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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| CHARLES SMITH et. al,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>ONEWEST BANK GROUP, LLC, et al.,<br><br>Defendants and Respondents. | 2d Civil No. B234037<br>(Super. Ct. No. CV100717A)<br>(San Luis Obispo County) |

Appellants Charles and Deborah Smith obtained a loan in 2004 to purchase a vacation home. They did not make the required payments and the lender foreclosed in 2009. Almost a year after the foreclosure sale, appellants filed this action seeking damages and injunctive relief for alleged wrongful foreclosure. Citing numerous pleading defects, the trial court sustained the respondents' demurrers to the complaint without leave to amend. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

On October 7, 2004, IndyMac Bank, F.S.B. (IndyMac Bank) loaned appellants $310,000 to purchase a vacation condominium located at 2698 Spyglass Drive, Unit 1, Shell Beach, California (Property). Appellants made a down payment of approximately 5 percent of the purchase price and executed a promissory note in the amount of $294,500, secured by a deed of trust on the Property. The deed of trust named

Mortgage Electronic Registration Systems, Inc. (MERS) as beneficiary and "nominee for Lender and Lender's successors and assigns." First American Title Insurance Company (First American) was the named Trustee.

In 2008, the Office of Thrift Supervision, which regulated the operations of federally-chartered savings banks and savings and loan associations, closed IndyMac Bank and appointed the Federal Deposit Insurance Company (FDIC) as receiver. Substantially all of IndyMac Bank's assets were transferred to a new institution, IndyMac Federal Bank, F.S.B. (IndyMac Federal). The FDIC subsequently arranged for the sale of IndyMac Federal to OneWest Bank, F.S.B. (OneWest). (See *Lutz v. Stewart Mich. Title* (E.D. Mich. 2011) 781 F.Supp.2d 526, 529.)

By early 2009, appellants had ceased making payments on the loan. In August 2009, OneWest instituted foreclosure proceedings.

On September 3, 2009, MERS assigned the note and deed of trust to OneWest. OneWest substituted MTC Financial Inc., dba Trustee Corps (Trustee Corps) in place of First American as trustee on the deed of trust. OneWest also assigned the note and deed of trust to Federal Home Loan Mortgage Corporation (Freddie Mac).

The trustee's sale was held on December 11, 2009. Freddie Mac purchased the Property with a credit bid of $287,650. The trustee's deed upon sale was recorded on December 21, 2009. According to appellants, Fidelity National Title Insurance Company (Fidelity) caused the trustee's deed and certain other documents to be recorded.

On or about October 25, 2010, appellants sent an "affidavit" to IndyMac Mortgage Services requesting certain information regarding their loan. IndyMac Mortgage Services responded on November 5, 2010.

On November 30, 2010, almost a year after the foreclosure sale, appellants filed a complaint in propria persona against OneWest, Trustee Corps, MERS, First American and Fidelity. The 43-page complaint alleges causes of action for (1) fraud, (2) rescission and damages under the Truth-in-Lending Act (TILA), (3) damages under the Real Estate Settlement Procedures Act (RESPA), (4) infliction of emotional distress,

(5) conspiracy, (6) unfair business practices, (7) breach of fiduciary duty, (8) slander of title, (9) quiet title and (10) temporary restraining order and preliminary injunction.

Trustee Corps removed the complaint to federal court. OneWest, MERS and Trustee Corps moved to dismiss the complaint for failure to state a claim for relief. The federal court remanded the case to state court, which treated the motions as general demurrers and sustained them without leave to amend. The court also sustained the demurrers of First American and Fidelity without leave to amend.

The trial court determined that "based on the long interval between [appellants'] purchase of their Condo and the allegations of wrongdoing in the foreclosure process, it does not seem plausible that [they] can plead valid causes of action for common law fraud or violations of the TILA, RESPA or for wrongful foreclosure." The court referenced appellants' statement at oral argument that the "loss" of the Property was not caused by defendants, but by "the loss of employment and an inability to make the mortgage payments."

A judgment of dismissal was entered as to OneWest and MERS on April 28, 2011, as to First American on May 18, 2011, and as to Fidelity on July 11, 2011. The record does not reflect entry of judgment as to Trustee Corps.

