

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

MICHAEL ANDERSON et al.,

Plaintiffs and Appellants,

v.

SELECT PORTFOLIO SERVICING, INC., et al.,

Defendants and Respondents.

C068411

(Super. Ct. No. SCV0027034)

Homeowners and plaintiffs Michael Anderson and Karen Anderson (Anderson) sought to refinance their loan and entered into a mortgage loan with defendant Accredited Home Lenders, Inc. (Accredited), secured by a deed of trust. Anderson later filed a complaint against Accredited and the loan servicer, Select Portfolio Servicing, Inc. (Select), alleging numerous causes of action, including fraud and violations of Business and Professions Code sections 17200 and 17500. Subsequently, Anderson filed an amended complaint against Accredited, Select, and various other defendants alleging deceit, civil conspiracy, negligence, breach of fiduciary duty, and violations of Business and Professions Code section 17200. Select and defendants other than Accredited filed a

demurrer, which the trial court sustained without leave to amend. Anderson appeals, arguing the trial court erred in not granting leave to amend. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2006 Anderson entered into a mortgage loan in the principal amount of \$236,500 with lender Home Funds Direct, the fictitious business name for Accredited. A deed of trust secured the loan encumbering the Anderson property.

Prior to taking out the loan, a mortgage broker, Robert Siniscalchi, contacted Anderson. According to Anderson, Siniscalchi made several oral representations that differed from the written terms in the loan documentation. Anderson was not given the opportunity to read the loan documents at the time of the closing of the loan.

The deed of trust states, in part: “Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the ‘Loan Servicer’) that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change” Select is the current servicer of the loan.

In 2010 Anderson filed a complaint against Accredited and Select alleging deceit, fraud, breach of fiduciary duty, and violations of Business and Professions Code sections 17200 and 17500, and seeking restitution and declaratory relief. The complaint alleged Select was liable under a theory of successor liability. The complaint did not name defendant Mortgage Electronic Registration Systems, Inc. (Mortgage Electronic) or defendant Deutsche Bank National Trust Company (Deutsche Bank). At the time the complaint was filed, Anderson did not know the loan had been sold to Deutsche Bank.

Select filed a demurrer to Anderson's complaint. Select's demurrer argued Anderson's claims were barred by the applicable statute of limitations and were uncertain and ambiguous. Prior to a hearing on the demurrer, Anderson filed an amended complaint.

In the amended complaint, Anderson added Mortgage Electronic and Deutsche Bank as defendants and alleged causes of action for deceit, civil conspiracy, negligence, breach of fiduciary duty, and violations of Business and Professions Code section 17200, and sought declaratory and injunctive relief. The amended complaint also challenged Deutsche Bank's claim to the beneficial interest under the deed of trust and Mortgage Electronic's authority to assign that interest.

In the amended complaint, Anderson alleged Siniscalchi stated he was a loan broker for Accredited. Anderson was presented with a " 'stack' " of loan documents and was rushed into signing them without reading or reviewing them. The complaint alleges several misrepresentations: Michael Anderson would be the sole borrower, the loan was an FHA loan at 6.9 percent, and there would not be a prepayment penalty prior to closing. In fact, both Michael and Karen Anderson are listed as borrowers, the loan was a conventional loan at 6.999 percent, and the loan had a substantial prepayment penalty.

According to the amended complaint, a determination as to whether Anderson would be able to make the payments "was never truly made." The amended complaint also alleges Siniscalchi misrepresented that Anderson could refinance "if they became unable to make their monthly mortgage payments."

Select, Deutsche Bank, and Mortgage Electronic (defendants) filed a demurrer to the amended complaint on the grounds of the statute of limitations and equitable tolling, the failure to allege successor liability of defendants, the requirement of specificity in fraud claims, the lack of a duty owed by a lender to a borrower, and Mortgage Electronic's authority to assign the beneficial interest.

In opposing the demurrer, Anderson requested leave to amend to allege successor liability, restate the allegations concerning the loan, and detail the allegations of diligence in discovering the fraud and negligence. Anderson admitted a lack of clarification in the amended complaint as to defendants' status.

The trial court sustained the demurrer without leave to amend. The court noted Anderson's opposition conceded the allegations were insufficient and focused the issue on whether Anderson should be granted leave to amend. In denying leave to amend, the court found: "plaintiffs already have availed themselves of an opportunity to amend the complaint in an attempt to plead past the statute of limitations issues and other defects pointed out by defendants in the first demurrer. Nonetheless, plaintiffs, having already been alerted to the statute of limitations issue and having already amended the complaint once in response to the issue, offer nothing here in the way of proposed factual allegations that might overcome the statute of limitations. The court presumes at this point that if such facts existed, they would have been pleaded or described by now."

