

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION TWO

MARCELLINE M. GARDNER,

Plaintiff and Appellant,

v.

HSBC BANK USA et al.,

Defendants and Respondents.

E053398

(Super.Ct.No. CIVVS908055)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kirtland L. Mahlum, Temporary Judge (pursuant to Cal. Const., art. VI, § 21) and Steve Malone, Judge.¹ Affirmed.

Marcelline M. Gardner, in pro. per., for Plaintiff and Appellant.

¹ Judge Mahlum sustained demurrers to the operative complaint, without leave to amend. Judge Malone entered the resulting judgments of dismissal.

Mark V. Asdourian, Mark V. Asdourian and Jamie L. Ackerman for Defendants and Respondents HSBC Bank USA, N.A., Litton Loan Servicing, LP, and Mortgage Electronic Registration Systems, Inc.

Darling & Risbrough, Ronald E. Darling and Nancy C. Eng for Defendant and Respondent Signature Group Holdings, Inc.

According to Marcelline M. Gardner's complaint, in 2005, during the go-go era of the Southern California housing market, she used 100 percent, adjustable-rate, interest-only financing to buy a house in Hesperia. In hindsight, this was not a good idea. In 2009, the house went into foreclosure (although it appears that, for the moment, Gardner is still living there).

Gardner then filed this action against the lender, the lender's successor in interest, and other entities involved in the loan. The trial court sustained demurrers to the original complaint and the first amended complaint; finally, it sustained demurrers to the second amended complaint without leave to amend.

Gardner appeals. The only contentions that she has properly asserted in her opening brief are:

1. The three-year statute of limitations for rescission under the Truth in Lending Act had not run.

2. The lender's successor in interest is as liable as the lender.

We find no reversible error. Hence, we will affirm.

PROCEDURAL BACKGROUND

Gardner filed the original complaint in this action in December 2009. The trial court sustained a demurrer to the original complaint with leave to amend.

Gardner then filed a first amended complaint. The trial court sustained demurrers to the first amended complaint *without* leave to amend with respect to three causes of action but *with* leave to amend with respect to the remaining two causes of action — for predatory lending practices and for nondisclosure of required documents.

The operative complaint is the second amended complaint (the complaint). The defendants named in the complaint were:²

1. Fremont Reorganizing Corporation (Fremont);³
2. HSBC Bank USA, N.A. (HSBC);
3. Litton Loan Servicing, LP (Litton); and
4. Mortgage Electronic Registration Systems, Inc. (MERS).

² Quality Loan Services & Affiliates (Quality) had filed a declaration asserting that it was sued solely in its capacity as trustee under a deed of trust. (See Civ. Code., § 2924*l*, subd. (a).) It does not appear that Gardner objected to the declaration. (See *id.*, subd. (c).) Accordingly, Quality was not required to participate further in the proceeding. (See *id.*, subd. (d).)

³ While this action was pending, Signature Group Holdings, Inc. became the successor in interest to Fremont. We continue to refer to it as Fremont, because it is referred to as Fremont throughout most of the record.

The complaint repleaded the two remaining causes of action, for predatory lending practices and for nondisclosure of required documents.

Signature filed a demurrer. HSBC, Litton, and MERS collectively filed a separate demurrer. HSBC, Litton, and MERS argued, among other things, that Gardner's nondisclosure cause of action, to the extent that it was based on an alleged violation of the Truth in Lending Act, was barred by the applicable statutes of limitations.

The trial court sustained both demurrers without leave to amend. Accordingly, it dismissed the complaint.

II

FACTUAL BACKGROUND

Consistent with the applicable standard of review (see part III, *post*), the following statement of facts is based on the allegations of the complaint, supplemented by matters of which the trial court took judicial notice.

Gardner is a real estate agent. In November 2005, she purchased a house in Hesperia for \$448,000. To finance the purchase, she obtained a \$358,400 first mortgage and an \$89,600 second mortgage, both from Fremont.

Initially, Gardner did not want to accept the loans, because the interest rate was adjustable after two years and the monthly payment was too high. However, her mortgage broker assured her that Fremont would refinance the loan and reduce the monthly payment before the interest rate became adjustable.