On June 17, 2011, appellants filed a notice of appeal from "[j]udgment of dismissal after an order sustaining a demurrer." Although the notice of appeal was filed before entry of the judgment in favor of Fidelity, we treat it as filed immediately after entry of judgment. (Cal. Rules of Court, rule 8.104(d)(1).) In the interests of justice and to avoid delay, we construe the April 12, 2011 order dismissing the complaint as to Trustee Corps to incorporate a judgment of dismissal and treat the notice of appeal as applying to that judgment. (*Cohen v. Equitable Life Assurance Society of the U.S.* (1987) 196 Cal.App.3d 669, 671; *Taylor v. State Personnel Bd.* (1980) 101 Cal.App.3d 498, 501, fn. 1.)

## DISCUSSION

We review an order sustaining a demurrer de novo, exercising our independent judgment to determine whether a cause of action has been stated under any

legal theory. (*Ochs v. PacifiCare of Cal.* (2004) 115 Cal.App.4th 782, 788.) We accept as true properly pleaded allegations of fact, but not contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We also consider matters subject to judicial notice. (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.) "The burden is on [appellant] to demonstrate the manner in which the complaint might be amended, and the appellate court must affirm the judgment if it is correct on any theory. [Citations.]" (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459-460.)

*Sufficiency of the Allegations*

Appellants allege they are "victim[s] of the mortgage lending mess created by Wall Street, mortgage lenders and servicers . . . and various and assorted other vultures who are engaged in a pattern and business practices intended to deceive and mislead homeowners regarding application of their payments and the amounts owing under notes and deeds of trust . . . ." Their lengthy complaint contains "boilerplate" causes of action that appear to be taken, at least in part, from another case.[1] They seek damages, rescission of the promissory note and deed of trust and an injunction preventing the sale of the Property.

The parties filed a total of six briefs. We have considered the numerous issues and contentions in these briefs. Because we conclude that certain issues are dispositive, we do not address the parties' alternative issues and contentions.

The first cause of action alleges that as a direct result of certain misrepresentations and fraudulent conduct, appellants "obtained mortgage loan financing and [have] now suffered damages in an amount to be proven." The claim appears to be against all respondents, but names only OneWest, which did not exist at the time of the loan.

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[1] For example, the ninth cause of action alleges that "Bank of America, N.A. and Quality Loan Service Corp. wrongfully claim an interest in the property." Neither entity is involved here, and we assume the allegation should have referenced OneWest and MERS.

To plead fraud, a plaintiff must allege: (1) misrepresentation of a material fact; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance on the misrepresentation; and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice." (*Id.* at p. 645.) The plaintiff must plead facts which show how, when, where, to whom, and by what means the alleged representations were made. (*Ibid.*) When pleading fraud against a corporate defendant, the requirements are even greater. A 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. [Citations.]" (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157. The complaint contains no such information, and thus the allegations are not specific enough to state a claim for fraud. (See *Gil v. Bank of America, N.A.* (2006) 138 Cal.App.4th 1371, 1381.)

The cause of action also is barred by the three-year statute of limitations for fraud claims. (Code Civ. Proc., § 338, subd. (d).) Appellants obtained the loan in 2004, but did not file the complaint until six years later.

The second cause of action seeks damages and rescission for violations of TILA which, in its broadest sense, requires that a lender disclose certain terms of the lending arrangements. (See 15 U.S.C. § 1601 et seq.) TILA gives a borrower the right to recover damages "within one year from the date of the occurrence of the violation . . . ." (15 U.S.C. § 1640(e).) The limitations period begins to run on the date of execution of the loan documents. (*King v. State of Cal.* (9th Cir. 1986) 784 F.2d 910, 913-915.) Here, the one-year period commenced when the loan was finalized on October 7, 2004. Appellants did not file an action within one year; therefore, their claim for damages is time-barred.

The remaining portion of the TILA claim fails because rescission is available only for consumer loans involving principal dwellings. (15 U.S.C. § 1635(a); *Beach v. Ocwen Federal Bank* (1998) 523 U.S. 410, 411.) Appellants acknowledge the Property was their "second home," not their principal home. Even if appellants had a

right to rescind, however, it would have terminated in 2007, three years after the date of the original loan transaction. (15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3); see *Meyer v. Ameriquest Mortg. Co.* (9th Cir. 2003) 342 F.3d 899, 902.) Because Title 15 United States Code section 1635(f) is a statute of repose, it is not subject to equitable tolling. (*Lane v. Vitek Real Estate Indus. Group* (E.D. Cal. 2010) 713 F.Supp.2d 1092, 1099; see *Beach*, at p. 411 ["§ 1635(f) completely extinguishes the right of rescission at the end of the 3-year period"].)

