Filed 9/19/13 Fagan v. Wells Fargo Bank 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

BARRY S. FAGAN, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A. et al., Defendants and Respondents.	B241554 (Los Angeles County Super. Ct. No. SC112044)

APPEAL from judgments and an order of the Superior Court of Los Angeles County, Norman P. Tarle, Judge. Affirmed.

Barry S. Fagan, in pro. per.; Law Office of Richard L. Antognini and Richard L. Antognini for Plaintiff and Appellant.

Kutak Rock, Jeffrey S. Gerardo, Steven M. Dailey and Antoinette P. Hewitt for Defendants and Respondents Wells Fargo Bank, N.A. and American Securities Company.

Schaffer, Lax, McNaughton and Chen and Russell A. Franklin for Defendant and Respondent Ebert Appraisal Services, Inc.

The Dreyfuss Firm and Lawrence J. Dreyfuss for Defendant and Respondent T. D. Service Company.

INTRODUCTION

Plaintiff and appellant Barry Fagan appeals judgments of dismissal entered after the superior court sustained the demurrers of defendants and respondents Wells Fargo Bank, N.A. (Wells Fargo), American Securities Company, Ebert Appraisal Service, Inc. (Ebert) and T. D. Service Company (TD Service) to plaintiff's' second amended complaint without leave to amend. Fagan also appeals an order denying his motions for reconsideration of a previous order denying his discovery motions.

Plaintiff's suit arises from a $1 million line of credit he obtained from Wells Fargo secured by his house in Malibu. He contends that the line of credit agreement and related deed of trust he executed are void and that Wells Fargo has no interest in the property because Wells Fargo allegedly transferred its interests in the loan to a third party. Plaintiff seeks a judgment relieving him of any obligation to repay Wells Fargo or any other entity the balance of the $1 million loan he received.

Plaintiff also seeks monetary damages on various grounds. His principal claim is that although he requested a $775,000 line of credit, he was defrauded into receiving a credit limit of $1 million as a result of Ebert's appraisal of his property, which he contends grossly overstated its fair market value. Plaintiff also alleges that Wells Fargo and TD Services committed slander of title by filing a notice of default which they subsequently rescinded.

For reasons we shall explain, we conclude the trial court correctly determined that the second amended complaint fails to state facts sufficient to constitute a cause of action. We also conclude plaintiff has not met his burden of showing there is a reasonable possibility that he can cure the defects in his pleading and that has not meet his burden of showing the trial court abused its discretion in denying his motions for reconsideration. Accordingly, we affirm the judgments and the order.

BACKGROUND

1. *Allegations in the Second Amended Complaint*[1]

In May 2007, plaintiff applied to Wells Fargo for a line of credit in the sum of $775,000. As collateral for any loan drawn on the line of credit, plaintiff offered his single family residence in Malibu.

Wells Fargo retained Ebert to conduct an appraisal of plaintiff's property. Ebert estimated that the property's fair market value was $2.1 million. Although Ebert did not forward a copy of the appraisal report to plaintiff for another two years, its principal James Ebert advised plaintiff of the appraised value of his home.

On May 25, 2007, plaintiff executed two documents. The first was a line of credit agreement with Wells Fargo. Under this agreement, plaintiff established a "revolving account" with a credit limit of $1 million. Plaintiff agreed to repay any amounts drawn from this account, with interest, to Wells Fargo or "any successor or assign or subsequent holder" of the agreement.

Plaintiff also executed a deed of trust. This security instrument placed a lien on plaintiff's Malibu property and secured repayment of any loans made under the line of credit agreement. The deed of trust stated that American Securities Company was the trustee, Wells Fargo was the beneficiary, and plaintiff, as trustee of his living trust, was the trustor. It further provided that the "total amount which this Security Instrument will secure shall not exceed" $1 million, together with interest, as provided by the line of credit agreement.

It appears plaintiff borrowed the full $1 million limit under the line of credit agreement, though the second amended complaint is unclear on this point. In the Spring of 2011, TD Service advised plaintiff that he was in default of his obligations under the line of credit agreement. On March 22, 2011, TD Service recorded a notice of default and election to sell under deed of trust (notice of default). The notice of default stated

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[1] We assume at this stage in the proceedings that the factual allegations in the second amended complaint are true.

that plaintiff owed Wells Fargo an outstanding balance of $13,382.89 as of March 28, 2011, and that if plaintiff did not timely pay the outstanding balance, TD Service would conduct a nonjudicial foreclosure sale of plaintiff's Malibu property.

