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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GEOFFREY COMMONS,

Plaintiff and Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

B278130

(Los Angeles County
Super. Ct. No. BC610901)

APPEAL from a judgment of the Superior Court for Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed in part, reversed in part.

Geoffrey Commons, in pro. per., for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton and Kerry W. Franich for Defendant and Respondent.

Plaintiff Geoffrey Commons appeals from a judgment entered against him and in favor of defendant Bank of America, N.A. (BofA) after the trial court granted without leave to amend BofA's motion for judgment on the pleadings. Commons contends the trial court erred by refusing to grant him leave to amend the complaint. We conclude that Commons has not demonstrated that he can allege sufficient facts to state any of his causes of action except the cause of action for breach of contract. Accordingly, we reverse the judgment as to the breach of contract cause of action insofar as it denies Commons leave to amend, and affirm the judgment as to the remaining causes of action.

BACKGROUND

Representing himself, Commons filed a complaint alleging the following facts. Commons owns a house in Los Angeles County. The house has a first and a second mortgage, in the combined amount of approximately \$860,000; the value of the property is \$2 million to \$2.5 million. For 10 years, with Commons' authorization, BofA withdrew his monthly payments of \$4,000 from his bank account; all of those payments were made in full and on time. In April 2015, he submitted an application to BofA to refinance his house, to combine the first and second mortgages, with the same monthly payment. He received no response from BofA, even after Commons submitted all the required information multiple times. Instead, BofA kept transferring authority to deal with his refinance request, requested the same information and data numerous times, and recorded all conversations he had with its employees while refusing to allow him to record the conversations.

Then, in October 2015, BofA increased his monthly payment by \$2,500. Commons, who is 77 years old and lives on a fixed income, could not afford the increased payments. In addition, BofA stopped making the automatic withdrawals from his bank account, which destroyed his credit.

Based on these alleged facts, Commons asserts nine causes of action.

The first cause of action is for breach of contract. Commons alleges that he completed his application to refinance his house four times, but BofA refused to refinance even though Commons met the bank guidelines for refinancing.

The second cause of action incorporates the factual allegations and alleges in its entirety that BofA “made constantly false representations. They stated after [t]hey had completed the application they would make a decision within 30 days. They stated the criteria they used and constantly changed the criteria. They stated the information they needed and constantly changed the list of information. They stated they would call back within 24 hours and almost never called back. [¶] Such action and other actions were taken with the intent to willfully defraud Plaintiff and as such since the conduct is willful, malicious and oppressive which warrant the imposition of punitive damages. Since plaintiff was and is treated in a manner similar to others and this type of behavior by the bank needs to be stopped.”

The third cause of action is entitled “BREACH OF FAIR HEARING AND GOOD FAITH.” It alleges that BofA “acted with no good faith toward plaintiff” by (1) recording all calls with Commons but

not giving him a copy of the calls or allowing him to record his calls; (2) requiring an additional \$2,500 monthly payment that BofA knew Commons could not pay and then foreclosing, which ruined Commons' credit and prevented him from going to an alternate lender; and (3) transferring authority for review of Commons' refinance application on a monthly basis to people with no knowledge of the history of the application.

The fourth cause of action, for negligent misrepresentation, is somewhat confusing. First, it alleges that BofA intentionally misrepresented its policy or lack of policy regarding processing a loan modification. It then alleges that Commons was approved for a loan modification but that "the loan was never processed due to the negligent actions of the bank," and that "[t]he second loan modification request has never been answered."

The fifth cause of action, for unjust enrichment, alleges that BofA should have completed the refinance before October 2015, and has been unjustly enriched by receiving or billing an additional \$2,500 every month since then.

The sixth cause of action for breach of the Real Estate Settlement Act simply alleges that BofA "violated the California Real Estate Procedures Act as well as RESPA and similar laws by not adhering to residential law, thereby causing damage to Plaintiff."

The seventh cause of action for general negligence alleges that BofA owed Commons "a duty of due care and fair hearing in the loan modification process" and that Commons has been damaged.

The eighth cause of action for breach of Business and Professions Code section 17200 alleges that BofA's "fraud" amounts to a violation of Business and Professions Code sections 17200 and 17500, causing damage to Commons.

The ninth cause of action is entitled "GENERAL RELIEF," and alleges that an actual controversy exists between Commons and BofA "with respect to these matters" and seeks declaratory relief and other relief to determine the rights and liabilities of Commons and BofA.

BofA answered the complaint, and subsequently filed a motion for judgment on the pleadings, supported by a request to take judicial notice of the two deeds of trust on Commons' property.¹ In its motion, BofA set forth the elements of each of the causes of action (except for the unjust enrichment and declaratory relief causes of action, which BofA argued are remedies, and not proper causes of action), and showed why the allegations of the complaint fail to state any causes of action. BofA also argued that the court should deny Commons leave to amend because the gravamen of his complaint is that BofA refused to comply with his demand that it refinance his two loans under the terms he requests, but BofA has no obligation -- contractual, statutory, or otherwise -- to do so.

