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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DAVID S.N. AFLLEJE

Plaintiff and Appellant,

v.

HOMESALES, INC.

Defendant and Respondent.

B234943

(Los Angeles County
Super. Ct. No. YC062754)

APPEAL from a judgment of the Superior Court of Los Angeles County,
William G. Willett, Judge. Affirmed.

David S.N. Afleje, in pro. per., for Plaintiff and Appellant.

Morrison & Foerster, Miriam A. Vogel, William V. O'Connor and Jessica A.
Roberts for Defendant and Respondent.

INTRODUCTION

Plaintiff David S.N. Afleje (plaintiff or Afleje) appeals a judgment of dismissal entered following an order by the trial court sustaining the demurrer of defendant Homesales, Inc. (defendant or Homesales) to plaintiff's complaint without leave to amend. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Plaintiff, as Trustee of a Trust, Obtained Two Loans Secured By Property in Torrance*

Before the commencement of this action, plaintiff, as the trustee of the David S.N. Afleje Family Trust dated October 12, 1993 (the Trust), owned real property located at 1308 Crenshaw Boulevard in Torrance, California (the Property).

Plaintiff used the Property as security for two loans. On July 29, 2004, plaintiff, as trustee of the Trust, executed a promissory note (the Note) in the amount of \$248,000 to Community Commerce Bank (CC Bank). On February 16, 2005, plaintiff, as trustee of the Trust, obtained a home equity line of credit (the Line of Credit) in the amount of \$233,000 from Washington Mutual Bank, FA (Washington Mutual). Both the Note and Line of Credit were secured by deeds of trust which plaintiff executed as trustee of the Trust.

2. *The Sale of the Property to Defendant*

On October 2, 2009, California Reconveyance Company (CRC), as trustee of the February 16, 2005, deed of trust in favor of Washington Mutual, recorded a Notice of Default and Election to Sell under Deed of Trust. This notice stated that as of October 1, 2009, plaintiff was behind on his payments due under the Line of Credit in the amount of \$9,987.26 and, if plaintiff did not pay all amounts due, CRC would conduct a trustee sale of the Property.

On January 25, 2010, Homesales purchased the Property at a trustee's sale. Plaintiff, however, did not vacate the premises. As of July, 2010, the Property remained occupied.

3. *The Unlawful Detainer Action*

On July 2, 2010, Homesales filed an unlawful detainer complaint (Case No. SB10Z00872) against Afleje. In this complaint, Homesales alleged that Afleje unlawfully remained in possession of the Property.

4. *The Allegations in the Complaint in this Action*

On July 7, 2010, Afleje filed the complaint in this action (Case No. YC062754) against Homesales and “Does” 1-100. Afleje filed the complaint in propria persona (pro. per.) in his individual capacity, and not as trustee of the Trust. The complaint alleges the following.

The Note and Line of Credit do not conform with “the Standards of a Valid Contract” and they “Violate the Fourteenth Amendment Equal Protection Clause of the Constitution of the United States, rendering the Contracts Void.”

Defendants had a duty to represent plaintiff’s best interests and to act for the benefit of plaintiff. However, defendants breached that duty because they neglected to protect plaintiff’s interest, and neglected to negotiate loan modifications. Defendants also “Intentionally ignored Plaintiff[’s] interest in favor of their Business Interest and other Special interest to Accommodate investing in the Stock Market violating Plaintiff’s trust in the Honesty and Integrity in both the Financial Institution and Defendants”

Based on plaintiff’s “reliance upon the honesty and integrity” of CC Bank, JP Morgan Chase Bank (the successor of Washington Mutual), the law firm of Artiano, Guzman & Toomey LLP, Peninsula Escrow, Inc., and Orexco Old Republic Exchange Company, plaintiff was “induced and was forced to sign” the Note and the Line of Credit. Plaintiff tried to renegotiate the terms of the Note and the Line of Credit, but was unable to do so. He also made a \$50,000 payment toward the balance due to CC Bank, and hired an attorney to assist him.

The Property was sold to Homesales at a trustee sale. On July 2, 2010, Homesales filed an unlawful detainer action. The unlawful detainer action “Constitutes an interference with Plaintiff[’s] Protectable Rights and Interest.” Defendants “unlawfully Persecuted Plaintiff by engaging in the course of Conduct described herein above and falsely Imprisoned” the Property with no justification.