Shortly after recording the notice of default, TD Service recorded a substitution of trustee. This document indicated that TD Service had replaced American Securities Company as the trustee of the deed of trust executed by plaintiff.[2]

At some point after plaintiff executed the line of credit agreement and deed of trust, he allegedly discovered facts which he claims form the basis for his various causes of action. Plaintiff contends that the deed of trust Wells Fargo recorded was different than the document he signed. Specifically, he alleges that while page 4 of the recorded deed of trust contains a blank space, the original page 4 contains an "irrevocable assignment" by Wells Fargo of its interest in the deed of trust "to undisclosed third parties, the true identity of whom or which remains unknown to Plaintiff." Plaintiff does not attach a copy of the alleged "original" page 4 of the deed of trust to the second amended complaint.

Plaintiff further claims that Wells Fargo's interest in the line of credit agreement was "transferred and securitized into" the Wells Fargo Mortgage Backed Securities 2007-10 Trust (Trust). Attached to the second amended complaint is a declaration by Arthur Bernardo, a self-described "mortgage industry expert." According to Bernardo and his attached reports, Wells Fargo transferred its interest in the line of credit pursuant to a pooling and servicing agreement dated June 28, 2007 (PSA). Under the PSA, a group of secured loans, including the loan made to plaintiff pursuant to the line of credit agreement, were aggregated and placed in the Trust. HSCB Bank USA, National Association, served as the trustee of the Trust, while Wells Fargo was the "custodian," "master servicer" and "servicer." Unspecified investors purchased mortgage backed securities from the Trust.

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[2] A successor trustee may record and serve a substitution of trustee after it records a notice of default if it does so before it records a notice of sale. (Civ. Code, § 2934a, subd. (c).) In this case, TD Service did not record a notice of sale.

Plaintiff further alleges that his application to Wells Fargo for a line of credit was "fraudulently prepared" by Wells Fargo banker Dalia Warren. The application allegedly contained a number of factual errors of which plaintiff was unaware when he executed the line of credit agreement. Wells Fargo also failed to review plaintiff's tax returns, as it promised.

Additionally, plaintiff claims that Ebert "fraudulently inflated" its appraisal of plaintiff's Malibu property. This allegation is based primarily on two appraisals plaintiff obtained from third parties. One appraisal stated that the estimated value of plaintiff's home as of December 8, 2009, was $1,150,000, while another appraisal stated that the estimated value of plaintiff's home as January 20, 2011, was $1,185,000.

Based on these factual allegations, the second amended complaint sets forth causes of action for (1) declaratory relief, (2) cancellation of instrument, (3) quiet title, (4) breach of the implied covenant of good faith and fair dealing, (5) unfair business practices, (6) slander of title, (7) fraud and deceit, and (8) "appraisal fraud." We shall discuss the allegations of each cause of action in more detail *post*.

2. *Procedural History*

Plaintiff filed his initial complaint in April 2011. After defendants filed demurrers to the complaint, plaintiff filed a first amended complaint. Defendants then filed demurrers to the first amended complaint, which the court sustained with leave to amend.

In November 2011, plaintiff filed his second amended complaint. Again, Wells Fargo and American Securities Company, TD Service and Ebert filed separate demurrers to plaintiff's pleading.

In the meantime, prior to the hearing on defendants' demurrers to the second amended complaint, plaintiff filed discovery motions against Wells Fargo and Ebert. Both motions sought to compel the defendant to produce additional documents and further responses to requests for production. On February 2, 2012, the superior court entered a minute order denying plaintiff's discovery motions. The order also required plaintiff to pay monetary sanctions in the amounts of $6,600 and $2,625 to Wells Fargo and Ebert, respectively.

On February 23, 2012, plaintiff filed a notice of reinstatement of payment to Wells Fargo. The notice stated that plaintiff paid Wells Fargo $44,022.90, the full balance due under the line of credit agreement.

On February 29, 2012, plaintiff filed motions for reconsideration of the court's order dated February 2, 2012. On March 12, 2012, TD Service recorded a notice of rescission of the notice of default.[3] Subsequently, the superior court entered minute orders sustaining defendants' demurrers to the second amended complaint without leave to amend.