¹ The first deed of trust secures a promissory note to lender America's Wholesale Lender in the amount of \$612,000. The second deed of trust secures a revolving line of credit, up to the amount of \$415,069, with BofA under an Equity Maximizer Agreement and Disclosure, which provides for a variable interest rate.

In his opposition, Commons did not address the elements of his causes of action and how his factual allegations satisfy those elements. Instead, he mostly repeated his allegations, albeit with some minor elaboration, without connecting them to the elements of his claims. Most importantly, for purposes of this appeal, he did not suggest how he could amend his complaint to properly state any cause of action.

After trailing the hearing on BofA's motion to allow the parties to participate in a personal meet and confer, the trial court heard argument on the motion and granted it as to all causes of action. The court found that the "[f]acts alleged do not support [the] causes of action raised as there is no obligation under the law for a bank to consolidate or to change an interest rate." The court also denied Commons leave to amend his complaint. Judgment was entered, from which Commons timely filed a notice of appeal.²

DISCUSSION

As noted, Commons challenges only the trial court's ruling denying him leave to amend his complaint; he does not challenge the court's ruling that he failed to allege facts sufficient to state any of his causes of action. When an appellant challenges the denial of leave to amend following the sustaining of a demurrer or grant of a motion for

² Commons' notice of appeal actually was premature, having been filed on October 4, 2016, after the trial court made its order but before the judgment was entered on October 5, 2016. We treat the notice as having been filed immediately after entry of judgment. (Cal. Rules of Court, rule 8.104(d)(1).)

judgment on the pleadings, “we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [standard of review on sustaining of demurrer]; *Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 275 [judgment entered after grant of judgment on the pleadings is reviewed the same as would be a judgment of dismissal entered following the sustaining of a general demurrer].)

An appellant challenging the denial of leave to amend “bears the burden of showing the defects in its complaint are capable of being cured by amendment. [Citations.] “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.” [Citation.]’ [Citation.]” (*Vanacore & Associates, Inc. v. Rosenfeld* (2016) 246 Cal.App.4th 438, 454.)

In the present case, Commons’ opening and reply briefs mostly assert an abstract right to amend, citing cases holding that leave to amend should be liberally awarded, such as *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, *Mendoza v. Continental Sales Co.*

(2006) 140 Cal.App.4th 1395, and *Eckler v. Neutrogena Corp.* (2015) 238 Cal.App.4th 433. We have no quarrel with those cases. But what Commons does not do in his appellate briefs -- as he did not do in his opposition to the motion before the trial court -- is address the elements of his claims or the additional facts he could allege to state viable causes of action, with one exception. Thus, he failed to carry his burden on appeal to show that the trial court abused its discretion in denying him leave to amend all but one of those causes of action.

The one exception is the first cause of action for breach of contract.³ In his opening brief, Commons describes the “crux” of his case as follows: “for 10 years BofA made automatic withdrawals from Mr. Commons[] account to pay the Trust Deeds; that suddenly BofA stopped making the automatic withdrawal for the second trust deed only (\$1,000 per month) for no reason and without Mr. Commons[] consent and without notice for approximately 9 months; that as a result BofA very badly ruined Mr. Commons[] credit so that he could not borrow from any other sources; that BofA repeatedly promised to process Mr. Commons’ loan modification request but in bad faith refused to do so; that all of this is in bad faith, done intentionally

³ We acknowledge BofA’s argument in its respondent’s brief that Commons failed to provide an adequate record to demonstrate an abuse of discretion because he did not provide a reporter’s transcript of the hearing on the motion or a settled statement, and therefore we cannot determine how the trial court exercised its discretion. (Citing *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483.) However, in light of our determination that Commons’ theory and facts asserted in his opening brief, liberally construed, could state a good cause of action, we conclude the lack of a reporter’s transcript or settled statement is not fatal to his appeal.

constituting intentional fraud or negligent misrepresentation or at a minimum negligence also violating a number of real estate procedures statutes.”

In arguing that the trial court erred by refusing leave to amend the first cause of action, Commons acknowledges that that claim alleged that BofA breached a contract to refinance his house, which the court found (and he appears to acknowledge) does not state a cause of action. But he asserts that he can amend the complaint to allege a new theory, i.e., that the automatic payments constituted a contract, which BofA breached. Although Commons does not set forth in his argument the terms of the alleged contract, how BofA breached, or how he was damaged, we can infer from his description of the crux of his lawsuit that the contract was one in which BofA agreed to withdraw the payments from Commons’ account, that the breach was BofA stopping its withdrawals without notice or Commons’ consent, and the damages were caused by the resulting damage to Commons’ credit, which allegedly prevented him from borrowing money from any other sources.

In light of our obligation to find an abuse of discretion if we conclude “there is a reasonable possibility that the defect [in the original cause of action] can be cured by amendment” (*Blank v. Kirwan*, 39 Cal.3d at p. 318), we must reverse the judgment as to the first cause of action insofar as Commons was denied leave to amend that claim.

DISPOSITION

The judgment as to the first cause of action for breach of contract is reversed to the extent that Commons was denied leave to amend. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.