Fremont knew that Gardner's income was inadequate to repay the loan. However, Fremont "concealed" Gardner's true income so that it could approve the loan. (The complaint does not explain from whom this was concealed.)

The first trust deed named MERS as beneficiary, but it specified that MERS was "acting solely as a nominee" for Fremont.

In February 2009, HSBC purchased the first mortgage from Fremont. Litton was the loan-servicing agent for HSBC.

In May 2009, nonjudicial proceedings to foreclose the property were initiated.

In October 2009, a forensic loan audit revealed that Fremont had failed to provide Gardner with:

1. Loan details, such as the loan amount, payment amount, annual percentage rate, due dates, late charges, prepayment penalty, and service fees, allegedly in violation of the Truth in Lending Act (15 U.S.C. §§ 1601-1667f) (TILA);

2. A good-faith estimate of settlement costs and a booklet regarding real estate settlement services, allegedly in violation of the Real Estate Settlement Procedures Act (12 U.S.C. §§ 2601-2617) (RESPA);

3. A consumer caution and a home ownership disclosure, allegedly in violation of Finance Code sections 4970 and 4973;

4. A per diem interest statement, allegedly in violation of Civil Code section 2948.5;

5. A comparison of sample mortgage features, allegedly in violation of Finance Code section 22171 and California Code of Regulations, title 10, section 1950.314.8; and
6. A signed and initialed copy of the loan application, allegedly in violation of:
 - a. The Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f) (ECOA);
 - b. Regulation B (12 C.F.R. §§ 202.1-202.15);
 - c. The Home Mortgage Disclosure Act (12 U.S.C. §§ 2801-2810) (HMDA); and
 - d. California Code of Regulations, title 10, section 1950.204.

Gardner does not allege that her house was actually foreclosed upon.⁴ However, she does allege that she was “dr[i]ve[n] . . . into bankruptcy” in order to “save [her] home” and that her credit was “destroy[ed].”

III

STANDARD OF REVIEW

“On review from an order sustaining a demurrer, ‘we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. [Citations.]’ [Citation.] We may also consider matters that have been judicially noticed. [Citations.]” (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.)

⁴ Gardner’s current service address is the same as the address of the house.

IV

THE TILA STATUTE OF LIMITATIONS

Gardner contends that the three-year statute of limitations for rescission under TILA had not run.⁵

Subject to exceptions not applicable here, the right of rescission under TILA expires not later than “three years after the date of consummation of the transaction” (15 U.S.C. § 1635(f).) Gardner argues that HSBC, not Fremont, was the actual lender, and therefore the statute did not start to run until she discovered that HSBC was the lender. According to her own complaint, however, Fremont was the original lender; later, HSBC purchased the loan from Fremont. Accordingly, the “transaction” was “consummat[ed]” in 2005, and the three-year statute ran in 2008, before this action was filed in 2009.

Gardner also argues that, under Code of Civil Procedure section 339, a cause of action does not accrue until the aggrieved party discovers the loss or damage. This statute applies to certain causes of action under state law. It does not apply to a cause of action under a federal statute such as TILA.

The limitations period for rescission under TILA, by its terms, applies “notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor”

⁵ Gardner does not even attempt to argue that the one-year limitations period for an action for damages under TILA (15 U.S.C. § 1640(e)) had not expired.

(15 U.S.C. § 1635(f).) The statute sets “a fixed, statutory cutoff date . . . independent of any variable such as the claimant’s awareness of a violation, and not subject to equitable tolling. [Citation.]” (*Chabot v. Wash. Mut. Bank (In re Chabot)* (Bankr. D. Mont. 2007) 369 B.R. 1, 15; accord, *Dixon v. Countrywide Home Loans, Inc.* (S.D. Fla. 2010) 710 F.Supp.2d 1325, 1333-1334; *Ramos v. Chase Home Fin.* (D. Hawai’i 2011) 810 F.Supp.2d 1125, 1136.)

