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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

SHARON BUTTICCI,

Plaintiff and Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

A142043

**(Marin County
Super. Ct. No. CIV
1302298)**

_____/

Sharon Butticci borrowed money from Countrywide Bank, N.A. (Countrywide), and a deed of trust on her home in Sausalito (the property) secured the loan. Butticci defaulted on the loan and the property was sold at a public auction. Butticci sued Bank of America, N.A. (Bank of America) in propria persona for fraud and other claims, alleging Bank of America failed to disclose required information about the loan's terms and engaged in predatory loan practices. The trial court sustained Bank of America's demurrer to the operative third amended complaint without leave to amend, denied her motion for reconsideration, and entered judgment for Bank of America.

Butticci appeals in propria persona. She contends the court erred by sustaining Bank of America's demurrer to the operative complaint without leave to amend. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2006, Butticci borrowed \$1.84 million from Countrywide, secured by the deed of trust on the property. The deed of trust entitled Countrywide to substitute the trustee, assign the note to third parties, and sell the property in case of default.¹ Butticci signed the deed of trust and the adjustable rate rider, which identified the initial interest rate and monthly payment and stated in bold, capitalized letters, “**THE NOTE CONTAINS PROVISIONS THAT WILL CHANGE THE INTEREST RATE AND THE MONTHLY PAYMENT.**” By April 2009, Butticci was \$85,369.69 in arrears on the loan. Bank of America initiated nonjudicial foreclosure proceedings against Butticci (Civ. Code, § 2924, et seq.) and the property was sold at a public auction in July 2011.

In 2013, Butticci sued Bank of America. Her original complaint alleged seven causes of action and claimed Bank of America engaged in “negligent, predatory, debt entrapment and malicious business practices” in connection with the loan. The court sustained Bank of America’s demurrer to the complaint with leave to amend and Butticci filed an amended complaint (erroneously captioned as a second amended complaint). With leave of court, Butticci filed another amended complaint — the operative third amended complaint — alleging claims for: (1) fraud and deceit under the Truth in Lending Act ((TILA) 15 U.S.C. § 1601, et seq.); (2) violation of the Home Ownership and Equity Protection Act ((HOEPA) 15 U.S.C. §§ 1602(aa), 1639); (3) civil conspiracy;

¹ Butticci’s factual summary is argumentative and does not cite to the record in violation of California Rules of Court, rule 8.204(a)(1)(C). “Consequently, we do not accept her factual assertions and rely instead on [Bank of America’s] statement of facts, which is supported by appropriate record references.” (*Stasz v. Schwab* (2004) 121 Cal.App.4th 420, 424 & fn. 1.) We disregard Butticci’s references to events and documents not before the trial court when it ruled on Bank of America’s demurrer to the operative complaint. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444.) The record on appeal does not contain a reporter’s transcript.

CTC Real Estate Services was the original trustee and Mortgage Electronic Registration Systems, Inc. (MERS) was the original beneficiary under the deed of trust. MERS later assigned beneficial interest in the deed of trust to BAC Home Loans Servicing LP (BAC) and substituted ReconTrust Company, N.A. as the trustee. Bank of America is BAC’s successor.

(4) violation of the Unfair Competition Law ((UCL) Bus. & Prof. Code, § 17200); (5) breach of fiduciary duty; and (6) quiet title, securitization, and chain of title violations. Butticci alleged she was the “victim of numerous frauds, misrepresentations, and predatory lending practices” that masked the loan’s terms and interest rate. She claimed she did not discover Bank of America’s alleged misrepresentations until July 2012, when she “researched other pending cases.”

Bank of America demurred, arguing: (1) the complaint failed to state a valid cause of action against it; (2) the statute of limitations barred Butticci’s claims; (3) Butticci lacked standing to challenge the foreclosure sale because the complaint failed to allege tender; and (4) Butticci’s claims arose out of her loan with Countrywide and the complaint did not allege any facts supporting successor liability against Bank of America. Butticci opposed the demurrer, claiming she alleged facts supporting a fraud claim and that the “tender doctrine” did not apply to her lawsuit. She urged the court to overrule the demurrer, but she did not seek leave to amend.

Following a hearing, the court sustained the demurrer without leave to amend. In a detailed order, the court determined: (1) Butticci’s TILA and fraud claims were barred by the statute of limitations because they were based on alleged misrepresentations made in connection with loan documents executed in October 2006 and Butticci failed to plead facts demonstrating why she could not have discovered the alleged misrepresentations earlier despite reasonable diligence; (2) the loan did not fall within HOEPA; (3) the operative complaint failed to allege the elements of fraud or misrepresentation; (4) Bank of America owed no fiduciary duty to Butticci; and (5) the operative complaint failed to state a claim for a violation of the UCL or securitization or chain of title violations. The court noted Butticci “fail[ed] to suggest” she could “amend her complaint to cure any of the deficiencies[.]”

