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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ZEEV LEVAVI,

Plaintiff and Appellant,

v.

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

Defendant and Respondent.

B234760

(Los Angeles County
Super. Ct. No. SC108236)

APPEAL from a judgment of the Superior Court of Los Angeles County.

John L. Segal, Elma Mora, Judges. Affirmed.

Law Offices of Stephen M. Feldman, Stephen M. Feldman; Robert Hirschman & Associates, Robert Hirschman for Plaintiff and Appellant.

Reed Smith, Margaret M. Grignon, Zareh A. Jaltorossian, Raymond Y. Kim, David S. Reidy for Defendant and Respondent.

Zeev Levavi appeals from the judgment entered in favor of respondents Countrywide Financial Corporation, Countrywide Home Loans, Countrywide Bank, and Bank of America, as successor to Countrywide Financial (collectively, "Countrywide"), after their demurrer to his second amended complaint was sustained without leave to amend. We affirm.

Standard of Review

A demurrer serves to test the sufficiency of a pleading by raising questions of law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Summary

Between August 2005 and February 2008, Levavi took out four loans¹ from Countrywide, secured by deeds of trust on three pieces of real property in Beverly Hills and Sherman Oaks. All the loans had adjustable rates.

¹ One was a homeowner's line of credit, and we cannot see that the complaint alleges that Levavi ever drew on this line of credit.

In June of 2010, he sued Countrywide. In the second amended complaint² at issue here, he brought, inter alia,³ causes of action for fraud and for violation of Business and Professions Code section 17200.

The complaint includes allegations about the terms of Levavi's loans, and alleges that Countrywide engaged in deceptive marketing practices by concealing the terms of loans from borrowers, engaging in high pressure sales tactics, and so on. The complaint incorporates by reference a 2009 complaint against Countrywide, filed by the California Attorney General seeking relief under Business and Professions Code sections 17500 and 17200, which includes detailed allegations about improper sales, marketing, and underwriting tactics.

However, Levavi's theory was not that he was deceived about his loans, or that he suffered damages due to the terms of those loans.⁴ Instead, his theory was that Countrywide did not tell him that it was engaging in deceptive marketing practices with respect to *other* borrowers in the neighborhoods in which his real property was located. He alleged that Countrywide knew that those practices would eventually cause the housing market in those neighborhoods to collapse, that Countrywide's practices did cause the housing market to collapse, and that he was damaged because his real estate investments suffered in the collapse.

² Levavi's first amended complaint was filed while respondents' demurrer to his original complaint was pending. Respondents' demurrer to the first amended complaint was sustained with leave to amend.

³ The complaint also included causes of action for negligent and intentional interference with prospective economic advantage, and for breach of the implied covenant of good faith and fair dealing. Demurrer was sustained as to those causes of action, too, but Levavi does not challenge those rulings on appeal.

⁴ Indeed, at oral argument on the demurrer to the first amended complaint, he represented that "I read my loan documents . . . I'm current," and at oral argument on the demurrer to the second amended complaint, Countrywide agreed with that last assertion, saying that the loans were not in default.

Levavi sought \$1.2 million in damages, based on the decrease in the value of his property and his inability to refinance.

On Countrywide's demurrer, the trial court found, inter alia, that "Plaintiff's theory is fundamentally flawed, and, despite several opportunities, has not amended to state viable causes of action, or even defective causes of action that could be cured by amendment. The proposed amendments will not cure the defects in plaintiff's causes of action. There are claims that borrowers can state against lenders, but plaintiff is either unable or unwilling to allege facts that state such claims. For these reasons, defendants' demurrer to the second amended complaint is sustained without leave to amend." We agree with the trial court.

Discussion

Fraud

The complaint

Levavi brought two fraud causes of action, titled fraud based on concealment, and fraud and deceit. In those causes of action, he alleged that:

-- "[Countrywide] knew or should have known that their concealment of their predatory and deceptive marketing practices would foreseeably lead to a substantial decline in real estate prices and a substantial increase[] in loan defaults and foreclosures which contribute to the decline in real estate values including a substantial decline in neighborhoods where they had a dominant market share which include . . . the neighborhoods where [Levavi's] properties [were] located."

-- "At all relevant times, the information and business practices of [Countrywide] was not known to [Levavi] and/or other members of the general public, that the information was exclusively within [Countrywide's] knowledge and that . . . [Countrywide] actively concealed the true facts from [Levavi]."

-- "As a result of [Countrywide's] actions and conduct . . . there has been a substantial decline in real estate values in California including a substantial decline in the

value of [Levavi's real property] and . . . that these properties owned by [Levavi] are not marketable, that the loans . . . cannot be refinanced and that the balance owed on the loans is greater than the value of the properties and that when the payment options adjust, [Levavi] will not be able to make the payments on these loans."

