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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NIEVES O. GERBER et al.,

Plaintiffs and Appellants,

v.

BANK OF AMERICA, N.A. et al.,

Defendants and Respondents.

B255218

(Los Angeles County
Super. Ct. No. PC053877)

APPEAL from a judgment of the Superior Court of the County of Los Angeles,
Melvin Sandvig, Judge. Reversed and remanded with instructions.

Law Offices of Richard L. Antognini, Richard L. Antognini for Plaintiffs and
Appellants.

Reed Smith, Michael E. Gerst, Kathleen van Boer for Defendants and
Respondents.

INTRODUCTION

Plaintiffs and appellants Nieves Gerber and Nieves Millar (plaintiffs)¹ appeal from a judgment of dismissal entered in favor of defendants and respondents (defendants)² following the trial court's ruling sustaining demurrers without leave to amend. According to plaintiffs, the trial court erred when it sustained defendants' special demurrer for uncertainty and when it sustained their general demurrer to each of the five causes of action asserted in the first amended complaint. Plaintiffs also contend that the trial court abused its discretion when it denied them further leave to amend their complaint because they have demonstrated on appeal that there is a reasonable possibility they can allege six viable causes of action.

We hold that the trial court correctly determined that the amended complaint was uncertain, but that plaintiffs should have been granted leave to amend to cure the deficiencies and state potential causes of action. Therefore, we reverse the judgment of dismissal and remand the matter to the trial court with instructions to enter a new order sustaining defendants' special demurrer, but with leave to amend to attempt to state the six causes of action specified by plaintiffs.

PROCEDURAL BACKGROUND

In October 2012, plaintiffs filed their original complaint against defendants. They asserted causes of action for fraudulent concealment, intentional misrepresentation, negligent misrepresentation, broken chain of title, wrongful foreclosure, wrongful transfer, and unfair competition based on a dispute with their lender over monthly

¹ Although plaintiffs are represented by counsel on appeal, they represented themselves in the trial court, a fact that may have contributed to the issues with their pleading discussed below.

² Defendants are Bank of America, N.A., Countrywide Financial Corporation, Countrywide Home Loans, Inc., and ReconTrust Company, N.A.

mortgage payments due under a home loan. Defendants filed a special demurrer and general demurrers to the amended complaint. In their special demurrer, defendants argued, *inter alia*, that the complaint was vague and uncertain. The trial court sustained the special demurrer, ruling that the entire complaint was uncertain. The trial court also sustained the general demurrers to the wrongful foreclosure, broken chain of title, and wrongful transfer causes of action without leave to amend. But the trial court granted plaintiffs leave to amend the remaining causes of action and to add a cause of action for breach of contract.

In July 2013, plaintiffs filed the operative first amended complaint. The pleading itself was 126 pages long and there were 57 exhibits attached. The exhibits consisted of another 176 pages. In addition to the attached exhibits, the amended complaint cross-referenced many of the 97 exhibits that were attached to the original complaint.³

The amended complaint asserted causes of action for breach of contract, fraudulent concealment, intentional misrepresentation, negligent misrepresentation, and violation of the Unfair Competition Law (UCL) based on the same monthly mortgage payment dispute between plaintiffs and their lender that gave rise to the original complaint. None of the causes of action specified the defendants against which each claim was being made.

The breach of contract cause of action, which was 68 pages long, alleged not one, but multiple breaches of contract based on “violating contractual monthly mortgage payments owed,” “‘TILA’ violations,” “‘TARP violations,” and “‘HAMP violations.”

The amended complaint incorporated by reference into each cause of action all of the preceding and subsequent allegations of the complaint. Much of the amended complaint was in outline form, consisting of sentence fragments and a significant amount of underscored, bolded, and italicized text. In addition, the amended complaint contained detailed, but unnecessary, schedules of mortgage, insurance, and tax payments. And it contained lengthy quotations from federal regulations and other statutes.

³ Plaintiffs did not include the 97 exhibits attached to the original complaint in the record on appeal.

The amended complaint also contained detailed, but again unnecessary, descriptions of multiple telephone and other communications between plaintiffs, on the one hand, and multiple Bank of America representatives, on the other hand, including the dates, times, and telephone numbers relevant to each such communication. Similarly, the amended pleading detailed the sworn testimony of seven Bank of America employees, the substance of news articles about that testimony, and the specifics of a consent judgment, the significance of all of which was unclear.

The amended complaint compounded the foregoing pleading issues by repeating allegations and making multiple factual and legal conclusions. In short, the amended pleading was convoluted, difficult to follow, unnecessarily detailed, and, at several points, incomprehensible.