On April 16 and April 20, 2012, the court entered judgments in favor of Ebert, Wells Fargo and American Securities Company. Then on April 30, 2012, the court entered a minute order denying plaintiff's motions for reconsideration. The order stated: "The [court] lost jurisdiction on the motions once it signed the judgments requested by the defendants." On May 31, 2012, the court entered judgment in favor of TD Service and against plaintiff. Plaintiff filed a timely notice of appeal of the judgments dated April 16, 2012, April 20, 2012 and May 31, 2012, as well as the order dated April 30, 2012.

ISSUES

There are three main issues on appeal:

1. Whether the trial court erroneously sustained defendants' demurrers to plaintiff's second amended complaint.

2. Whether the trial court abused its discretion in denying plaintiff leave to amend his second amended complaint.

3. Whether the trial court abused its discretion in denying plaintiff's motions for reconsideration.

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[3] The notice of rescission was an exhibit to plaintiff's proposed third amended complaint filed concurrently with plaintiff's opposition to Wells Fargo's demurrer to the second amended complaint. We take judicial notice of the recording of the notice of rescission and its legally operative language. (Evid. Code, §§ 452, 459; *Fontenot v. Wells Fargo Bank, N. A.* (2011) 198 Cal.App.4th 256, 265.)

DISCUSSION

1. *The Superior Court Correctly Sustained Defendants' Demurrers*

a. *Standard of Review*

On appeal from a judgment of dismissal following a ruling sustaining a general demurrer, we determine de novo whether the complaint alleges facts sufficient to state a cause of action. (*Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 87 (*Maxton*).) We assume the truth of the factual allegations in the complaint, liberally construed, as well as facts that can be reasonably inferred from those expressly pleaded. (*Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.* (2012) 203 Cal.App.4th 913, 919; *Maxton*, at p. 87.) We do not, however, accept as true plaintiff's contentions, deductions or conclusions of law. (*Maxton*, at p. 87.) We also examine the exhibits attached to the complaint and, to the extent facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence. (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 282.)

b. *Declaratory Relief*

The first cause of action in the second amended complaint is for declaratory relief. A threshold requirement for declaratory relief is that there is an "actual controversy" between the parties. (Code Civ. Proc., § 1060; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) "Unless all the allegations of a complaint show that an actual controversy does exist between the parties, there is no basis for declaratory relief" (*Amer. Mission Army v. City of Lynwood* (1956) 138 Cal.App.2d 817, 819) and the complaint is subject to general demurrer (*Lord v. Garland* (1946) 27 Cal.2d 840, 851). Whether a claim presents an "actual controversy" is a question of law we review de novo. (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885 (*Environmental Defense*).)

Although a probable future controversy relating to the legal rights and duties of the parties can be the subject of a declaratory relief claim, the controversy must be ripe. (*Environmental Defense*, *supra*, 158 Cal.App.4th at p. 885.) "The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory

opinions." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170 (*Pacific Legal Foundation*).)

" 'A controversy is "ripe" when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.' " (*Pacific Legal Foundation*, *supra*, 33 Cal.3d at p. 171; accord *Environmental Defense*, *supra*, 158 Cal.App.4th at p. 885; *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 606.) In other words, " '[t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' " (*Pacific Legal Foundation*, at pp. 170-171.)

Here, plaintiff seeks a declaratory judgment stating Wells Fargo "has no legal right to seek the remedy of foreclosure, or to authorize others to implement such remedy" because it does not have any "real interest" in the line of credit agreement or the deed of trust. When the superior court adjudicated defendants' demurrers to the second amended complaint, however, there was no nonjudicial or judicial foreclosure proceeding pending. The issue of whether Wells Fargo could seek the remedy of foreclosure was thus moot. In any case, under California's comprehensive statutory scheme for nonjudicial foreclosures, a borrower cannot maintain a declaratory relief cause of action to determine whether a person initiating a nonjudicial foreclosure has the authority to do so. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1155.)

Moreover, there are no facts alleged in the second amended complaint indicating that plaintiff is in danger of making loan payments to the wrong entity. Under the line of credit agreement, plaintiff is obligated to make payments to Wells Fargo or any successor or assign of Wells Fargo. The summary of the PSA attached to the second amended complaint indicates that although the line of credit was assigned to the Trust, Wells Fargo

remained the loan servicer.[4] The second amended complaint does not allege, and there is no reason to believe, that any entity other than Wells Fargo, as the loan servicer, has a right to collect payments due under the line of credit agreement, or is claiming such a right.

