  
for Respondent.