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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROSEMARY FUENTES,

Plaintiff and Appellant,

v.

CALLISTO GROUP, INC.,

Defendant and Respondent.

B271363

(Los Angeles County
Super. Ct. No. BC577203)

APPEAL from judgment of the Superior Court of Los Angeles County, Samantha P. Jessner, Judge. Affirmed.

Stephen R. Golden & Associates and Stephen R. Golden, for Plaintiff and Appellant.

Mark V. Asdourian and Mark V. Asdourian and Jamie L. Ackerman, for Defendant and Respondent.

Plaintiff and appellant Rosemary Fuentes appeals from a judgment of dismissal following an order sustaining a demurrer without leave to amend in favor of defendant and respondent Callisto Group, Inc., doing business as Metro Lending Services, in this action arising from foreclosure proceedings.¹ On appeal, Fuentes contends (1) the trial court abused its discretion by denying leave to amend the complaint, (2) the statements in recorded documents that Callisto was the lender were false, (3) her fraud causes of action are not barred by the statute of limitations, and (4) her loan documents should be cancelled because they are void. We conclude that the record on appeal is inadequate for review, because it lacks a reporter's transcript of the hearing on the demurrer or a suitable substitute, such as a settled statement under California Rules of Court, rule 8.137. Moreover, even were we to consider the record

¹ Defendants Select Portfolio Servicing, Inc., and The Bank of New York Mellon, formerly known as The Bank of New York, as trustee on behalf of the holders of the Alternative Loan Trust 2007-16CB, Mortgage Pass-Through Certificates, Series 2007-16CB, filed a respondents' brief on appeal. They are not parties to the judgment from which Fuentes appealed, and are not respondents on appeal. "The policy of liberally construing a notice of appeal in favor of its sufficiency (Cal. Rules of Court, rule 8.100(a)(2)) does not apply if the notice is so specific it cannot be read as reaching a judgment or order not mentioned at all. [Citations.]" (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 173.)

adequate, Fuentes has not alleged any damages that resulted from the alleged fraud, and she has not explained how she could amend the complaint to state a cause of action. Because Fuentes has not met her burden on appeal to demonstrate error, we affirm.

FACTS AND PROCEDURAL HISTORY

Allegations of the Complaint

Fuentes filed a complaint against several defendants, including Callisto, on March 30, 2015. She filed a second amended complaint on October 6, 2015, which alleged causes of action against Callisto for fraud, negligent and intentional misrepresentation, cancellation of a mortgage instrument, quiet title, and an accounting as follows.

Callisto is a licensed mortgage broker. On April 18, 2007, Fuentes and her husband obtained a loan from Callisto in the amount of \$363,000 to refinance their property on Newby Avenue in Rosemead, California. Callisto prepared a promissory note and a deed of trust listing itself as the lender. The statements in the documents that Callisto was the lender were false, because the money belonged to a third party. Callisto did not provide its own funds. Instead, the money was provided by a third party who has never been disclosed to Fuentes. Callisto received commissions for supplying the funds on behalf of the true lender and acted as an agent of the true lender.

The Mortgage Electronic Registration System (MERS) was the original beneficiary listed under the deed of trust. In September 2008, MERS recorded a notice of default stating that Fuentes owed \$14,611.65 as of September 2, 2008, and naming Recontrust, N.A., as trustee. MERS recorded a substitution of trustee on December 22, 2008, which substituted Recontrust as the trustee under the deed of trust. A notice of trustee's sale was recorded by Recontrust that same day, but no trustee's sale was held based on the notice.

On May 12, 2011, MERS recorded an assignment of the deed of trust to The Bank of New York Mellon, acting as trustee for the certificate holders of CWALT, Inc., Alternative Loan Trust 2007-16CB Mortgage Pass-Through Certificates, Series 2007-16CB (the Trust). The Trust became the beneficiary under the deed of trust.

On November 29, 2011, Recontrust recorded a notice of rescission of the declaration of default. On March 20, 2012, the Trust recorded a substitution of trustee appointing Recontrust as trustee. Recontrust recorded a notice of default stating the amount due was \$72,391.77 as of March 16, 2012. Recontrust recorded a notice of rescission of the trustee's deed upon sale on May 22, 2013.

Select Portfolio Servicing, Inc., as the Trust's servicing agent, recorded a substitution of trustee appointing National Default Servicing Corporation (NDSC) as the trustee. NDSC recorded a notice of trustee's sale, followed by a notice of rescission of the notice of default.

In November 2014, Select recorded a substitution of trustee substituting Quality Loan Service Corporation as trustee. Quality recorded a notice of default on November 4, 2014, stating that the amount Fuentes and her husband owed was \$148,414.54 as of October 31, 2014.

