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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ALAN DALE RIDLEY, Plaintiff and Appellant, v. BANK OF AMERICA, N.A., Defendant and Respondent.	B241443 (Los Angeles County Super. Ct. No. YC065423)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cary Nishimoto, Judge. Affirmed.

Alan Dale Ridley, in pro. per., for Plaintiff and Appellant.

Bryan Cave LLP, Brian J. Recor and Andrea N. Wintermitz for Defendant and Respondent.

Plaintiff and appellant Alan Dale Ridley appeals from a judgment of dismissal following an order sustaining a demurrer in favor of defendant and respondent Bank of America, N.A. (the Bank) in this action arising out of requests for loan modifications. Ridley contends he stated causes of action for fraud, breach of contract, intentional infliction of emotional distress, and negligent misrepresentation. We conclude he has failed to allege a misrepresentation upon which he relied to his detriment, an enforceable loan modification contract, or outrageous conduct beyond the bounds of decency. Therefore, we affirm.

FACTS

In July 2006, Ridley and his wife took out two loans from Countrywide Home Loans,[1] in the amounts of $459,920 and $114,980, secured by residential property on Roselle Avenue in Hawthorne. Although Ridley qualified for the loans based on his salary alone, Countrywide required his wife's signature before they would make the loans.

In 2007, Ridley's salary was reduced, his wife returned to Bogota, Columbia in 2008, and he filed for divorce.

In March 2009, Countrywide agreed to a loan modification after obtaining Ridley's signature alone. The loans are currently serviced by the Bank.

Ridley applied for additional loan modifications through a program called Neighborhood Assistance Corporation of America (NACA). In December 2009, the Bank approved the modifications, but to be valid, the Bank required certain documents to be signed and returned by the homeowners. When Ridley failed to have the modification documents signed by his wife, the Bank denied the modifications.

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[1] Ridley's pleadings allege that Countrywide made both loans. The Bank's brief on appeal identifies a second lender on one of the loans. Because the Bank is servicing both loans, it is of no moment on appeal whether there was more than one original lender.

Ridley's wife provided permission for Ridley to sign her name to legal documents to accomplish the divorce. A divorce decree was entered on June 30, 2010. The divorce decree states there is no community debt. Ridley signed a document releasing her from any debt, and she executed a quitclaim deed transferring the property to Ridley. Ridley is no longer able to reach his former wife.

In November 2010, Ridley applied for loan modifications through a program called Home Affordable Modification Program (HAMP), which does not require the signature of both homeowners. However, the trial period plan monthly payment for the larger loan was not based on Ridley's correct salary and provided for payments that were too high for Ridley to pay. The Bank subsequently notified Ridley that he was not eligible for HAMP because he did not make the required trial payments by the end of the trial period. Ridley sent copies of his correct salary and paycheck information but did not receive a response.

The Bank denied the modification of the smaller loan on the ground that the home equity loan was insured by a private mortgage insurance company that had not approved a modification under HAMP. Ridley asked for additional information but did not receive a response.

On April 26, 2011, Ridley received a repayment plan from the Bank stating an agreement to repay delinquent amounts owed to the Bank. Ridley made the payments stated under the repayment plan.

In June 2011, Ridley sent a qualified assumption application to the Bank with his ex-wife's signature. The Bank declined the application. In August 2011, the Bank denied the most recent loan modification application under NACA for failure to obtain his ex-wife's signature.

PROCEDURAL HISTORY

On August 26, 2011, Ridley filed a complaint against the Bank for fraud, breach of contract, intentional infliction of emotional distress, and negligent misrepresentation.

The Bank filed a demurrer. On January 26, 2012, Ridley filed an amended complaint. (In addition to alleging the facts above, Ridley alleged the Bank intentionally deceived him by denying loan modifications and allowing interest and fees to increase, causing him emotional distress. The Bank represented that it was trying to help him stay in his house and understand the options available to him, as well as other customer service marketing slogans.)

The Bank filed a demurrer and a request for judicial notice. Ridley opposed the demurrer and filed a request for judicial notice. A hearing was held on April 17, 2012. The trial court sustained the demurrer as to all of the causes of action without leave to amend. Ridley filed a notice of appeal from the April 17, 2012 order. No rulings were made on the judicial notice requests. A judgment of dismissal was entered on November 16, 2012. In the interests of justice, we treat the appeal from the nonappealable order sustaining a demurrer as filed immediately after entry of judgment. (Cal. Rules of Court, rule 8.104(d)(2).)

