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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

CONNIE SWIFT,

Plaintiff and Appellant,

v.

BARCLAYS CAPITAL REAL ESTATE,  
INC. et. al.,

Defendants and Respondents.

E053917

(Super.Ct.No. CIVRS903219)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barry L. Plotkin, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Franklin L. Ferguson, Jr., for Plaintiff and Appellant.

Houser & Allison, Eric D. Houser and Chris C. Chapman, for Defendants and Respondents.

Plaintiff and appellant Connie Swift appeals after the trial court sustained the demurrer of defendants and respondents Barclays Capital Real Estate Inc, dba HomeEq

Servicing (Barclays), Wells Fargo Bank, NA, as Trustee Under Pooling and Servicing Agreement Dated July 1, 2006 (Wells Fargo), and Mortgage Electronic Registration Systems, Inc. (MERS) to plaintiff's second amended complaint (SAC) for negligence, fraud and other causes of action, arising out of the allegedly wrongful foreclosure of plaintiff's homes. The appeal is from a judgment of dismissal after sustaining the demurrer without leave to amend.<sup>1</sup> We affirm.

## I. PROCEDURAL BACKGROUND AND FACTS

On February 14, 2006, plaintiff, as an "unmarried man," obtained two loans in the amounts of \$608,000.00 and \$152,000.00 from Fremont, which were secured by respective deeds of trust that were recorded for real property located at 1670 North Quince Way in Upland, California (Quince Way Property). Eight months later, on October 20, plaintiff, as an "unmarried man," obtained a loan with a balloon rider in the amount of \$560,000.00, and a \$140,000.00 loan from WMC Mortgage Corp. (WMC), which loans were secured by deeds of trust that were recorded for real property located at 653 West Kenwood Street in Upland, California (Kenwood Property).

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<sup>1</sup> Plaintiff also sued Fremont Investment and Loan Corporation (Fremont), which was granted judgment in its favor on or about June 13, 2011. However, plaintiff's notice of appeal was from the April 20, 2011, judgment entered in favor of Barclays, Wells Fargo and MERS. This court's inquiry on August 16, 2011, as to whether Fremont is a party to the appeal was never answered. Although plaintiff's opening brief states "This appeal is taken from two judgments of dismissal, following orders sustaining two independent demurrers," the only judgment referenced and attached to the civil case information statement filed on September 27, 2011, was the April 20 judgment in favor of Barclays, Wells Fargo, and MERS. Accordingly, Fremont is not a party to this appeal.

On May 23, 2008, a notice of default in the amount of \$16,404.87 was recorded as to the \$608,000.00 loan. Plaintiff cured this default. However, on August 21, 2008, another notice of default in the amount of \$16,531.92 was recorded as to the \$608,000.00 loan.

On December 1, 2008, Old Republic Default Management Services (Old Republic) recorded a notice of trustee's sale as to the Quince Way Property. That same day, a substitution of trustee was recorded wherein MERS was substituted in place of Old Republic as trustee for the Quince Way Property. The Quince Way Property was sold at a public auction on December 19, 2008, to Wells Fargo for \$641,200.09, which included the amount of unpaid debt together with costs. A trustee's deed upon sale was recorded on January 15, 2009, along with an assignment of deed of trust to Wells Fargo. Eviction proceedings commenced, and plaintiff lost. There are no allegations as to any foreclosure and sale of the Kenwood Property.

On March 27, 2009, plaintiff initiated this action, alleging wrongful foreclosure; injunctive relief; set aside trustee sale; quiet title; breach of agreement; breach of covenant of good faith and fair dealing; fraud; violation of Financial Code section 4970 et. seq.; and accounting. Defendants' demurrer was sustained and plaintiff filed a first amended complaint, which added claims for declaratory relief and Unruh Civil Rights Act violation.<sup>2</sup> Again, defendants' demurrer was sustained and the SAC was filed on October 18, 2010, alleging negligence; fraud; cancellation of a voidable contract (Rev. &

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<sup>2</sup> On or about January 15, 2010, Wells Fargo sold the Quince Way Property to James and Lynette Martindale, as trustees of the Martindale Family Trust.

Tax. Code, §§ 23304.1, 23305a) and violation of Corporations Code section 191(c)(7); action to set aside trustee's sale, action to void or cancel trustee's deed upon sale; action to void or cancel assignment of deed of trust; wrongful foreclosure; breach of contract; breach of implied covenant of good faith and fair dealing; unjust enrichment; violation of Business and Professions Code sections 17200 et. seq.; slander of title; quiet title; and violation of Unruh Civil Rights Act (Civ. Code, § 51.5). Plaintiff primarily alleged a wrongful foreclosure because certain foreclosure documents referred to him as a woman. No contracts, notes, deeds of trust, notices or correspondence were attached to the SAC.