Defendants filed a demurrer to the first amended complaint, arguing, *inter alia*, that the pleading was vague and uncertain under Code of Civil Procedure section 430.10, subdivision (f). Following a hearing on the demurrer, the trial court adopted its tentative ruling and ruled that the “entire First Amended Complaint is uncertain, and, therefore, subject to demurrer. CCP 430.10(f). The First Amended Complaint makes general, conclusory, and, at times contradictory statements against the defendants/moving parties. As such, moving parties cannot reasonably respond. Additionally, [plaintiffs] fail to adequately plead each of the [five] causes of action alleged in the First Amended Complaint.” The trial court sustained the special and general demurrers to the first amended complaint without leave to amend and thereafter entered a judgment of dismissal. Plaintiffs filed a timely notice of appeal from the judgment of dismissal.

DISCUSSION

A. Standard of Review

A ruling on a demurrer is reviewed under a de novo standard. “For purposes of analyzing the ruling on demurrer, we give the pleading a reasonable interpretation, reading it as a whole, its parts in their context, to determine whether sufficient facts are stated to constitute a cause of action or a right to the relief requested. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) If a demurrer was sustained without leave to amend, but the defect was curable by amendment, we would find an abuse of discretion in that ruling. However, if the order is correct as a matter of law, we would not reverse it. (*Ibid.*) We examine the legal sufficiency of the judgment, not necessarily the reasoning of the trial court. (*D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 [112 Cal.Rptr. 786, 520 P.2d 10].)” *Otay Land Co. v. Royal Indemnity Co.* (2008) 169 Cal.App.4th 556, 561-562.) Abuse of discretion in sustaining a demurrer without leave to amend is reviewable on appeal without a request for leave to amend. (*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 550, Code Civ. Proc. § 472 subd. (c); and *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711.)

B. Special Demurrer for Uncertainty

A demurrer to a complaint may be general or special. A general demurrer challenges the legal sufficiency of the complaint on the ground it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) A special demurrer challenges other defects in the complaint, including whether a pleading is uncertain. (Code Civ. Proc., § 430.10, subd. (f).) The term uncertain includes the issue of whether the pleading is “ambiguous and unintelligible.” (*Ibid.*) A demurrer for uncertainty should be sustained if the complaint is drafted in such a manner that the defendant cannot reasonably respond, i. e., the defendant cannot determine what issues

must be admitted or denied, or what counts are directed against the defendant. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.)

“All that is required of a plaintiff, even as against a special demurrer, is that he set forth in his complaint the essential facts of his case with reasonable precision and with particularity sufficiently specific to acquaint the defendant of the nature, source, and extent of his cause of action.’ (*Goldstein v. Healy* (1921) 187 Cal. 206, 210 [201 P. 462]; *Smith v. Kern County Land Co.* (1959) 51 Cal.2d 205, 209 [331 P.2d 645].) Essentially the problem is one of fairness in pleading so as to give the defendant such notice by the complaint that he may prepare his case. (*Bauer v. County of Ventura* (1955) 45 Cal.2d 276, 291 [289 P.2d 1].)” (*Wise v. Southern Pacific Company* (1963) 223 Cal.App.2d 50, 63.)

C. Chain Letter, Shotgun, and Prolix Pleadings

In *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, the court defined a pleading practice that it termed “chain letter” or cumulative pleading and explained that the practice should be avoided because it causes ambiguity and creates redundancy.

“[The p]laintiff employs in part a ‘chain letter’ or cumulative type of pleading. That is, [the] plaintiff’s cause of action for negligent infliction of emotional distress, the second cause of action in the second amended complaint, incorporates by reference the entire first cause of action. This type of pleading should be avoided as it tends to cause ambiguity and creates redundancy.” (*Id.* at p. 285.)

In *Sollberger v. Wachovia Securities, LLC* (C.D. Cal. June 30, 2010, No. SACV 09-0766 AG) 2010 U.S. Dist. LEXIS 66233 at *11-12, the court defined a related pleading practice that it termed “shotgun” pleading and explained why that practice should not be tolerated by trial courts. “Shotgun pleadings are pleadings that overwhelm defendants with an unclear mass of allegations and make it difficult or impossible for defendants to make informed responses to the plaintiff’s allegations. They are unacceptable. . . . The Court has recognized that allowing shotgun pleadings would lead to many negative consequences. *See Mason v. County of Orange*, 251 F.R.D. 562, 563-

64 (C.D. Cal. 2008) (quoting *Anderson v. District Board of Trustees*, 77 F.3d 364, 366-67 (11th Cir. 1996)) (‘[E]xperience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court’s docket becomes unmanageable, the litigants suffer, and society loses confidence in the court’s ability to administer justice.’); *see also Byrne v. Nezhat*, 261 F.3d 1075, 1130 (11th Cir. 2001) (‘Cases framed by shotgun pleadings consume an inordinate amount of a court’s time. As a result, justice is delayed, if not denied, for litigants who are standing in the queue waiting to be heard. Their impression of the court’s ability to take care of its business can hardly be favorable. As the public becomes aware of the harm suffered by the victims of shotgun pleading, it, too, cannot help but lose respect for the system.’)”