Whether Wells Fargo assigned its interest, as the beneficiary of the line of credit, to the Trust, is of no practical significance to plaintiff at this time. A declaration regarding that issue would be no more than an advisory opinion on a matter not ripe for judicial review. The trial court therefore correctly sustained defendants' demurrer to plaintiff's declaratory relief cause of action.

c. *Cancellation of Instrument*

The second cause of action in the second amended complaint is for cancellation of instrument. Plaintiff seeks to declare void and cancel three written documents pursuant to Civil Code section 3412, namely the deed of trust, notice of default and substitution of trustee. Civil Code section 3412 provides: "A written instrument, in respect to which there is reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (Civ. Code, § 3412.)

The second amended complaint alleges the deed of trust is "invalid on its face, or which is invalid by reason of other instruments and evidence subject to judicial notice and proof at trial." The pleading, however, contains no facts indicating that the deed of trust is invalid or void, and plaintiff does not articulate a coherent argument in his briefs regarding the basis for cancelling this instrument.

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[4] Wells Fargo was also designated the master servicer. Under many PSAs, the master servicer has the authority to foreclose on deeds of trust. (See e.g. *Arabia v. BAC Home Loans Servicing, L.P.* (2012) 208 Cal.App.4th 462, 477.) It is unclear whether the PSA in this case authorizes Wells Fargo, as the master servicer, to initiate foreclosure proceedings.

Although plaintiff contends that page 4 of the deed of trust recorded by Wells Fargo has been "altered," he does not provide any reasoned argument regarding how this alleged alteration is grounds to cancel the instrument or cite any legal authority regarding this issue. In particular, plaintiff does not allege any facts regarding how this alleged alteration caused him "serious injury," as required by Civil Code section 3412. Plaintiff thus forfeited any arguments relating to the alleged alteration of the deed of trust. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*); *Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 122.)

The second amended complaint also alleges the notice of default and substitution of trustee are "void or voidable as having been recorded in violation of, inter alia, California Civil Code § 2923.5, and therefore subject to cancellation." Civil Code section 2923.5 sets forth certain requirements that must be satisfied in connection with the filing of a notice of default. (Civ. Code, § 2923.5; *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 221 (*Mabry*).

Plaintiff's claim that defendants violated Civil Code section 2923.5 is moot because nonjudicial foreclosure proceedings against plaintiff's property in Malibu are no longer pending. Further, the sole remedy available for a violation of Civil Code section 2923.5 is a postponement of nonjudicial foreclosure proceedings. (*Mabry*, *supra*, 185 Cal.App.4th at pp. 226, 235; *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526.) Thus even if defendants violated Civil Code section 2923.5, such violation would not be grounds to cancel the notice of default or substitution of trustee.

d. *Quiet Title*

The third cause of action in the second amended complaint is for quiet title. An action to quiet title is equitable in nature, governed by equitable principles. (*Mix v. Sodd* (1981) 126 Cal.App.3d 386, 390.) It is well established that under equitable principles, a mortgagor cannot maintain a quiet title action without first tendering or discharging his or her debt to the mortgagee. (*Id.*; *Shimpones v. Stickney* (1934) 219 Cal. 637, 649; *Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477-478; *Horton v. California Credit Corp. Ret. Plan*

(S.D. Cal. 2011) 835 F. Supp.2d 879, 893.) The same equitable principles prevent a trustor of a deed of trust from maintaining a quiet title action against a beneficiary or trustee, or their successors and assignees, without first tendering or discharging his or her secured debt.

The second amended complaint seeks a judgment stating that Wells Fargo and its successors and assignees, American Securities Company and "anyone else claiming interest" in plaintiff's Malibu property, have no right to title or interest in the property. It does not allege, however, that plaintiff has paid the outstanding balance due under the line of credit agreement or tendered that amount to Wells Fargo, the Trust, or any other individual or entity plaintiff claims is the holder of the line of credit. The second amended complaint thus fails to state a cause of action for quiet title.

Plaintiff's reliance on *Onofrio v. Rice* (1997) 55 Cal.App.4th 413 (*Onofrio*) is misplaced. *Onofrio* stated that a trustor of a deed of trust need not tender the amount due under an associated promissory note where it would be "inequitable" to do so. (*Id.* at p. 424.) If the trustor disputes the validity of the underlying debt, for example, he or she is not required to tender the debt in order to challenge a trustee's sale. (*Ibid.*) This rule does not, of course, permit a trustor to cancel a debt he or she indisputably owes.