On December 9, 2010, defendants demurred to the SAC and asked the trial court to take judicial notice of documents relevant to their actions regarding foreclosure of the Quince Way Property. On March 18, 2011, the trial court sustained the demurrer without leave to amend, in part. Specifically, the only causes of action that were sustained without leave to amend included: (1) negligence; (2) cancellation of a voidable contract (Rev. & Tax. Code, §§ 23304.1, 23305a); (3-6) actions to set aside trustee's sale, void or cancel trustee's deed upon sale, void or cancel assignment of deed of trust and wrongful foreclosure as to the Quince Way Property; (7) unjust enrichment; and (8-9) quiet title and slander of title as to Quince Way Property. The court granted 20 days' leave to amend as to the remaining claims and those regarding the Kenwood Property. We note that while both properties are discussed in the SAC, only the Quince Way Property is

discussed in the original complaint.<sup>3</sup> While the Kenwood Property is mentioned in the SAC, it is unclear how, if at all, defendants wrongfully foreclosed on that property. This may explain why the trial court allowed plaintiff leave to amend certain causes of action as to the Kenwood Property only. Plaintiff failed to file a third amended complaint, and defendants' request to dismiss any remaining claims in the SAC with prejudice was granted on April 20, 2011. On June 17, plaintiff filed a notice of appeal as to the April 20 judgment only.

## II. STANDARD OF REVIEW

The appellate court reviews de novo the trial court's rulings sustaining defendants' demurrers without leave to amend. (*Schauer v. Mandarin Gems of Cal., Inc.* (2005) 125 Cal.App.4th 949, 955.) "The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

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<sup>3</sup> Because plaintiff opted to prepare his own appendix, this court has been provided with only limited portions of his original complaint. We remind plaintiff it is his burden to provide this court with an adequate record from which we are able to assess the merits of his claims. (*Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348.)

### III. DISCUSSION

Plaintiff contends the trial court erred in dismissing his action because the SAC exceeded the minimum threshold required for pleading claims. Specifically, he argues that he properly alleged causes of action for negligence, cancellation of a voidable contract (Rev. & Tax. Code, §§ 23304.1 and 23305a), wrongful foreclosure, and both claims that the trustee's deed upon sale and assignment of deed of trust are void. Further, he argues that he demonstrated plausible theories within the proposed third amended complaint the trial court should have allowed him to file. As for the causes of action which plaintiff has not raised any objections to the sustaining of the demurrer without leave to amend, or the subsequent dismissal for failure to amend,<sup>4</sup> he has not met his burden of showing a reasonable possibility that the defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 20.) Thus, our discussion is limited to the claims that plaintiff addressed in his opening brief.

#### A. Negligence

Plaintiff contends the six-part test established in *Biakanja v. Irving* (1958) 49 Cal.2d 647 and *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089 “weigh[s] in favor of the finding that [defendants] owed [plaintiff] a duty of care.” We disagree. Except under special circumstances, lenders do not owe borrowers a fiduciary

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<sup>4</sup> They include fraud; breach of contract; breach of implied covenant of good faith and fair dealing; unjust enrichment; violation of Business and Professions Code sections 17200 et. seq.; slander of title; and violation of Unruh Civil Rights Act (Civ. Code, § 51.5).

duty of care. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979; *Nymark v. Heart Fed. Savings & Loan Assn.*, *supra*, at p. 1098; *Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 436.) Here, the trial court found that plaintiff's allegations, including the reference to him as a female in recorded documents,<sup>5</sup> failed to create any duty "outside the role of a normal money lender." Plaintiff was given the opportunity to state facts necessary to support his claim; however, he failed to do so. On appeal he still fails to provide the necessary facts. Accordingly, we conclude the trial court did not err in sustaining the demurrer to the negligence cause of action on the basis that plaintiff failed to adequately allege the requisite fiduciary duty.

## **B. Cancellation of Voidable Contract**

According to the SAC, plaintiff alleged, against MERS only, that the deed of trust was voidable because MERS, the nominee beneficiary under the deed of trust, allegedly failed to comply with California's franchise tax laws and failed to register as a foreign corporation. In support of its demurrer, MERS argued that plaintiff lacked standing to challenge MERS's violations of California's Revenue and Taxation Code and Corporations Code, and that MERS's subsequent registration with the State of California is given retroactive effect on prior transactions as a matter of law. (*United Medical Management Ltd. v. Gatto* (1996) 49 Cal.App.4th 1732, 1739-1740 [upon correction of the defect, the corporation is permitted to prosecute or defend an action].) At the trial