DISCUSSION

I. Standard of Review

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We review the trial court's decision de novo. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.)

II. Fraud and Negligent Misrepresentation

Ridley contends he alleged a cause of action for fraud, although his arguments are nearly unintelligible. We conclude that he has not alleged any fraud with the requisite specificity to support a cause of action against the Bank.

A. Elements of Fraud

"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. [Citation.] The tort of negligent misrepresentation, a species of the tort of deceit [citation], does not require intent to defraud but only the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true. [Citation.]" (*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.) The normal policy of liberally construing pleadings against a demurrer will not be invoked to sustain a fraud cause of action that fails to set forth such specific allegations. (*Ibid.*) The heightened pleading standard for fraud requires " 'pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered." ' [Citation.]" (*Ibid.*) Thus, "every element of the cause of action for fraud must be alleged in full, factually and specifically . . . ." (*Wilhelm v. Pray* (1986) 186 Cal.App.3d 1324, 1331.) The specificity requirement serves two purposes: (1) to furnish the defendant with certain definite charges that can be intelligently met; and (2) to ensure the complaint is specific enough so that the court can "weed out nonmeritorious actions on the basis of the pleadings." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216-217, superceded by statute on another issue.)

B. NACA Loan Modifications

Ridley seems to contend the Bank's statements that the signatures of both borrowers are required for the NACA modification agreements to be valid are false, because the Bank accepted one modification without both signatures. This is incorrect.

The modification of a written contract is governed by Civil Code section 1698, which provides: "(a) A contract in writing may be modified by a contract in writing. [¶] (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties. [¶] (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions. [¶] (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts."

The Bank required each of the loan modification agreements to be signed by both borrowers, as shown by the signature lines set forth in each agreement. In March 2009, Countrywide or the Bank waived the signature requirement for Ridley's first loan modification application by agreeing to the modification based on Ridley's signature alone and accepting his payments under the agreement. However, waiver of the signature requirement for the March 2009 agreement did not operate to waive the Bank's right to require both borrowers' signatures on subsequent loan modification agreements. No fraud has been alleged based on the Bank's adherence to contractual modification requirements.

C. Calculation of Reduced Payments and Failure to Respond

Ridley makes several contentions concerning his application for HAMP. We find that no cause of action for fraud has been alleged in connection with these applications.

"'The United States Department of the Treasury and other federal agencies created HAMP pursuant to authority granted by the Emergency Economic Stabilization Act, title 12 United States Code section 5201 et seq. [Citation.] Mortgage servicers may voluntarily participate in HAMP. [Citation.] Treasury guidelines set forth threshold criteria to define the class of eligible borrowers. [Citation.] The guidelines also set forth accounting steps using a standardized net present value test to determine whether it is more profitable to modify the loan or allow it to proceed to foreclosure. [Citation.]' (*Nungaray v. Litton Loan Servicing, LP* (2011) 200 Cal.App.4th 1499, 1501, fn. 1.)" (*Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1005, fn. 1.)

"[C]ourts have determined that lenders are not required under HAMP to modify eligible loans." (*Lucia v. Wells Fargo Bank, N.A.* (N.D. Cal. 2011) 798 F.Supp.2d 1059, 1070 (*Lucia*); see also, e.g., *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 559, fn. 4 [stating that courts have uniformly rejected claims of homeowners trying to assert rights arising under HAMP and citing cases].) Moreover, "there is no express private right of action against [Troubled Asset Relief Program (TARP)] fund recipients." (*Pantoja v. Countrywide Home Loans, Inc.* (N.D. Cal. 2009) 640 F.Supp.2d 1177, 1185.) Therefore, the Bank was under no obligation to modify Ridley's loan under HAMP, regardless of any assistance the Bank may have received from the TARP program.

Ridley seems to contend the Bank made a false representation by calculating HAMP loan payments based on incorrect salary information. However, it appears the Bank calculated the loan payments based on the salary information it possessed, which was outdated. After the calculation was completed and presented to Ridley, he attempted to demonstrate that his salary had decreased. This does not constitute a misrepresentation by the Bank.

Ridley also seems to contend the Bank committed fraud with respect to his HAMP applications by failing to respond to his letters seeking to have his payment recalculated based on current salary information and failing to respond to questions about his home equity loan. A lack of response is not a representation. Therefore, it cannot form the basis of a fraud action.