In this case, there is nothing inequitable about requiring plaintiff to tender the amount due under the line of credit agreement before he can quiet title to the property. Plaintiff does not dispute he executed the line of credit agreement and deed of trust and that he received $1 million from Wells Fargo pursuant to the contract. Although plaintiff contends another lender has succeeded Wells Fargo, he concedes that he has not paid back the principal balance of the loan, plus interest, as provided by the line of credit agreement.[5] Plaintiff thus seeks a nearly $1 million windfall by obtaining a judgment on his quiet title cause of action allowing him to pocket the money he received from Wells Fargo without paying *anyone* back. *Onofrio* does not support such a claim and plaintiff does not and cannot cite any other cases that do so.

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[5] As we explain *post*, plaintiff's claim that he was "defrauded" into obtaining a $1 million loan instead of a $775,000 loan fails as a matter of law.

e. *Breach of the Implied Covenant of Good Faith and Fair Dealing*

Plaintiff's fourth cause of action is for breach of the implied covenant of good faith and fair dealing against Wells Fargo and Ebert. The implied covenant prohibits both parties to a contract from doing anything " ' "which will injure the right of the other to receive the benefits of the agreement." ' " (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1120.) "This covenant is 'read into contracts "in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose." ' " (*Ibid.*)

Here, the second amended complaint alleges that Wells Fargo breached the implied covenant of good faith and fair dealing read into the line of credit agreement by "concealing the fact that it was not, in fact, lending any money to Plaintiff, but was acting only as the agent of an undisclosed principal who lent funds for a number of 'pooled' loans, and to whom or which the [line of credit agreement] was wholly assigned." Had plaintiff known that "he was not borrowing directly" from Wells Fargo, the second amended complaint states, "he would not have agreed to the loan increase from $775,000 to [$1 million], and would likely have sought alternative financing."

These allegations are insufficient to state a breach of implied covenant of good faith and fair dealing claim against Wells Fargo. Nowhere in the second amended complaint does it state that plaintiff did not receive the benefits under the line of credit agreement, including a loan of $1 million. This omission is fatal to plaintiff's claim.

Moreover, the line of credit agreement expressly authorizes Wells Fargo to assign its interests to a third party. The implied covenant of good faith and fair dealing cannot impose duties or limits beyond the express terms of a contract. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350.) Thus the implied covenant did not prohibit Wells Fargo from assigning its interest in the line of credit to the Trust, or require Wells Fargo to disclose this assignment to plaintiff, so long as plaintiff received the full benefits of the line of credit agreement. Accordingly, the second amended complaint does not state a cause of action for breach of the implied covenant of good faith and fair dealing against Wells Fargo.

With respect to Ebert, the second amended complaint alleges that plaintiff was a third party beneficiary of the appraisal invoice, which he contends was a written contract between Ebert and Wells Fargo. The second amended complaint alleges that Ebert breached the implied covenant of good faith and fair dealing read into that contract.

Plaintiff's claim against Ebert is fatally defective because plaintiff was not a third party beneficiary of the alleged written contract between Ebert and Wells Fargo. "For a third party to qualify as a beneficiary under a contract, the contracting parties must have intended to benefit that third party, and their intent must appear from the terms of the contract." (*Kirst v. Silna* (1980) 103 Cal.App.3d 759, 763.) Nothing in the appraisal invoice, however, indicates that plaintiff was intended to benefit from the agreement. The invoice stated that Wells Fargo, not Fagan, was responsible to pay Ebert's $500 appraisal fee. Moreover, the purpose of the appraisal was to ensure that Wells Fargo had adequate security in the event of plaintiff's default, i.e. to protect *Wells Fargo's* interests. (See *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1099.)

Even assuming plaintiff was a third party beneficiary to the appraisal contract, the second amended complaint fails to allege any facts indicating Ebert did something to deprive plaintiff of the benefits under the written agreement. To the extent the appraisal invoice imposed any obligation on Ebert, it was to provide an appraisal report to Wells Fargo. The second amended complaint alleges Ebert satisfied that obligation. Moreover, as we explain *post*, Ebert's alleged "overstated" appraisal did not cause plaintiff any damages as a matter of law. The second amended complaint therefore fails to state facts sufficient to constitute a breach of the implied covenant of good faith and fair dealing cause of action against Ebert.

f. *Unfair Business Practices*

Plaintiff's fifth cause of action is for unfair business practices based on Business and Professions Code section 17200 et seq. The second amended complaint alleges that Wells Fargo and TD Service engaged in numerous unfair business practices, including executing and recording "false and misleading documents," instituting "improper or premature foreclosure proceedings," failing to "disclose the principal for which

documents were being executed and recorded," and filing "false and inflated appraisal, and income loan applications."

