Filed 9/11/19 Ghadban v. Capital One, N.A. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALI GHADBAN, Plaintiff and Appellant, v. CAPITAL ONE, N.A., et al., Defendants and Respondents.	B294859 Los Angeles County Super. Ct. No. BC697669

APPEAL from a judgment of the Superior Court of Los Angeles County, David S. Cunningham III, Judge. Affirmed.

Law Office of Terence J. Mix and Terence J. Mix for Plaintiff and Appellant.

Severson & Werson and Jan T. Chilton for Defendants and Respondents.

INTRODUCTION

To prevail in a civil case, the plaintiff must assert his claims before the statute of limitations expires. But the statutory period does not begin to run until the plaintiff knows—or reasonably should know—the facts upon which his claims rest. Plaintiff and appellant Ali Ghadban sued his lender's successor, defendant and respondent Capital One, N.A. (Capital One), alleging that in 2012, the lender erroneously reported cancelled debt on a federal tax form, Form 1099-C, after foreclosing on his home. He also sued defendant and respondent Integrated Lender Services, Inc. (Integrated), which handled the foreclosure sale, alleging the company breached its duty as trustee by failing to notify him that his promissory note had been satisfied. But Ghadban did not file his lawsuit until March 2018—more than six years after he received the Form 1099-C. He claims he did not realize the Form 1099-C was wrong until January 2018, when he received an unsolicited letter from an attorney to that effect. The trial court sustained Capital One's and Integrated's demurrer without leave to amend on timeliness grounds, and Ghadban appeals from the subsequent judgment of dismissal. We affirm.

BACKGROUND

1. Foreclosure, Sale, and the Form 1099-C

In September 2005, Ghadban borrowed $543,750 from ING Bank, fsb (ING) to refinance his home loan.[1] The loan was secured by a deed of trust on the home. The deed of trust contained a power of sale clause, which allowed ING to proceed

[1] ING merged with Capital One in 2012.

by nonjudicial foreclosure in the event of a default. (Civ. Code § 2924 et seq.; see *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830 [addressing regulation of nonjudicial foreclosure sale under power of sale clause in a deed of trust].)

Ghadban defaulted on the loan in 2009, and ING initiated nonjudicial foreclosure proceedings in January 2010. At some point thereafter, Integrated took over as trustee.

On April 18, 2011, Integrated held a nonjudicial foreclosure sale and accepted ING's credit bid for $599,058.59. The trustee's deed conveying the property to ING was recorded on June 3, 2011, and reflected a total unpaid debt of $599,058.59—the same amount as the sale price.

Several months later, in January 2012, ING sent Ghadban the debtor's copy of a Form 1099-C; the form said that on May 31, 2011, ING had cancelled $120,006.42 in debt owed by Ghadban. Form 1099-C is an Internal Revenue Service form that creditors must file when they discharge indebtedness, including certain mortgage debt. (See 26 U.S.C. § 6050P; 26 C.F.R. § 1.6050P-1.) It is a reporting tool designed to help the IRS track lenders' debt forgiveness, which can sometimes constitute taxable income to the borrower. (*FDIC v. Cashion* (4th Cir. 2013) 720 F.3d 169, 180.)

When Ghadban read the form, he believed he "faced a huge tax liability he had no way to pay," and that belief triggered immediate, severe emotional distress. The form plunged him into "a state of depression," "impacted his ability to focus and to sleep[,] and left him in a state of helplessness and hopelessness … ." At some point, Ghadban "initiated a diligent investigation" by forwarding the form to his accountant, "who he regarded as having a high level of expertise on all matters

concerning taxation." He did not investigate the form's accuracy further, however.

Ghadban alleged he "reasonably believed [the] Form 1099-C legitimately set forth cancelled debt in the correct amount" because he "is not knowledgeable about income tax matters and has no expertise in the area of taxation [and] reasonably assumed that a major national bank, with all of its resources, including experts on taxes and real estate, would know all of the rules and would not have made the cancellation of debt if not allowed under the law."