D. Quality Assumption Application

Ridley seems to contend the Bank committed fraud by denying his application to assume the entire loan obligation because of his poor credit record. Having reviewed Ridley's allegations, we would agree that it is irrational and circular for the Bank to deny his application to assume the entire loan obligation due to his inability to pay his mortgage payments and poor credit record, yet deny his application to lower his mortgage payments because he cannot obtain the signature of his co-borrower. However, he has not alleged any fraudulent conduct by the Bank, and he has not shown that he changed his position to his detriment in reliance on any representation.

E. Loan Origination

On appeal, Ridley seems to contend for the first time that Countrywide acted fraudulently in making the original loans to him, because Countrywide made him believe he could perform his obligations under the loans, knowing this was not true. However, Ridley has alleged that he qualified for the loans without a co-borrower and it was a reduction in his salary that made the mortgage payments unaffordable. He has not demonstrated that he can allege a cause of action for fraud against the Bank related to origination of the loans.

III. Breach of Contract

Ridley contends the complaint alleges a cause of action for breach of contract, but he has failed to allege an enforceable contract was breached.

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

Ridley alleges the Bank required signatures of both borrowers for his December 2009 and April 2011 loan modification applications under NACA to be valid and effective. Although Ridley believes the Bank could have and should have modified the loans based on his signature alone, it is clear the Bank required both borrowers' signatures and Ridley could not provide his ex-wife's signature. Ridley alleges to have made payments in accordance with the modifications, but the agreements clearly require both borrowers' signatures to be valid and he was presumably required to make higher payments under the original loan agreements. Ridley has not alleged enforceable contracts with respect to his applications under NACA.

With respect to the HAMP applications, Ridley admits he did not make payments on the trial plan provided for one loan and the other loan did not qualify for HAMP. Therefore, Ridley has not alleged an enforceable contract was made under the HAMP provisions. His requests for additional information and for recalculation of his salary show that the parties did not enter into an enforceable contract under HAMP. His allegations on appeal about an opt-out agreement do not rise to the level of an enforceable contract.

IV. Intentional Infliction of Emotional Distress

Ridley contends he has alleged a cause of action for intentional infliction of emotional distress. We disagree.

"'The elements of a prima facie case for the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. [Citations.] . . . Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' (*Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579, 593.)" (*Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1009.)

The trial court properly sustained the demurrer to the cause of action for intentional infliction of emotional distress because Ridley did not allege conduct by the Bank that could be considered "outrageous." At most, this was a situation between lender and borrower in which the Bank exercised its rights under the loan agreements. There are no allegations that any Bank employees threatened, insulted, abused, or humiliated Ridley during the loan modification process. Ridley has not shown that he can state a claim for intentional infliction of emotional distress.

V. Negligent Misrepresentation

Ridley contends he has alleged a cause of action for negligent misrepresentation based on statements by Bank employees. He has failed to allege a cause of action for negligent misrepresentation.

"The elements of negligent misrepresentation are (1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. [Citations.]" (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196.)

Ridley lists several customer service platitudes that he alleges constituted negligent misrepresentations, including: 1) we take great pride in helping people achieve and maintain the dream of homeownership; 2) it's not just our business, it's our passion; 3) we look forward to assisting you; 4) we appreciate the opportunity to serve your home loan needs; 5) we strive to provide excellent customer service, and we are aware that our customer satisfaction is the key to our success; 6) we want to help you make your mortgage payment more affordable; 7) you are a valued customer; and 8) we want to help you avoid foreclosure. However, Ridley fails to identify who made the statements to him and when, or how he changed his position to his detriment in reliance on any of these statements.

He also alleges Bank employees commented that he was attempting to resolve the issue of a modification based solely on his signature and they were looking into a simple assumption of the loan so that his ex-wife would not be required to sign documents related to the loan. However, he has not alleged that these statements were false when they were made. In fact, he was attempting to resolve the issue and the Bank processed his application to assume the loan in his name alone. He does not explain how he changed his position to his detriment in reliance on these statements, other than his hope that the loan assumption would be approved. Ridley simply has not alleged sufficient facts to support a cause of action for negligent misrepresentation against the Bank.

DISPOSITION

The judgment is affirmed. Respondent Bank of America, N.A., is awarded its costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.