In *Zinzuwadia v. Mortgage Electronic Registration Systems, Inc.* (E.D. Cal. December 28, 2012, No. 2:12-cv-02281-KJM-KJN PS) 2012 U.S. Dist LEXIS 182797 at *17, the court reiterated the negative effects that prolix pleadings have on the judicial system. “[The p]laintiff’s prolix pleading, which consists of more than 80 pages of many repetitive, confusing allegations against all defendants, fails to give each defendant proper notice of the claims against it and forces the court to wade through conclusory and redundant allegations in efforts to piece together the facts upon which [the] plaintiff’s claims are based. [¶] A panel of the Ninth Circuit Court of Appeals summarized the ills of confusing or vague complaints as follows: [¶] ‘Prolix, confusing complaints such as the ones [the] plaintiffs filed in this case impose unfair burdens on litigants and judges. As a practical matter, the judge and opposing counsel, in order to perform their responsibilities, cannot use a complaint such as the one [the] plaintiffs filed, and must prepare outlines to determine who is being sued for what. Defendants are then put at risk that their outline differs from the judge’s, that plaintiffs will surprise them with something new at trial which they reasonably did not understand to be in the case at all, and that res judicata effects of settlement or judgment will be different from what they reasonably expected. . . . [¶] The judge wastes half a day in chambers preparing the ‘short and plain statement’ which [Federal Rules of Civil Procedure,] Rule 8 obligated [the] plaintiffs to submit. He then must manage the litigation without knowing what claims are made against whom. This leads to discovery disputes and

lengthy trials, prejudicing litigants in other case[s] who follow the rules, as well as defendants in the case in which the prolix pleading is filed.’ [¶] *McHenry v. Renne*, 84 F.3d 1172, 1179-80 (9th Cir. 1996) (affirming district court’s dismissal of the complaint for violation of Rule 8 and failure to comply with court orders); see also *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058-59 (9th Cir. 2011) (addressing dismissals for overly lengthy complaints and stating that ‘[o]ur district courts are busy enough without having to penetrate a tome approaching the magnitude of *War and Peace* to discern a plaintiff’s claims and allegations.’)” (See also *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 673.)

D. Ruling on Special Demurrer for Uncertainty

The trial court sustained defendants’ special demurrer under Code of Civil Procedure section 430.10, subdivision (f) on the grounds that the entire complaint was uncertain. On appeal, plaintiffs do not dispute that their amended complaint was uncertain. They do say they stated facts sufficient to state a cause of action. But they do not deal with the issue by pointing to specific allegations. Moreover, if the complaint is so unintelligible, it is intuitive that the complaint fails to state facts sufficient to constitute a cause of action. They argue that the special demurrer and general demurrer should not have been sustained *without leave to amend* because there was a reasonable possibility that the defects in their pleading could be cured and one or more viable causes of action could be stated.

Based on our review of the lengthy and prolix first amended complaint, including the 57 attached exhibits, we conclude that the trial court correctly determined that the amended complaint was uncertain. As noted, the hundreds of pages of allegations and exhibits were redundant, conclusory, ambiguous, unnecessarily detailed, and, at times, contradictory. Moreover, by failing to specify which of the defendants was included in which cause of action and incorporating by reference in each cause of action every preceding and subsequent allegation, the amended complaint ran afoul of the prohibition against chain letter or cumulative pleading and resulted in further ambiguity

and redundancy. In addition, the unnecessary detail, including detailed schedules of loan, tax, and insurance payments and cross-references to exhibits attached to the original complaint, evinced an intent to “overwhelm defendants with an unclear mass of allegations” and served only to make it difficult, if not impossible, for the defendants and the trial court to make informed responses to the allegations. The outline format, replete with sentence fragments and bolded, underscored, and italicized text, made it even more difficult to understand the gravamen of each cause of action. The cumulative effect of all the foregoing pleading deficiencies was an ambiguous and largely unintelligible pleading that fit the legal definition of uncertain.

The trial court should not have been required to wade through conclusory and redundant allegations to piece together the facts upon which each of plaintiffs’ separate causes of action were based. We therefore conclude that the trial court did not err in sustaining defendants’ special demurrer on the grounds that the amended complaint was uncertain.