A private party cannot maintain an unfair business practices claim unless he or she is "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.) To satisfy the "injury in fact" requirement a plaintiff must show that he or she suffered economic injury and that such injury was the result of, i.e., caused by, the unfair business practice. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322.)

Although the second amended complaint states that plaintiff "has lost money and potentially his property and suffered injury in fact," it contains no facts to support this legal conclusion. In essence, plaintiff complains that he received too much money from Wells Fargo—$1 million instead of the $775,000 he initially requested. Under the express terms of the line of credit agreement, however, plaintiff was not required to borrow the full amount of his credit limit. Further, Wells Fargo had no duty to determine whether plaintiff could repay the loan, and its calculation of plaintiff's credit limit was for its own protection, not plaintiff's. (*Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 436 (*Perlas*).) Plaintiff has cited no California authority for the novel proposition that a borrower who is given a greater credit limit than he requested somehow suffers economic injury.[6] We hold that as a matter of law plaintiff did not suffer any injury or damages as a result of receiving a $1 million loan instead of a $775,000 loan.

Because the second amended complaint does not state any facts indicating plaintiff suffered an injury in fact as a result of defendants' alleged unfair business practices, it fails to state a Business and Professions Code section 17200 claim. The trial court thus correctly sustained defendants' demurrer to this cause of action.

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[6] To the extent *Wallace v. Midwest Fin. & Mortg. Servs., Inc.* (6th Cir. 2013) 714 F.3d 414 supports plaintiff's position, we decline to follow it.

g. *Slander of Title*

The sixth cause of action of the second amended complaint is for slander of title against Wells Fargo and TD Service. Plaintiff alleges defendants' recording of the deed of trust and notice of default was a slander of his title to the Malibu property. The elements of a slander of title cause of action are "(1) a publication, which is (2) without privilege or justification, (3) false, and (4) causes pecuniary loss." (*La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 472, italics omitted.)

With respect to the notice of default, the second amended complaint fails to allege facts indicating the last three elements are satisfied. The publication of a notice of default is a privileged communication. (Civ. Code, § 2924, subd. (d)(1).) Further, contrary to plaintiff's legal conclusion that the notice of default is "false," there are no facts in the second amended complaint indicating that is so. Plaintiff admits he fell behind on the payments due under the line of credit agreement. Merely because Wells Fargo transferred its interest in the line of credit does not mean that TD Service was not the duly authorized trustee of the deed of trust with the authority to record a notice of default. Finally, the recording of the notice of default caused no damages to plaintiff because the notice was subsequently rescinded and defendants never recorded a notice of sale.

The second amended complaint alleges that the deed of trust is a "legal nullity" because the line of credit was "separated and severed" from it. Unfortunately plaintiff does not present a coherent argument to support this allegation, and cites no pertinent legal authority. Plaintiff thus forfeited the issue. (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.) There are no facts, moreover, alleged in the second amended complaint indicating that the recording of the deed of trust somehow caused plaintiff direct pecuniary loss. The second complaint therefore fails to state facts sufficient to constitute a slander of title cause of action.

h. *Fraud and Deceit*

Plaintiff's seventh cause of action is for fraud and deceit against Wells Fargo and TD Service. "The elements of fraud, which give rise to the tort action for deceit, are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage. " (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 (*Lazar*).) This means the complaint must allege facts which show how, when, where, to whom, and by what means the representations were tendered. (*Ibid.*)

"A plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must '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.' " (*Lazar, supra*, 12 Cal.4th at p. 645.)

The second amended complaint states that defendants "filed false loan applications, failed to properly credit payments made and foreclosed on the Subject Property and instead initiated foreclosure proceedings on the Subject Property on the basis of putative non-payments, when Defendants knew or should have known that said payments had, in fact, been paid." It appears plaintiff contends Wells Fargo and TD Service made two sets of misrepresentations, the first relating to the loan application and the second relating to the payments plaintiff made to Wells Fargo after he received the loan.