If Fuentes had known the facts, she would not have employed Callisto's services. As a proximate result of the defendants' conduct, Fuentes' property value declined, she lost equity in her house, she incurred the cost of protecting herself, she has reduced credit scores and less access to credit, she has reduced availability of goods and services related to credit ratings, and she has increased costs for services related to credit ratings. Fuentes did not discover her remedies until the decision of the United States Supreme Court in *Jesinoski v. Countrywide Home Loans, Inc.* (2015) 135 S.Ct. 790, 792 (*Jesinoski*), which held that a borrower exercising the right to rescind under the Truth in Lending Act (TILA, 15 U.S.C. § 1601 et seq.) need only provide notice of rescission to the lender within three years, and was not required to file a lawsuit within the three-year period. The statute of limitations was tolled until the time of discovery.

Fuentes sought several remedies, including damages, an order declaring the defendants held the beneficial interest in trust for her, an accounting of funds owed to her, a declaration that the foreclosure sale was void and cancellation of the trustee's deed upon sale, and an order quieting title in her name.

Demurrer, Opposition, Reply, and Ruling

Callisto filed a demurrer on November 9, 2015, on the ground that the second amended complaint failed to state a cause of action against Callisto. There was no causal connection between the failure to disclose the identity of the individual or entity that provided the funds for the loan and the damages that Fuentes suffered. All of her damages were the product of her failure to pay her mortgage, and not due to concealment or nondisclosure of the source of the funds. In addition, Callisto had no duty to disclose the source of the funds provided for the loan, and the failure to disclose the source of funds for the loan is not actionable. Fuentes received the loan proceeds and the benefits of the transaction. Lastly, the causes of action for fraud and misrepresentation were barred by the statute of limitations.

Cancellation of the deed of trust was an equitable remedy. Fuentes must do equity by repaying the borrowed funds before she could void the loan and the security. Fuentes had no right to quiet title without paying the debt secured by the mortgage and had no right to an accounting. The property was sold to a third party on September 11, 2015. The trustee's deed upon sale stated that the amount of the unpaid debt, together with costs, was \$540,556.43. The amount paid by the grantee at the trustee sale was \$332,000.

Fuentes argued in her opposition to the demurrer that she was damaged by the fraud because she lost her home and could not negotiate a loan modification with the party that legally owned the beneficial interest in her deed of trust. The deed of trust was void, and therefore, her claims for quiet title and cancellation of the mortgage instrument did not require tender of the unpaid debt. The accounting claim was sufficient based on the relationship between the parties and the unknown balance due to Fuentes. In the event that the claims were not adequately pled, Fuentes requested permission to amend them.

Callisto filed a reply. A hearing was held on January 25, 2016. No reporter's transcript or agreed or settled statement has been made part of the record on appeal. The trial court entered an order that day sustaining Callisto's demurrer without leave to amend. The court ruled that Fuentes had failed to allege any misrepresentation or concealment with sufficient particularity. In addition, it was not clear how the alleged misrepresentation or concealment of the source of the loan funds proximately caused Fuentes harm, since she received the proceeds of the loan. There was no legal authority for the proposition that failure to disclose the source of the loan funds was actionable. Callisto was the lender named on the promissory note, and the legal effect was that Callisto was required to perform the obligations under the note.

The fraud causes of action were also barred by the three-year statute of limitations. *Jesinoski* did not apply,

because Fuentes never provided written notice of an intent to rescind the transaction. For these reasons, the trial court sustained the demurrer as to the causes of action for fraud, and negligent and intentional misrepresentation.

There was also no legal authority to support the argument that the failure to disclose the origin of the loan funds rendered the deed of trust void or voidable, so the trial court sustained the demurrer as to the cause of action for cancellation of the mortgage. Fuentes could not quiet title in her favor without paying the underlying debt, the documents were not void on their face, and there were no allegations making the requirement of tender inequitable. Based on this, the trial court sustained the demurrer as to the quiet title cause of action. Since the cause of action for an accounting is derivative and Fuentes other causes of action failed as a matter of law, the cause of action for an accounting failed as well. Fuentes had not shown that she could successfully amend her complaint, so leave to amend the complaint was denied.

On February 19, 2016, the trial court entered a judgment of dismissal with prejudice as to Select and the Trust after an order sustaining a demurrer. On February 23, 2016, the trial court entered judgment in favor of Callisto and against Fuentes, dismissing the second amended complaint with prejudice as to Callisto. Fuentes filed a notice of appeal on April 4, 2016, from the judgment entered on February 23, 2016. The civil case information statement filed with this court and served on the parties to this appeal

attached a copy of the February 23, 2016 judgment to specify the judgment subject to Fuentes's appeal.