In addition, the court found Anderson failed to suggest any specific or additional facts in support of their theory of successor liability as to Deutsche Bank, Select, or Mortgage Electronic. Ultimately, the court determined Anderson could not, as a matter of law, allege any facts pertaining to Mortgage Electronic's rights to assign and Deutsche Bank's claim to beneficial interest under the deed of trust.¹

The trial court entered final judgment in favor of Deutsche Bank, Select, and Mortgage Electronic. Anderson filed a timely notice of appeal.

¹ The court sustained the demurrer without leave to amend as to the first, second, third, fifth, and sixth causes of action. The fourth cause of action, for breach of fiduciary duty, is alleged only against Accredited.

DISCUSSION
STANDARD OF REVIEW

The function of a demurrer is to test the sufficiency of the complaint by raising questions of law. We give the complaint a reasonable interpretation and read it as a whole with its parts considered in their context. A general demurrer admits the truth of all material factual allegations. We are not concerned with the plaintiff's ability to prove the allegations or with any possible difficulties in making such proof. We are not bound by the construction placed by the trial court on the pleadings; instead, we make our own independent judgment. (*Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 824.)

When the trial court sustains the demurrer without leave to amend, we must decide whether there is a reasonable possibility the plaintiff can cure the defect with an amendment. If we find that an amendment could cure the defect, we must find the court abused its discretion and reverse. If not, the court has not abused its discretion. The plaintiff bears the burden of proving an amendment would cure the defect. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.)

Deceit

The amended complaint's first cause of action is for deceit under Civil Code section 1709. Anderson's cause of action for deceit centers on a series of misrepresentations allegedly made by Siniscalchi. Anderson contends Siniscalchi is the "broker, employee, and/or agent of Accredited for the Subject Loan." However, the amended complaint makes no specific allegation that Siniscalchi acted on behalf of Select, Mortgage Electronic, or Deutsche Bank in making the alleged misrepresentations.

In addition, the statute of limitations for deceit is three years. (Code Civ. Proc., § 338, subd. (d).) The loan in question closed on April 20, 2006; Anderson's initial complaint was filed more than four years later, on April 26, 2010.

A plaintiff whose complaint shows on its face that the claim is barred must specifically plead facts to show the time and manner of discovery, and the inability to have made discovery earlier despite reasonable diligence. The plaintiff bears the burden of establishing diligence; conclusory allegations will not suffice to withstand a demurrer. (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160.)

Here, Anderson seeks to overcome the statute of limitations in the amended complaint by alleging that all of the misrepresentations were “discovered within the past year such that any applicable statute of limitations are extended” under the doctrine of equitable tolling. Anderson, in the original complaint, made the identical late discovery allegation. In their demurrer to the original complaint, defendants asserted the statute of limitations as a bar.

Anderson bears the burden of demonstrating there is a reasonable possibility that the defects of the pleading can be cured by amendment. However, as the trial court noted, Anderson, in opposing the demurrer to the amended complaint, failed to set forth any facts in avoidance despite being put on notice of the statute of limitations issue by defendants in their demurrer to Anderson’s original complaint. Given Anderson’s failure to offer any allegations to counter the statute of limitations bar, the trial court presumed “at this point that if such facts existed, they would have been pleaded or described by now.”

On appeal, Anderson proposes an amendment to the amended complaint stating “ ‘the loan documents were not reviewed until within the past year prior to the filing of the lawsuit because there was no need to and no reasonable person would have so done.’ ” In support, Anderson cites authority for the proposition that “‘The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he [or she] transacts business. Laws are made to protect the trusting as well as the suspicious. [T]he

rule of *caveat emptor* should not be relied upon to reward fraud and deception.’
[Citations.]” (*Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal.App.4th 950, 976.)

However, equitable tolling of the statute of limitations requires an inability to have made earlier discovery *despite reasonable diligence*. A plaintiff whose complaint shows on its face that the claim would be barred by the statute of limitations must specifically plead facts to show the time and manner of discovery and the inability to have made earlier discovery despite reasonable diligence. The plaintiff bears the burden of showing diligence; conclusory allegations will not withstand demurrer. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807-808 (*Fox*.)