-- "If [Levavi] had known the true facts as to the marketing practices of [Countrywide] . . . [Levavi] would not have taken the loans since it was known to [Countrywide] that the result of their practices . . . the real estate market would and did decline. [Levavi] is informed that all properties owned by [Levavi] which secure the Countrywide loans and all other properties in which [Levavi] had an interest are now underwater in that the loan amounts exceed the value of the property such that the properties cannot be sold and . . . cannot be refinanced."

Duty

One of the elements of a cause of action for fraud based on concealment is that "the defendant must have been under a duty to disclose the fact to the plaintiff." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 665–666.) The trial court found that Countrywide had no duty to disclose its general lending and marketing practices to Levavi. We agree.

This issue was recently and intelligently discussed by our colleagues in Division Three of this Court, in *Bank of America Corp. v. Superior Court* (2011) 198 Cal.App.4th 862. In that case, Countrywide borrowers based a fraud claim on the allegation that Countrywide had failed to disclose to its borrowers that the mortgages being offered were part of a "massive fraud" to bilk investors by selling them pooled mortgages at inflated values. Those plaintiffs then alleged that Countrywide knew this fraud would ultimately result in materially depressed home values, the loss of the equity in plaintiffs' home, and the impairment of plaintiffs' credit rating. (*Id.* at p. 866.)

After a review of relevant case law, Division Three concluded that "[w]e are aware of no authority supporting the imposition of additional liability on an intentional tortfeasor for failing to disclose his or her tortious intent before committing a tort.'

([*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326,] 338; accord *Deteresa v. American Broadcasting Companies, Inc.* (9th Cir. 1997) 121 F.3d 460, 467–468 [even if audiotaping and videotaping were wrongful, defendant was not liable for failing to disclose its intention to commit those wrongful acts]; *In re MRU Holdings Securities Litigation* (S.D.N.Y. 2011) 769 F.Supp.2d 500, 515 [it is "rather circular" to say that . . . Defendants "committed fraud by concealing their intent to commit fraud".])" (*Bank of America Corp. v. Superior Court, supra*, 198 Cal.App.4th at p. 873.) Division Three thus found no duty.

The allegations in this case mirror the allegations in *Bank of America Corp. v. Superior Court, supra*. In both cases, the allegation is that Countrywide had an obligation to tell borrowers about its practices with regard to *others*. We, like Division Three, know of no authority which would support a finding that there is any duty to do so, and, as Division Three has indicated, believe that the law is to the contrary.

Levavi makes a number of arguments on this point. First, he argues public policy supports finding a duty, in that lawsuits such as this one would deter bad actors. Perhaps, but the duty he suggests is so broad and all-inclusive that it would, in our view, constitute a radical expansion of existing law, so that the largest effect would be the creation of litigation.

Levavi also relies on *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, but the case does not assist him. In *Boschma*, the plaintiffs were borrowers who alleged that their lender had failed to disclose the terms of plaintiffs' own loans. In other words, it was a conventional fraud case, and it was in that context that the court held that "defendant had a common law duty to avoid making partial, misleading representations that effectively concealed material facts." (*Id.* at p. 250.)

Levavi's final argument on this point is that respondents owed him a duty to disclose under the Home Mortgage Disclosure Act. (12 U.S.C. §§ 2801–2810.) We cannot see that Levavi stated a cause of action for fraud under this theory.

The purpose of that Act is not to protect investors or borrowers, but to "provide the citizens and public officials . . . with sufficient information to enable them to determine whether depository institutions are filling their obligations to serve the housing needs of the communities and neighborhoods in which they are located and to assist public officials in their determination of the distribution of public sector investments in a manner designed to improve the private investment environment." (12 U.S.C. § 2801, subd. (b).)

To that end, that Act requires that financial institutions "compile and make available . . . to the public for inspection and copying at the home office, and at least one branch office within each primary metropolitan statistical area," statistical information about the mortgage loans made by that institution. That statistical information includes the number and dollar amount of mortgage loans made or purchased by the institution, grouped by metropolitan statistical area; grouped by points and fees and terms; grouped by value of property, and so on. (12 U.S.C. § 2803, subd. (a).)

Levavi argues that Countrywide violated the Act by failing to post the required information in the branch office where he obtained his loans. However, he points to nothing in the Act which would create a private right of action, and we see nothing to that effect.

Damages

Another element of fraud is, of course, damages. (*Roddenberry v. Roddenberry*, *supra*, 44 Cal.App.4th at pp. 665–666.) Levavi argues that he properly pled damages when he pled that he would not have taken out the loans if he had known that Countrywide was deceiving others. He argues that he was damaged by the decline in home values, contending that he is unable to sell his property and unable to refinance his Countrywide loans, so that he is saddled with high interest rates.