The court denied Butticci’s motion for reconsideration, dismissed the operative complaint with prejudice, and entered judgment for Bank of America.

DISCUSSION

The principles governing our review of an order sustaining a demurrer are well-settled and we need not restate them here, except to note that “to prevail on appeal from an order sustaining a demurrer, the appellant must affirmatively demonstrate error. Specifically, the appellant must show that the facts pleaded are sufficient to establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer. [Citation.] We will affirm the ruling if there is any ground on which the demurrer could have been properly sustained. [Citation.]” (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.)

Butticci contends the court erred by sustaining Bank of America’s demurrer to the operative complaint without leave to amend for three reasons. First, Butticci claims she would have been able to obtain documents establishing Bank of America’s misconduct — which she claims were “in the possession of Bank of America” — had the court issued “a clearly stated Discovery Deadline Order.” This argument fails for several reasons. First, Butticci possessed the deed of trust and the adjustable rate rider, which clearly stated the loan’s variable interest rate and other terms; she does not identify what additional documents would have allowed her to show “the misconduct of [] Bank of America.” Second, Butticci has not cited to a portion of the record where she requested the court issue a “Discovery Deadline Order.” “Rather than scour the record unguided,” we conclude Butticci has waived this argument by failing to support it with “accurate citations to the record.” (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287.)² Butticci’s argument fails for the additional reason that it is unsupported by reasoned argument and authority obligating the trial court to issue such a discovery order. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.)

² If Butticci did not request such an order in the trial court, she cannot raise the issue on appeal. “As a general rule, ‘issues not raised in the trial court cannot be raised for the first time on appeal.’ [Citation.]” (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417.)

Next, Butticci contends the court erred by concluding the statute of limitations barred her TILA claim. According to Butticci, the statute of limitations was equitably tolled until she “had a reasonable opportunity to discover the fraud or nondisclosures . . . that form[ed] the basis of the TILA action” against Bank of America. We disagree. The court properly dismissed Butticci’s TILA claim for damages and rescission as time-barred (see 15 U.S.C. §§ 1640(e), 1635(f)) and declined to apply equitable tolling because Butticci did not make any showing of due diligence. (*Cervantes v. Countrywide Home Loans, Inc.* (9th Cir. 2011) 656 F.3d 1034, 1045 [equitable tolling applies “in situations where, despite all due diligence, the party invoking equitable tolling is unable to obtain vital information bearing on the existence of the claim[,]” citation omitted]; *Hubbard v. Fidelity Federal Bank* (9th Cir. 1996) 91 F.3d 75, 79 [declining to toll TILA statute of limitations when “nothing prevented [the mortgagor] from comparing the loan contract, [the lender’s] initial disclosures, and TILA’s statutory and regulatory requirements”] fn. omitted.)

Butticci’s final contention is the court erred by determining her fraud claim was time-barred because she filed her action within three years after she “became knowledgeable of the predatory and fraudulent acts of Bank of America.” We are not persuaded. To avoid the three-year statute of limitations in Code of Civil Procedure section 338, subdivision (d), a plaintiff has the burden to plead and prove that discovery of the conduct alleged to constitute the fraud was reasonably delayed. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 14.) Among other burdens, a plaintiff must plead and prove she “was not negligent in failing to make an earlier discovery, [and] that [she] had no actual or presumptive knowledge of facts sufficient to put [her] on inquiry. [Citation.]” (*Merchants’ Ice etc. Co. v. Globe Brew. Co.* (1947) 78 Cal.App.2d 618, 623.) “To meet this burden, it must . . . appear that [the plaintiff] had no knowledge of facts which would make a reasonably prudent person suspicious of the fraud complained of.” (*Id.* at pp. 623-624.)

Here, the alleged fraud occurred when Butticci obtained the loan in 2006. Accepting as true the allegations of the fraud claim, Butticci needed only to read the loan

documents when she signed them to uncover the alleged wrongdoing, and her failure to do so constitutes inexcusable neglect on her part, and fatally undermines her claim of delayed discovery of the fraud. The court did not err by concluding Butticci's fraud claim was barred by the statute of limitations.

DISPOSITION

The judgment is affirmed. Bank of America is awarded costs on appeal. (Cal. Rules of Court, rule 8.278.)

Jones, P.J.

We concur:

Simons, J.

Needham, J.