The second amended complaint alleges that Dalia Warren, an employee of Wells Fargo, fraudulently prepared the loan application. The application allegedly contained a number of factual errors, including stating that plaintiff was unmarried, that plaintiff purchased his Malibu property in 2001, and that the property was not held in a trust. In fact, plaintiff was married, plaintiff purchased the property in 1996, and the property was held in plaintiff's trust.

Additionally, plaintiff claims he was misled into believing Warren would review his tax returns to verify his income. Plaintiff signed a form granting Wells Fargo permission to "pull" his tax returns. In May 2007, Warren advised plaintiff that he was "receiving an income verification waiver." In April 2008, after plaintiff signed the line of credit agreement, Warren sent an email to him stating: "KEEP IN MIND BY US REVIEWING YOU[R] TAX RETURNS IT WILL HAVE NO EFFECT ON YOU[R] CURRENT LINE OF CREDIT WITH THE BANK." Wells Fargo, however, never reviewed plaintiff's tax returns.

Although the second amended complaint states the legal conclusion that plaintiff detrimentally relied on Warren's alleged misrepresentations concerning his loan application, it contains no facts supporting this conclusion. Plaintiff alleges he was unaware of the contents of his loan application and Warren's alleged failure to review his tax returns before he executed the line of credit agreement and deed of trust. He thus bases his reliance claim on Wells Fargo's alleged failure to disclose the factual errors in his application and its failure to advise him that it did not actually review his tax returns. Plaintiff appears to allege that had he known of the concealed facts, he would not have borrowed $1 million but instead would have only borrowed $775,000. As we have explained, however, his receipt of more money than he initially asked for does not constitute damages or injury.[7]

Plaintiff's allegations regarding Wells Fargo's alleged failure to properly credit his loan payments are also deficient. The second amended complaint does not come close to satisfying the specificity requirements for pleading fraud. It does not specify what Wells Fargo stated, when it did so, and whether the statement was written or oral. It also does not identify the natural person at Wells Fargo who allegedly made the statement or to

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[7] The second amended complaint contains no facts whatsoever indicating how TD Service could possibly have committed fraud in connection with plaintiff's loan application. In fact, the second amended complaint indicates that TD Service did not engage in any activity with respect to plaintiff's loan or real property before plaintiff executed the line of credit agreement and deed of trust.

whom the statement was made. The second amended complaint also contains no facts indicating that TD Service, the successor trustee of the deed of trust, was involved in a fraud relating to plaintiff's loan payments. In any case, plaintiff does not provide any reasoned argument or citations to relevant legal authority in his briefs relating to his fraud claim based on defendants' alleged failure to credit plaintiff's loan payments. Plaintiff thus forfeits any claim of error relating to this allegation on appeal.

We conclude that the superior court correctly sustained defendants' demurrer to plaintiff's seventh cause of action for fraud and deceit.

i. *Appraisal Fraud*

The eighth cause of action in the second amended complaint is for "appraisal fraud" against Wells Fargo and Ebert. The second amended complaint alleges that these defendants falsely stated that the fair market value of his Malibu property was $2.1 million when in fact the property was worth less than that amount. Had plaintiff known "that the appraisal was false and overstated," the second amended complaint further alleges, "he would not have agreed to borrow the larger sum [of $1 million], but would instead have insisted upon the lesser sum of [$775,000] for which he had applied." As we explained *ante*, however, plaintiff's receipt of a loan in an amount greater than he initially applied for does not constitute damages. Plaintiff thus fails to allege facts indicating he detrimentally relied on the alleged misrepresentations Wells Fargo and Ebert made relating to the fair market value of his property. This omission is fatal to plaintiff's appraisal fraud cause of action.

2. *Plaintiff Has Not Met His Burden of Showing There is a Reasonable Possibility He Can Cure the Defects in His Second Amended Complaint*

When a general demurrer is sustained, the plaintiff must be given leave to amend his or her complaint when there is a reasonable possibility that the defects can be cured by amendment. (*Maxton*, *supra*, 203 Cal.App.4th at p. 95.) "The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

" 'To satisfy that burden on appeal, a plaintiff "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." [Citation.] The assertion of an abstract right to amend does not satisfy this burden.' " [Citation.] The plaintiff must clearly and specifically state 'the legal basis for amendment, i.e., the elements of the cause of action,' as well as the 'factual allegations that sufficiently state all required elements of that cause of action.' " (*Maxton*, *supra*, 203 Cal.App.4th at p. 95.)