The third cause of action alleges that respondents violated RESPA (12 U.S.C. § 2605) by failing to provide appellants with certain disclosures at the time of closing and by failing to adequately respond to their qualified written request (QWR) dated October 25, 2010. The nondisclosure claim fails because no private right of action exists for RESPA disclosure violations. (*Bloom v. Martin* (N.D. Cal. 1994) 865 F.Supp. 1377, 1384-1385.) The QWR claim fails because appellants' written request was outside the scope of RESPA.

Title 12 United States Code section 2605(e)(1)(B) defines a QWR as a written correspondence to a loan servicer that includes the name and account number of the borrower, and contains a statement of the reasons for the borrower's belief that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower. Appellants did not submit their request for information until after the foreclosure sale, which had effectively extinguished their loan obligation. (*Commercial Fed. Mortg. Corp. v. Smith* (*In re Smith*) (11th Cir. 1996) 85 F.3d 1555, 1558 ["'Foreclosure of a mortgage extinguishes the debt. . . .'"].) Appellants provide no authority for the proposition that RESPA applies to a *former* loan servicer or to an obligation that has been extinguished by a foreclosure sale. (See *Allen v. United Financial Mortg. Corp.* (N.D. Cal. 2009) 660 F.Supp.2d 1089, 1097 [dismissing RESPA claim where plaintiff alleged only harm as a result of foreclosure].) In any event, the documents produced by appellants confirm that IndyMac Mortgage Services provided a timely written response to their request.

The fourth cause of action seeks emotional distress damages for the alleged RESPA violations. Because appellants have not properly pled such violations, this cause of action also fails.

The fifth cause of action alleges that respondents violated Title 18 United States Code section 241 by conspiring to deprive appellants of their civil rights. The trial court properly sustained the demurrers because this statute does not create a private right of action. (*Tsabbar v. Booth* (S.D.N.Y. 2003) 293 F.Supp.2d 328, 335; see *Aldabe v. Aldabe* (9th Cir. 1980) 616 F.2d 1089, 1092 [noting that 18 U.S.C. § 241 is a criminal statute that "provide[s] no basis for civil liability"].)

The sixth cause of action alleges that respondents engaged in unfair business practices in violation of Business and Professions Code section 17200. The claim is based on the alleged fraud and RESPA violations. Having failed to adequately plead those causes of action, appellants have not stated a claim under Business and Professions Code section 17200. In addition, the claim is barred by the four-year statute of limitations, which began to run on the date the cause of action accrued, not on the date of discovery. (Bus. & Prof. Code, § 17208; *Karl Storz Endoscopy-America, Inc.* (9th Cir. 2002) 285 F.3d 848, 857.) Because any purported misrepresentations resulting in the loan agreement occurred, by necessity, before the loan was finalized in 2004, this claim is at least two years too late.

The seventh cause of action is for breach of fiduciary duty. "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. [Citations.]" (*Nymark v. Heart Fed. Savings & Loan Ass'n.* (1991) 231 Cal.App.3d 1089, 1096; see *Oaks Management Corp. v. Superior Court* (2006) 145 Cal.App.4th 453, 466 [noting relationship between banks or lenders and their loan customers is not a fiduciary one].) The complaint does not allege any special circumstances that would create such a relationship with the lender or with any of the other respondents. Moreover, the statute of limitations for an alleged breach of fiduciary duty is four years. (Code Civ. Proc., § 343; *Stalberg v. Western Title Ins. Co.* (1991) 230

Cal.App.3d 1223, 1230.) The complaint was filed more than four years after the loan was made.

The eighth cause of action alleges slander of title based upon "numerous false documents" respondents caused to be recorded in the records of San Luis Obispo County. These documents include the original deed of trust plus certain documents recorded during the foreclosure process. The recording of the latter documents is protected under Civil Code section 2924, subdivision (d). This statute "makes the recording of the notice of default by the beneficiary, and any other statutorily authorized act of the beneficiary acting as trustee, a privileged communication under [Civil Code] section 47." (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 333-334, 340.)

With respect to the deed of trust, appellants allege that the deed falsely named MERS as the nominee for the beneficiary.[2] They contend that MERS was suspended from doing business in California from the time the deed was recorded until after the completion of the foreclosure sale.