A cardinal rule of contract law is that a party’s failure to read a contract or to carefully read a contract prior to signing is not a defense to the contract’s enforcement. To allege a claim of fraud in the contract’s execution, a party must show that his or her apparent assent to the contract, in the form of a signature, is negated by fraud so fundamental that the party was deceived as to the basic character of the documents signed and had no reasonable opportunity to discover the truth. A necessary element of the defense of fraud in the execution is reasonable reliance; it is generally not reasonable to fail to read a contract. This is true even if the party relied upon the defendant’s assertion that it was not necessary to read the contract. (*Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal.App.4th 866, 872-873.)

Here, Anderson for years failed to read the loan documents but contends no “reasonable person” would have done so. However, equitable tolling requires that a plaintiff was unable to have discovered the fraud despite *reasonable diligence*. (*Fox, supra*, 35 Cal.4th at pp. 807-808.) It is manifestly not reasonable to fail to read loan documents for *four* years. Since Anderson presents no other argument for equitable tolling, the court did not err in denying leave to amend the first cause of action for deceit.

Civil Conspiracy

Anderson's second cause of action alleges civil conspiracy. Civil conspiracy is a theory of joint liability for underlying conduct. (*Klistoff v. Superior Court* (2007) 157 Cal.App.4th 469, 479.)

The trial court found the amended complaint failed to allege any underlying tort for which defendants would be jointly liable. Nor did the amended complaint sufficiently allege the formation or operation of any conspiracy, providing only conclusory allegations.

On appeal, Anderson does not offer any additional allegations regarding civil conspiracy to remedy the defects in the amended complaint. In the trial court, at oral argument, Anderson's counsel did not argue that leave to amend be granted as to the cause of action for civil conspiracy. Accordingly, the court did not abuse its discretion in denying leave to amend as to the second cause of action.

Negligence

Anderson's third cause of action alleges defendants owed Anderson a duty of care that they breached, causing damage. The amended complaint states: "Deutsche Bank had a duty not to falsely allege it is the current beneficiary of the Note. [¶] . . . MERS had a duty to act as a 'registry' that allowed its 'members' to forego traditional recording requirements and the resulting fees to local governments."

The trial court found the allegations against defendants were insufficient to allege that defendants owed a duty of care to Anderson or breached that duty. In addition, the court found the amended complaint barred by the two-year statute of limitations under Code of Civil Procedure section 339. Anderson failed to meet the burden of suggesting how these defects might be overcome if leave to amend was granted.

On appeal, Anderson merely reiterates the allegations of the amended complaint and states: "Deutsche Bank liability is not based on its duty as a lender because it was not the lender. Accredited is clearly liable as lender because the FAC alleges it had a

fiduciary relationship with the plaintiff as also being its broker. There is the distinction. A broker has a fiduciary duty and a bank does [sic] not. Once the liability of Accredited is established then the liability of Deutsche for negligence is not based on its own negligence but as successor liability from Accredited.”

However, Anderson fails to set forth any specific or additional facts to support the theory that defendants are liable as successors to Accredited. Anderson merely reiterates the theory without any additional allegations of fact to support liability. Again, this failure supports sustaining the demurrer without leave to amend as to the third cause of action.

Business and Professions Code Section 17200

The fifth cause of action alleges defendants’ actions constituted unlawful, unfair, and/or fraudulent business practices under Business and Professions Code section 17200. The fifth cause of action incorporates the prior allegations of the amended complaint.

The court noted the statute of limitations for Business and Professions Code section 17200 is four years (Bus. & Prof. Code, § 17208), and Anderson “[has] not suggested any facts pertaining to late discovery of the facts that would permit a further amendment of their complaint to overcome the statute.”

On appeal, Anderson does not address this cause of action or attempt to demonstrate the court erred in sustaining the demurrer. We are required by rules of appellate review to presume that the trial court’s ruling was correct; we do not presume error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 88.)

Declaratory and Injunctive Relief

Finally, Anderson sought declaratory and injunctive relief in the sixth cause of action. Anderson alleged a judicial determination “is necessary and appropriate at this time under the circumstances so Plaintiffs may ascertain their rights under the Note and Deed of Trust and Defendants’ right to proceed with their alleged remedies.”

The court found the allegations impermissibly vague and noted that Anderson partially conceded this in the opposition to the demurrer. Anderson requested an opportunity to amend and clarify the claim. The court noted that at oral argument on the demurrer, Anderson's counsel did not argue that leave to amend this cause of action should be granted.

Again, on appeal, Anderson does not address this cause of action. We cannot presume error or find an abuse of discretion.

DISPOSITION

The judgment is affirmed. Defendants shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

RAYE, P. J.

We concur:

HULL, J.

DUARTE, J.