Plaintiff claims he can amend the second amended complaint by alleging that defendants violated Civil Code sections 2923.55, 2924.12 and 2924.17, which became effective January 1, 2013, pursuant to Senate Bill No. 900 (2011-2012 Reg. Sess.) These statutes, however, relate to nonjudicial foreclosure proceedings.[8] Because no such proceedings are pending and, in any case, defendants never sold plaintiff's property in a foreclosure sale, defendants' alleged violations are moot. Further, these statutes only apply prospectively because the Legislature did not make an express declaration regarding retroactive application. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840.)

Plaintiff also claims he can state a cause of action under Title 15 United States Code section 1641, subdivision (g). This statute provides that when a mortgage loan is sold or otherwise transferred to a third party, within 30 days "the creditor that is the new owner or assignee of the debt" must notify the borrower about the transfer and provide relevant information regarding the new creditor, including its identity, address and telephone number. (15 U.S.C. § 1641, subd. (g).) Plaintiff does not allege that any of the defendants are the "new owner or assignee of the debt"; he claims the Trust is that entity. Plaintiff thus cannot maintain a cause of action based on this statute against defendants.

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[8] Civil Code section 2923.55 sets forth the obligations of a mortgage servicer or other authorized agent of a lender when it records a notice of default. Civil Code section 2924.17 establishes certain requirements for declarations recorded in nonjudicial foreclosure proceedings. Civil Code section 2924.12 provides for injunctive relief to enjoin material violations of Civil Code sections 2923.5, 2923.7, 2924.11 or 2924.17.

Plaintiff contends that he should be given leave to amend his second amended complaint to add a cause of action for an accounting "to prove whether or not Wells Fargo has committed perjury and that all payments made by Appellant have been properly credited." An essential element of a cause of action for an accounting, however, is that a fiduciary relationship exists between the parties. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 819, p. 236.) Absent special circumstances, there is no fiduciary duty between a borrower and a lender. (*Perlas*, *supra*, 187 Cal.App.4th at p. 436.) Because there were no such circumstances here, Wells Fargo did not have a fiduciary relationship with plaintiff and plaintiff cannot maintain an accounting cause of action against Wells Fargo.

Plaintiff's reliance on *Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938 (*Brown*) is unfounded. In *Brown*, the court found that there were "unique factual circumstances" which created a fiduciary relationship between a bank and borrowers. (*Id.* at p. 960.) The borrowers were elderly, vulnerable people. (*Ibid.*) Further, the bank's employee was given access to all of the borrowers' financial information, gave the borrowers investment advice, managed their significant financial paperwork, and actually worked biweekly in their home. (*Ibid.*) Plaintiff does not allege similar facts in this case. *Brown* is thus distinguishable.

In sum, plaintiff does not set forth a coherent legal or factual basis for any cause of action against defendants. He thus fails to meet his burden of showing there is a reasonable possibility that the defects in the second amended complaint can be cured by amendment.

3. *The Superior Court Did Not Abuse Its Discretion in Denying Plaintiff's Motions for Reconsideration*

We review a trial court's denial of a motion for reconsideration under the abuse of discretion standard. (*Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 106.) Further, a trial court's erroneous order denying a motion for reconsideration cannot be reversed unless the error was prejudicial. (Code Civ. Proc., § 475.)

Plaintiff's argument regarding the trial court's denial of his motions for reconsideration consisted of one conclusory sentence. He contends that because the trial court entered judgment in favor of Ebert on April 16, 2012 and in favor of Wells Fargo on April 20, 2012, and "thereafter [was] **without jurisdiction**, [the court] committed reversible error by **actually denying [**his motion for reconsideration] on April 30, 2012." Plaintiff, however, cites no legal authority and provides no legal analysis to support his position. He also fails to explain how the trial court's alleged error was prejudicial and provides no coherent analysis of the merits of the underlying orders he requested the trial court to reconsider.[9] Plaintiff therefore forfeited on appeal any claim of reversible error relating to the trial court's denial of his motions for reconsideration. (See *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

DISPOSITION

The judgments dated April 16, 2012, April 20, 2012 and May 31, 2012, and the order dated April 30, 2012, are affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

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[9] Plaintiff does not clearly state what he believes the trial court should have done. He apparently contends the trial court should have taken no action at all, or simply declared it had no jurisdiction to act. If that is his argument, it is difficult to understand how plaintiff was prejudiced by the trial court's alleged "error" in denying his motion.