Ghadban's emotional distress continued until September 2012, when the accountant sent Ghadban his tax return. Ghadban noted that the accountant had reported the $120,006.42 from the Form 1099-C as income but had also filed a Form 982 exempting it from taxation. Thus, Ghadban did not owe any taxes on the supposedly forgiven debt.

In January 2018, six years after receiving the Form 1099-C, Ghadban received an unsolicited letter from an attorney "explaining the misconduct of ING and its misuse of said Form 1099-Cs."

2. Proceedings Below

Ghadban filed this action on March 12, 2018. The operative second amended complaint, filed September 6, 2018, asserted four causes of action. The first cause of action alleged Integrated and its agent Loretta Echols negligently breached their duties as trustees by failing to notify Ghadban that his promissory note had been satisfied.[2] The second, third, and fourth causes of

[2] Ghadban later dismissed his claims against Echols with prejudice.

action, against Capital One, stemmed from the erroneous Form 1099-C, and alleged negligent infliction of emotional distress, fraudulent misrepresentation, and intentional infliction of emotional distress.

Capital One and Integrated (collectively, respondents) demurred to the entire complaint on various grounds including, as relevant here, that all causes of action were time-barred. Respondents argued that all causes of action accrued when Ghadban received the Form 1099-C in January 2012, and were subject to either the two-year limitations period for negligence and intentional infliction of emotional distress in Code of Civil Procedure[3] section 335.1 or the three-year limitations period for fraudulent misrepresentation in section 338. Because Ghadban did not file his complaint until March 2018, respondents argued the lawsuit was time-barred.

The court sustained the demurrer without leave to amend on statute of limitations grounds and entered a judgment of dismissal in favor of respondents.[4] Ghadban filed a timely notice of appeal.

DISCUSSION

Ghadban contends the court erred in sustaining respondents' demurrer without leave to amend on timeliness grounds. We disagree.

---

[3] Undesignated statutory references are to the Code of Civil Procedure.

[4] The court had previously granted leave to amend after sustaining demurrers to both the original complaint and the first amended complaint on statute of limitations grounds.

1. Standard of Review

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Courts must also consider judicially noticed matters. (*Ibid.*) In addition, we give the complaint a reasonable interpretation, and read it in context. (*Ibid.*) If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Ibid.*) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid.*) The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid.*)" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

"In light of these principles, the difficulties in demurring on statute of limitations grounds are clear: '(1) trial and appellate courts treat the demurrer as admitting all material facts properly pleaded and (2) resolution of the statute of limitations issue can involve questions of fact. Furthermore, when the relevant facts are not clear such that the cause of action might be, but is not necessarily, time-barred, the demurrer will be overruled. [Citation.] Thus, for a demurrer based on the statute of limitations to be sustained, the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint and matters judicially noticed. [Citation.]' [Citations.]" (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 585 (*Austin*).)

2. Statute of Limitations

"To determine which statute of limitations governs a given cause of action, we must first ' "identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action." [Citation.] The nature of the cause of action and the primary right involved, not the form or label of the cause of action or the relief demanded, determine which statute of limitations applies. [Citations.]' [Citation.]" (*Austin*, *supra*, 21 Cal.App.5th at p. 585.) Here, the first, second, and fourth causes of action, for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress, are subject to two-year statutes of limitations. (§ 335.1.) The third cause of action, for fraudulent misrepresentation, is subject to a three-year statute of limitations. (§ 338, subd. (d).)

2.1. Accrual Date

A " 'statute of limitations does not begin to run until the cause of action accrues, that is, " 'until the party owning it is entitled to begin and prosecute an action thereon.' " [Citation.]' [Citation.] Thus, to determine when the statutes of limitations ended, we must first address when they began." (*Austin*, *supra*, 21 Cal.App.5th at pp. 587–588.)

"Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' [Citations.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806–807 (*Fox*).) Respondents contend Ghadban's causes of action accrued in January 2012, when he received the erroneous Form 1099-C and suffered emotional distress. As he did not file this action until March 2018, more than six years later, they contend his causes of action are all barred on the face of the

second amended complaint. Ghadban asserts that his complaint was timely under the discovery rule: He argues that he did not know, and had no way to learn, that he had been wronged until January 2018, when he received the legal solicitation. As such, his claims did not accrue until that date, and this action is timely.