E. Leave to Amend

As noted, plaintiffs argue that the trial court should not have sustained the special demurrer for uncertainty and the general demurrer *without leave to amend* because there was a reasonable possibility that their deficient complaint could be amended to cure any deficiencies and state one or more viable causes of action. Specifically, plaintiffs, with the assistance of counsel on appeal, explain that they can amend to state potentially viable claims for breach of contract, promissory estoppel, fraud, negligent misrepresentation, negligence, and violation of the UCL.

The well-established public policy of this state is that leave to amend should be liberally granted. “Public policy dictates that leave to amend be liberally granted. If there is any reasonable possibility that the plaintiff can state a cause of action, it is error to sustain a demurrer without leave to amend. (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 245 [74 Cal.Rptr. 398, 449 P.2d 462]; *Sheehan v. San Francisco*

49ers, Ltd. (2009) 45 Cal.4th 992, 998 [89 Cal.Rptr.3d 594, 201 P.3d 472].)” (*Centex Homes v. St. Paul Fire & Marine Ins. Co.* (2015) 237 Cal.App.4th 23, 32.)

In their opening and reply briefs, plaintiffs, with the assistance of counsel on appeal, provide detailed explanations about how their defective complaint could be amended to state the six causes of action specified above. For example, plaintiffs explain that they can amend their pleading to state a breach of contract cause of action based on an alleged escrow waiver agreement. According to plaintiffs, when they agreed to take out the subject home loan in 2007, the original lender, Countrywide Home Loans, agreed that it would not require plaintiffs to make monthly property tax and insurance premium payments into an escrow impound account—the so-called escrow waiver agreement. Although the lender retained the right to open such an escrow impound account if plaintiffs failed on their own to make the required regular property tax and insurance payments, in addition to the required monthly mortgage payments, plaintiffs alleged that they did not fail to make any such payments and that the lender therefore had no right to require that they make monthly payments into an escrow impound account to ensure timely payment of all property tax and insurance obligations.

Defendants contended below and now on appeal that two letters attached as exhibits to the amended complaint contained statements showing that plaintiffs had failed to make required property tax and insurance premium payments. According to defendants, because those letters directly contradicted plaintiffs’ allegations that they made all required property tax and insurance premium payments, in addition to all monthly mortgage payments, plaintiffs cannot state a claim for breach of the escrow waiver agreement.

But as plaintiffs explain in their briefs, the two letters upon which defendants rely do not contain any admissions by plaintiffs that they failed to make property tax and insurance premium payments. Instead, those letters contain *statements by Bank of America representatives* that plaintiffs had failed to make tax and insurance payments. Those letters, however, do not constitute contradictory admissions by plaintiffs, but rather were merely assertions by the Bank that disputed plaintiffs’ claims that they were current

on all required payments. That the lender may have disputed plaintiffs' assertions that they were current raised, at best, a triable issue of fact, but it was irrelevant at the pleading stage to whether plaintiffs could state a viable claim for breach of the escrow waiver agreement. Thus, even if the trial court did not err in sustaining the general demurrers to the five causes of action set forth in the first amended complaint, there appears to be a reasonable possibility that plaintiffs can clarify their pleading by amendment to state a viable claim for breach of the escrow waiver agreement based on the explanations in plaintiffs' briefs.

In addition to demonstrating adequately how each of the six specified causes of action either stated or could be amended to state potentially viable claims against defendants, plaintiffs represent through appellate counsel that the unnecessary detail in the amended complaint can be eliminated and the ambiguities and redundancies can be clarified or cured. We therefore conclude that plaintiffs should be granted leave to make the proposed amendments in an effort to state adequately one or more of the six causes of action.

F. Ruling on General Demurrer for Failure to State Viable Claims

Although plaintiffs appeal from the trial court's order sustaining defendants' general demurrer to each of their five causes of action alleged in the first amended complaint, we do not need to reach the legal merits of the court's ruling in that regard. Based on our conclusion above that plaintiffs should be granted leave to amend their complaint to cure both the uncertainties and to state potentially viable causes of action, there is no reason to review whether the trial court erroneously sustained the general demurrer as to one or more of the five causes of action asserted in the first amended complaint. Regardless of whether the trial court erred as asserted, the judgment of dismissal must be reversed to allow plaintiffs an opportunity to amend their pleading to attempt to state one or more of the six causes of action specified by their appellate counsel.

DISPOSITION

The judgment of dismissal is reversed and the matter is remanded to the trial court with instructions to enter a new order sustaining the special demurrer for uncertainty, but granting plaintiffs leave to amend to state causes of action for breach of contract, promissory estoppel, fraud, negligent misrepresentation, negligence, and violation of the UCL. No costs are awarded.

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MOSK, Acting P. J.

We concur:

KRIEGLER, J.

KIRSCHNER, J.*

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.