As a proximate result of defendants’ fraud, deceit, negligence and breach of duty, plaintiff suffered damages in excess of \$813,221.67. Plaintiff is also entitled to \$25 million in punitive damages and an injunction prohibiting defendants from pursuing the unlawful detainer action.

Based on the foregoing allegations, the complaint purports to state causes of action for (1) fraud, (2) negligence, (3) breach of fiduciary duty, (4) intentional infliction of emotional distress, (5) harassment, (6) malicious prosecution, and (7) injunctive relief.

5. *Defendant’s Demurrer*

On May 13, 2011, Homesales filed a demurrer to the complaint on the grounds that the pleading did not state facts sufficient to constitute a cause of action. A hearing was held on the matter on July 12, 2011. On July 22, 2011, the trial court entered a minute order sustaining the demurrer without leave to amend.

6. *The Judgment*

On August 4, 2011, the trial court entered a judgment of dismissal in favor of Homesales and against Afleje. Afleje filed a timely appeal.¹

ISSUES

There are two main issues on appeal:

1. Did the trial court correctly sustain the demurrer?
2. Should plaintiff be given leave to amend his complaint?

¹ On July 28, 2011, after the trial court sustained the demurrer without leave to amend but before the judgment was entered, Afleje filed a notice of appeal of the July 22, 2011, minute order. That order is not appealable. (Code Civ. Proc., § 904.1.) We shall deem the appeal taken from the judgment as of the date the judgment was entered. (Cal. Rules of Court, rule 8.108(d)(2).)

DISCUSSION

1. *Standard of Review*

Where, as here, the trial court sustains a general demurrer, we review the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*)). We also assume all of the facts alleged in the complaint are true and make all reasonable inferences from those facts in favor of plaintiffs. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883; *Kruss v. Booth* (2010) 185 Cal.App.4th 699, 713.) “However, the assumption of truth does not apply to contentions, deductions, or conclusions of law and fact.” (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102.)

2. *Plaintiff Does Not Have Standing*

All of plaintiff's claims arise from his purported interest in the Property, loans secured by the Property, or the unlawful detainer action filed to gain possession of the Property. Plaintiff, however, does not have standing to pursue these claims on his own behalf, as an individual. The real party in interest is the trustee of the Trust. (See *O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1062.) The complaint therefore fails to state a cause of action.

3. *The Complaint Does Not Allege the Essential Elements of Any Cause of Action*

Even assuming plaintiff has standing to pursue this action the complaint fails to state facts sufficient to constitute a cause of action. Most of plaintiff's claims relate to the Note and the Line of Credit. The complaint, however, does not allege that Homesales had anything to do with those transactions. Rather, it alleges Homesales purchased the Property at a trustee sale and commenced an unlawful detainer action. There are no facts in the complaint indicating that this conduct was tortious or actionable.

Moreover, the complaint does not state facts indicating each of the elements of the various causes of action are satisfied. For example, the elements of fraud are (1) a misrepresentation of fact (false representation, concealment, or nondisclosure) (2) knowledge of falsity (or scienter), (3) intent to defraud, (4) justifiable reliance and (5) resulting damages. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638; *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.) The complaint contains no facts regarding any of these elements.

The same deficiency can be found in each of the complaint's purported causes of action. The trial court thus correctly sustained the demurrer on the grounds the complaint fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

4. *Plaintiff Did Not Meet His Burden of Showing the Defects in the Complaint Can Be Cured By Amendment*

“When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. The plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] The plaintiff may make this showing for the first time on appeal.” (*Rakestraw, supra*, 81 Cal.App.4th at p. 43.)

“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.” (*Rakestraw, supra*, 81 Cal.App.4th at p. 43.) 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.” (*Ibid.*)

Plaintiff has not met his burden of showing there is a reasonable possibility of curing the defects in the complaint by amendment. With respect to his lack of standing, plaintiff has not alleged that he is currently the trustee of the Trust, or that he is willing to amend his complaint to pursue this action in that capacity.² Likewise, plaintiff has not explained with specificity the facts he could allege to satisfy all of the elements of any cause of action against Homesales. The trial court therefore correctly sustained the demurrer without leave to amend.

DISPOSITION

The judgment of dismissal dated August 4, 2011, is affirmed. In the interest of justice, the parties shall bear their own costs.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.

² A non-attorney trustee of a Trust cannot pursue a lawsuit in pro. per. to protect trust property because doing so would constitute the unauthorized practice of law. (*Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 548-549.)