DISCUSSION

Judgment on Appeal

In the statement of facts in appellant's brief, Fuentes states that she is appealing from a final judgment entered on February 19, 2016. She refers to Select, the Trust, and Quality as respondents. This is incorrect. The notice of appeal is taken from the February 23, 2016 judgment in favor of Callisto, and the judgment that Fuentes supplied to the appellate court with the case information statement is the February 23, 2016 judgment of dismissal in favor of Callisto. The sole respondent on appeal is Callisto. We do not address the brief filed by Select Portfolio Servicing, Inc., and The Bank of New York Mellon, as they are not parties to the appeal.

Standard of Review

"For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.) Additionally, "facts appearing in exhibits

attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence.” (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.) We review a trial court’s decision denying a plaintiff leave to amend a complaint for abuse of discretion. (*Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 439.) “The plaintiff has the burden of proving that an amendment would cure the defect.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Inadequate Record

The record on appeal does not include a reporter’s transcript of the hearing on the demurrer or a suitable substitute, such as a settled statement under California Rules of Court, rule 8.137. We conclude the record is insufficient to demonstrate reversible error under settled California law.

“In numerous situations, appellate courts have refused to reach the merits of an appellant’s claims because no reporter’s transcript of a pertinent proceeding or a suitable substitute was provided. [Citations.] [¶] The reason for this follows from the cardinal rule of appellate review that a judgment or order of the trial court is presumed correct and prejudicial error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) ‘In the absence of a contrary showing in the record, all presumptions in favor

of the trial court's action will be made by the appellate court. "[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented." (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) This general principle of appellate practice is an aspect of the constitutional doctrine of reversible error. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)" (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186–187.)

Without a record of the proceedings, we cannot review the arguments, concessions, or information presented to the trial court. As a consequence, there is no basis for a finding that the trial court abused its discretion on the issue of whether to allow amendment of the complaint. The record and the argument on appeal are insufficient to demonstrate that the court erred. As we presume the judgment is correct unless the record affirmatively demonstrates otherwise, no showing of an abuse of discretion has been made on appeal.

Fraud Causes of Action

Based on the record presented, Fuentes has not demonstrated any error in the trial court's ruling sustaining the demurrer. In her appellant's brief, there is no discussion of any damages resulting from the alleged fraud or misrepresentation.

To prove fraud, a plaintiff must show: (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. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.)

Fuentes received loan proceeds to refinance her mortgage. She has not alleged that she suffered any damages as a result of her claim that the funds were provided by an individual or entity other than Callisto. She has not alleged that she had the ability to make payments on the debt or that she contacted Callisto to negotiate repayment. She has not explained any way that she was harmed in this case by the identity of the lender. All of the damages that she has alleged in her pleadings resulted from her failure to make her mortgage payments under the terms of her loan. The trial court properly sustained Callisto's demurrer to the causes of action for fraud and misrepresentation.

Cancellation of Mortgage Documents

Fuentes also contends that the complaint stated a cause of action for cancellation of the mortgage documents, because they are void on their face for failure to state the

true lender pursuant to the provisions of the TILA. This is incorrect.

Under the TILA, a transaction is “consummated” as soon as the consumer becomes contractually obligated on the credit transaction. (12 C.F.R. § 226.2(a)(13) (2017).) Fuentes and her husband became obligated when they signed the loan documents. Callisto was identified as the lender, and federal district courts have found a loan is “consummated” if the loan documents identify a lender, regardless of the ultimate source of the funds. (See *Ramos v. U.S. Bank* (S.D.Cal. Sept. 14, 2012, No. 12–CV–1820–IEG) 2012 U.S.Dist. Lexis 131564, *3, fn. 1 [loan was consummated regardless of how the lender was funded]; *Mohanna v. Bank of America, N.A.* (N.D.Cal. May 2, 2016, No. 16–CV–01033–HSG) 2016 U.S.Dist. Lexis 58291, *14 [district courts have unanimously found that a lender’s use of an undisclosed third party to complete a secured transaction does not preclude contract formation].)

The trial court correctly found that the mortgage documents are not void or voidable based on the allegations.

DISPOSITION

The judgment is affirmed. Respondent Callisto Group, Inc. is awarded its costs on appeal.

KRIEGLER, Acting P.J.

I concur:

DUNNING, J.*

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

BAKER, J., Concurring

I join the majority opinion, except its discussion of the consequences that flow from the absence of a reporter's transcript of the demurrer hearing. I agree that the absence of a record of what transpired at that hearing, along with plaintiff and appellant Rosemary Fuentes's failure to demonstrate on appeal how she could amend the operative complaint to state a valid cause of action, defeats her contention that the trial court abused its discretion in denying further leave to amend the complaint. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 890 ["[A] plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action"].) But I would not rely on the lack of a reporter's transcript (or an appropriate substitute) to abort all the arguments raised on appeal. As the majority concisely and persuasively demonstrates, those arguments (which challenge the trial court's ruling only with respect to the fraud and cancellation of mortgage document claims) fail on the merits without need to rely on a broad application of record adequacy principles.

BAKER, J.