Finally, even assuming that some sort of discovery rule applied, the complaint does not actually allege that Gardner was unaware of the factual basis of her TILA claim. That alleged factual basis was that Fremont had not provided her with certain required disclosures. It is hard to see how she could allege, in good faith, that she did *not* know that she had *not* received these. Admittedly, until the forensic loan audit in 2009, she may not have realized that this was a TILA violation. Under both state and federal law, however, while ignorance of the facts may give rise to equitable tolling, ignorance of the law does not. (E.g., *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. U.S.* (Fed.Cir. 2012) ___ F.3d. ___, ___ [2012 U.S.App. LEXIS 378, *21] *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 897-898.)

V

HSBC’S LIABILITY

Gardner contends that HSBC is just as liable as Fremont.

In its demurrer to the *first* amended complaint, HSBC argued that it could not be held liable on the predatory lending and nondisclosure causes of action because — unlike

Fremont — it was not the original lender. The trial court, however, sustained that demurrer to these causes of action *with* leave to amend.

By contrast, in its demurrer to the *second* amended complaint, HSBC did *not* argue that there was any distinction between it and Fremont. Rather, it *presumed* that *if* Fremont was liable, then it was also liable, as Fremont’s successor in interest. Gardner does not address any of HSBC’s *actual* arguments (aside from arguing that the TILA statute of limitations had not run; see part IV, *ante*); she does not argue that the trial court erred by sustaining *Fremont’s* demurrer. Accordingly, she has not established that the trial court erred by sustaining HSBC’s demurrer.

VI

REPLY BRIEF

Gardner raises several additional contentions in her reply brief.

“We will not consider arguments raised for the first time in a reply brief [Citations.]” (*Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1387-1388 [Fourth Dist., Div. Two].) “““Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. . . . [Citations.]” [Citation.]” (*Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1115.)

Separately and alternatively, we also reject each of these contentions on the merits.

First, Gardner argues that the transfer to HSBC was not disclosed to her.

However, there is no such allegation in the complaint. Even if the complaint were amended to include such an allegation, it does not appear that it would state a cause of action. Gardner provides no legal analysis to explain how this alleged fact is relevant. “[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]’ [Citations.]” (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Second, Gardner argues that Civil Code section 2948.5 was violated. She seems to think it requires a lender to give the borrower a statement of per diem interest *any time* a loan is secured by a single-family home. Not so. In general, this statute provides that, ordinarily, a lender cannot collect interest before close of escrow. (Civ. Code, § 2948.5, subd. (a).) However, if the borrower affirmatively requests that escrow close on a Monday, then the lender can start collecting interest on the previous Friday, provided the lender has already given the borrower a written statement of specified matters, including the *additional* per diem interest. (*Id.*, subd. (b).)

Defendants demurred to this claim on the ground that Gardner had not alleged sufficient facts. They were correct. “[O]n demurrer a court does not accept as true contentions, deductions or conclusions of law. [Citation.]” (*American States Ins. Co. v. National Fire Ins. Co. of Hartford* (2011) 202 Cal.App.4th 692, 703, fn. 5.) Gardner does

not allege *how* Civil Code section 2948.5 was violated. She does not state that she was charged any interest prior to close of escrow or that the escrow closed on a Monday.

Third, Gardner complains about a payment of \$89,600 that she supposedly made to Fremont in February 2006 to pay off the second mortgage. She claims that Fremont promised that, if she paid off the second, it would refinance the first. She argues that this constituted a breach of an oral contract, as well as fraud. The complaint itself, however, contains no such allegation.⁶

Gardner has not shown that, even if given leave to amend, she could state either cause of action. First, she has not shown that she could allege fraud with the required specificity. (See *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 [fraud claim against corporation must ““allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written””].) Second, she has not shown that a breach of contract cause of action is not time-barred. She admits that she was aware of the supposed breach of contract by March 2007. Accordingly, by the time she filed her original complaint, in December 2009, the two-year statute of limitations for actions on an oral contract had run. (Code Civ. Proc., § 339, subd. 1.)

⁶ The original complaint did mention the \$89,600 payment. However, Gardner chose not to include any allegations regarding it in either the first or second amended complaints.

VII

DISPOSITION

The judgment is affirmed. In the interests of justice, each side shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

MILLER
J.