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<sup>5</sup> Even plaintiff has referred to himself as a woman: "Next, there was a clear foreseeability of harm to Appellant as he could, and did, lose *her* home, i.e., actual injury." The original complaint also referenced Plaintiff as "*her*," "*herself*," and "*she*." (Bolding and italics added.)

level, plaintiff claimed “Defendants site [*sic*] no authority for the proposition that plaintiff lacks standing to make the claims and that MERS was authorized to violate Rev. & Tax Code §§ 23304.1, 23304.1(b) and 23305a.” On appeal, he raises the same challenge. However, MERS’s registration with the State of California corrected any defect alleged in the SAC. Furthermore, plaintiff has failed to provide any reasoned argument or cite any legal authority supporting his contention: ““Appellate briefs must provide argument and legal authority for the positions taken. “When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.”” [Citation.] ‘We are not bound to develop appellants’ argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.’ [Citations.]” (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) Thus, the trial court did not err in sustaining the demurrer to this cause of action.

**C. Set Aside Trustee’s Sale, Void or Cancel Trustee’s Deed Upon Sale, Void or Cancel Assignment of Deed of Trust, Wrongful Foreclosure, and Quiet Title**

Plaintiff’s claims to set aside trustee’s sale, to void or cancel trustee’s deed upon sale, to void or cancel assignment of deed of trust, for wrongful foreclose and to quiet title were sustained without leave to amend as to the Quince Way Property, and with 20 days’ leave to amend as to the Kenwood Property. The trial court agreed these claims could not be amended as to the Quince Way Property due to the collateral estoppel effect of the unlawful detainer judgment. (*Malkoskie v. Option One Mortgage Corp.* (2010) 188 Cal.App.4th 968, 974 [“subsequent fraud or quiet title suits founded upon

allegations of irregularity in a trustee’s sale are barred by the prior unlawful detainer judgment’”).) Plaintiff acknowledged there was an unlawful detainer judgment obtained as to the Quince Way Property; however, he failed to address the holding in *Malkoskie* or provide other authority which overrules application of collateral estoppel to the facts in this case. Thus, his arguments, including those regarding the tender rule, are misplaced. To the extent he claims that Old Republic (and later MERS) lacked the “legal authority to declare [him] in default,” we reject this claim under *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1157, 1157-1158 [language in deed of trust authorizes MERS to initiate foreclosure], and *Arabia v. BAC Home Loans Servicing, L.P.* (2012) 208 Cal.App.4th 462, 468-474 [loan servicer may initiate foreclosure]. Further, regarding the reference to plaintiff being a woman, as we have already noticed, even plaintiff has made the same mistake in his pleadings.

The trial court correctly sustained the demurrer to these causes of action.

#### **D. Proposed Third Amended Complaint**

In his final argument, plaintiff contends his “proposed Third Amended Complaint specifically addressed what the [t]rial [c]ourt articulated as perceived deficiencies in the [SAC].” Unfortunately, the proposed third amended complaint was filed with the court as an attachment to plaintiff’s motion for reconsideration of the court’s order sustaining Fremont’s demurrer without leave to amend.<sup>6</sup> It was not offered as a response to defendants’ demurrer. Instead, as the trial court noted, plaintiff failed to file oppositions

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<sup>6</sup> In his opening brief, plaintiff’s argument appears to be directed at Fremont, which we have already noted is not a party to this appeal. (See fn.1, *ante*.)

to most of the causes of actions being dismissed, and thus, waived any argument.

Further, at the hearing, plaintiff failed to offer any facts to support giving him leave to amend. Nonetheless, the court provided plaintiff with the opportunity to make an offer of proof as to what facts he could present in the third amended complaint such that he should be given leave to amend all of his claims; however, he failed to make such showing. When denying plaintiff leave to amend his fraud claim, the trial court stated: “Two years from the date of the filing of the first Complaint, you still don’t have the evidence in a fashion that you can put it in a brief and say, ‘Judge, here it is.’ I don’t think you will be able to get it.” Having failed to provide the trial court with an offer of proof, the court was within its discretion in granting the demurrer to certain causes of action without leave to amend, and then later dismissing those claims which plaintiff failed to amend.

Notwithstanding the above, we have reviewed the proposed changes as highlighted in plaintiff’s opening brief and conclude that plaintiff has not established that he can cure the defects in the SAC by amending. We therefore conclude the trial court properly sustained defendants’ demurrer without leave to amend, and then dismissed the remaining claims upon plaintiff’s failure to amend.

IV. DISPOSITION

The judgment is affirmed. Costs are awarded to defendants and respondents.

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RAMIREZ  
P. J.

We concur:

McKINSTER  
J.

MILLER  
J.