2.2. The Discovery Rule

"An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.]" (*Fox*, *supra*, 35 Cal.4th at p. 807.) "A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' [Citations.] Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. [Citations.]" (*Ibid.*) "In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Id.* at p. 808.)

"[T]o rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule **must specifically plead facts** to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.' [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence';

'conclusory allegations will not withstand demurrer.' [Citation.]" (*Fox*, *supra*, 35 Cal.4th at p. 808, emphasis added.)

While belated discovery is usually a question of fact, it may be decided as a matter of law when reasonable minds cannot differ. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1320.) "Thus, when an appeal is taken from a judgment of dismissal following the sustention of a demurrer, 'the issue is whether the trial court could determine as a matter of law that failure to discover was due to failure to investigate or to act without diligence.' [Citation.]" (*Ibid*.)

Ghadban insists that there was no way for him to know, before he received a legal solicitation in January 2018, that respondents committed misconduct in preparing the Form 1099-C. But that issue is irrelevant. For purposes of starting, or tolling, the statutes of limitation, the question is not when Ghadban discovered that he may have a *legal* claim for recovery against respondents based on mistakes in the form. (See *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1113.) Nor is the question whether it was reasonable for Ghadban to rely on his accountant for legal advice and to rely on ING for tax advice. Instead, the question is when Ghadban discovered or should have discovered that the Form 1099-C was wrong as a *factual* matter. And, based on the allegations in the operative pleading and attached exhibits, he knew or should have known by 2012 that the form was wrong.

According to the second amended complaint, on April 18, 2011, Ghadban's home was sold for $599,058.59. On June 3, 2011, Integrated recorded the trustee's deed of sale conveying the property. That deed showed a total unpaid debt of $599,058.59. A copy of the deed was attached as an exhibit to the complaint.

Because $599,058.59 (total debt) − $599,058.59 (sale price) = $0, the proceeds from the foreclosure sale apparently satisfied the debt on the property; there was nothing for ING to forgive. Accordingly, the Form 1099-C, which reflected $120,006.42 in cancelled debt and was issued in January 2012, was plainly inaccurate. Put another way, while Ghadban is right that the Form 1099-C did not reveal that the debt had been extinguished—and, therefore, the form may not have been sufficient itself to trigger a suspicion of wrongdoing—the trustee's deed of sale *did* reveal that information.

To be sure, the second amended complaint reveals neither when Ghadban learned the sale price of his home and the amount of the outstanding debt nor when he obtained a copy of the trustee's deed of sale. But Ghadban was required to allege those facts—and, if he did not have that information when he received the Form 1099-C, to explain when he learned it and what efforts he made to discover it. (*Fox*, *supra*, 35 Cal.4th at pp. 808–809, 811 [complaint must allege specific facts supporting allegation that plaintiff did not know and could not reasonably discover that injury has occurred].) That is, Ghadban was required to plead facts showing when and how he learned that the Form 1099-C was wrong as a *factual* matter. (See *id.* at p. 808 [pleading requirements for discovery rule].) As such, Ghadban did not meet his burden under the discovery rule.

3. The court properly sustained the demurrer without leave to amend.

On this record, all four causes of action accrued in January 2012, and thus, the complaint filed more than six years later was untimely. In January 2012, Ghadban had all the information that would have placed a reasonable person on notice regarding the

claimed misrepresentation (wrong debt cancellation amount) on the Form 1099-C. He was on notice, based on the trustee's deed of sale, that his outstanding debt on the property was $0, and, therefore, was necessarily aware that the $120,006.42 in cancelled debt noted on the Form 1099-C differed from the $0 he actually owed.

Therefore, the court properly sustained the demurrer on timeliness grounds. As Ghadban has not identified any way in which a third opportunity to amend his complaint would cure this problem, the court did not abuse its discretion by denying leave to amend.

DISPOSITION

The judgment is affirmed. Respondents Capital One, N.A. and Integrated Lender Services, Inc. shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.