Those are not allegations that he was damaged because Countrywide violated any duty to him, but are instead allegations that he was damaged because he bought real property. He would equally have been damaged if he had no bank-borrower relationship

with Countrywide, and even under his own theory, no right to disclosure from Countrywide.

Bank of America Corp. v. Superior Court, supra, 198 Cal.App.4th 862, 865 also considered this issue, holding that "plaintiffs/borrowers cannot state a cause of action against Countrywide for fraudulent concealment of an alleged scheme to bilk investors by selling them pooled mortgages at inflated values, the demise of which scheme led to devastated home values across California. Due to the generalized decline in home values which affects all homeowners (borrowers of Countrywide, borrowers who dealt with other lenders, and homeowners who owned their homes free and clear), there is no nexus between Countrywide's alleged fraudulent concealment of its scheme to bilk investors and the diminution in value of the instant borrowers' properties."

We agree. "In the words of Prosser and Keeton: '[T]he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation.'" (Prosser & Keeton on Torts [(5th ed. 1984)] § 41, at p. 264, quoting *North v. Johnson* (1894) 58 Minn. 242.) [¶] Therefore, the law must impose limitations on liability other than simple causality. These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy. (Prosser & Keeton on Torts, *supra*, § 41, at p. 264.) As Justice Traynor observed, proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.' (*Mosley v. Arden Farms Co.* (1945) 26 Cal.2d 213, 221 (conc. opn. of Traynor, J.))" (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315-316.)

Under those principles, we cannot see that Levavi can recover damages suffered through the general decline in the housing market, simply because Countrywide was his lender.

Finally, Levavi argues that he alleged that Countrywide deliberately concealed from him the fact that he was eligible for loans at lower interest rates, and that he would be able to prove damages based on the expenses he incurred with the Countrywide loans, versus the cost of other loans.

At the cited page of his complaint, he alleged only that "Per the Attorney General's Action, the Countrywide Defendants did not generally disclose that borrowers could obtain more favorable loans at lower interest rates if they were to provide proper documentation of their income" That is not an allegation that Levavi himself was deceived.

Levavi argues that he could amend to assert such a claim, and it is far too late, on this second amended complaint, for Levavi to change his theory of the case and contend that he is entitled to damages because he did not understand his own loans. (*Dey v. Continental Central Credit* (2008) 170 Cal.App.4th 721, 731.)

Business and Professions Code section 17200

The complaint

The allegations in this cause of action are somewhat different. While the cause of action incorporates all the factual allegations of the complaint, it is not based on the theory that Countrywide injured Levavi because it did not tell him about its fraudulent marketing and underwriting practices, but instead alleges that the practices described in the complaint were in themselves unfair or fraudulent business practices. He alleged that Countrywide was "engaged in unlawful, unfair or fraudulent business practices . . . with respect to the marketing of their loans to borrowers who could not reasonably be anticipated to repay the loans pursuant to the terms and conditions set forth in the sub prime loans originated by [Countrywide]." Levavi alleged that he suffered damages from the loss of equity in his property and because he paid fees to Countrywide.

Discussion

"[S]ince the passage of Proposition 64 in 2004, a private individual has standing to bring a UCL action only if he or she 'has suffered injury in fact and has lost money or property as a result of the unfair competition.' (Bus. & Prof. Code, § 17204.)" (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1339.) "Thus, a private person has no standing under the UCL unless that person can establish that the injury suffered and the loss of property or money resulted from conduct that fits within one of the categories of 'unfair competition' in section 17200." (*Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1098.)

A causal connection is required. A plaintiff has not suffered economic injury "as a result of" the unfair competition unless the injury was "caused by" the defendant's acts. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 326.)

We do not see that Levavi has, or can, properly allege damages.

Our first reasons are the ones we discussed above. The trial court correctly characterized, and rejected, Levavi's theory by saying "essentially, your theory is because they're so terrible, they tanked the market. And that's just too attenuated a causation. . . . [¶] . . . [Levavi] bought properties that went down because the market went down, and Countrywide . . . was one of the many macro-economic factors that contributed." "The connection between [Countrywide's] conduct and the decline in the value of plaintiff's properties . . . is too tenuous to constitute a causal connection." We agree.

What is more, the recent changes to the Unfair Competition Law bar such an action. The intent of those changes was to confine standing to those who have actually used the defendant's services, and through that use were actually injured by the defendant's unfair business practices. (*Kwikset Corp., supra*, 51 Cal.4th at p. 321.)

Levavi's UCL claim asserts, in essence, that anyone who suffered an economic injury due to the recent decline in home values could recover from Countrywide -- or indeed, given the connection between the decline in home values and other economic ills

we have recently suffered, for a wide variety of economic losses. If Levavi was allowed to proceed here, standing would be conferred on the general public. That is not the law.

Disposition

The judgment is affirmed. Respondents to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.