The trial court properly concluded that MERS, as a Delaware corporation, is not required to obtain a certificate of qualification to conduct business in California. (Corp. Code, §§ 167, 171.) Courts recognize that MERS does not "transact intrastate business" within the meaning of the Corporations Code. (E.g., *Castaneda v. Saxon Mortg. Servs., Inc.* (E.D. Cal. 2009) 687 F.Supp.2d 1191, 1195 & fn. 3.) Moreover, California's nonjudicial foreclosure law does not permit an action to determine whether

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[2] "As case law explains, 'MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.' [Citation.]" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1151.)

MERS has been authorized by the lender to initiate a foreclosure. (*Gomes v. Countrywide Home Loans, Inc.*, *supra*, 192 Cal.App.4th at pp. 1156-1157.)

The ninth cause of action against OneWest and MERS seeks to quiet title to the Property. An action to quiet title may be brought against a party making an adverse claim to real property. (Code Civ. Proc., § 760.020, subd. (a).) It is undisputed that Freddie Mac purchased the Property at the foreclosure sale. Freddie Mac is not a party to this action, and neither OneWest nor MERS claims an adverse interest in the Property.

Nonetheless, "[i]t is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured. [Citation.]" (*Shimpones v. Stickney* (1934) 219 Cal. 637, 649.) The borrower must allege tender of the amount of the debt to challenge any irregularity in the sale procedures and to void the sale. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109; *Kelley v. Mortgage Electronic Registration Systems, Inc.* (N.D. Cal. 2009) 642 F.Supp.2d 1048, 1057 [noting that a basic requirement of a quiet title action is an allegation that plaintiffs "are the rightful owners of the property, i.e., that they have satisfied their obligations under the Deed of Trust"].) In his affidavit dated October 25, 2010, Charles Smith stated he "is prepared to discuss a tender obligation, should it arise, and satisfactory ways in which to meet this obligation." In the absence of an actual tender, however, appellants cannot state a claim for quiet title. (*Abdallah*, at p. 1109.)

The tenth and final cause of action seeks a temporary restraining order and preliminary injunction preventing respondents from selling the Property. This claim fails because respondents are not in a position to sell the Property. Freddie Mac, which took title to the Property after the foreclosure sale, is not a named defendant. Moreover, appellants acknowledge the Property was sold to a third party on June 28, 2011, effectively mooting any claim for injunctive relief.

*Denial of Leave to Amend*

Appellants contend the trial court abused its discretion by sustaining the demurrers without leave to amend. "The burden is on the plaintiff, however, to

demonstrate the manner in which the complaint might be amended. [Citation.]" (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) Appellants have not met that burden.

Appellants were unable to explain to the trial court how they could amend the complaint to cure the various defects.[3] As discussed above, most of appellants' claims are time-barred on their face. They filed this action almost a year after the foreclosure sale and more than six years after obtaining the loan. They have not alleged or proffered sufficient facts excusing this significant delay.

Even if appellants could plead sufficient facts to circumvent the timeliness issues, as well as their failure to tender the amount due, they still must allege facts demonstrating that an irregularity in the loan or foreclosure process prejudiced their interests. (See *Debrunner v. Deutsche Bank Nat. Trust Co.* (2012) 204 Cal.App.4th 433, 443-444; *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1257-1258 [presumption that nonjudicial foreclosure sale was conducted regularly and fairly may be rebutted only by substantial evidence of "prejudicial procedural irregularity"].) They have not overcome this hurdle. According to the trial court, appellants acknowledged at oral argument that they lost the Property because they could no longer afford the mortgage payments. "Public policy does not impose upon the [lender] absolute liability for the hardships which may befall the [borrower] it finances. [Citation.]" (*Wagner v. Benson* (1980) 101 Cal.App.3d 27, 34.) The success of the borrower's investment "is not a benefit of the loan agreement which the [lender] is under a duty to protect [citation]." (*Ibid.*)

As the trial court observed, "[a]bsent concrete, understandable allegations of fraud, reliance, and prejudice, courts are loath to entertain hyper-technical attacks on trustee's sales." Because appellants failed to demonstrate an ability to amend the

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[3] Appellants' oppositions to the demurrers of First American and Fidelity did not address the merits of the demurrers. Appellants merely reiterated their contention that the trial court had properly entered the default of both defendants. Having erroneously entered the defaults while the case was pending in federal court, the trial court appropriately struck the defaults and considered the demurrers.

complaint to surmount the substantial pleading defects, the trial court properly sustained the demurrers without leave to amend.

DISPOSITION

The judgments of dismissal are affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Charles S. Crandall, Judge

Superior Court County of San Luis Obispo

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