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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

MICHAEL BLAND,

Plaintiff and Appellant,

v.

MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC. et al.,

Defendants and Respondents.

E055187

(Super.Ct.No. CIVDS1009679)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. Brian S.

McCarville, Judge. Affirmed.

Michael Bland, in pro. per., for Plaintiff and Appellant.

AlvaradoSmith, John M. Sorich, S. Christopher Yoo, and Jenny L. Meriss for  
Defendants and Respondents Mortgage Electronic Registration Systems, Inc., and EMC  
Mortgage LLC.

On October 3, 2011, the trial court sustained the demurrer of defendants Mortgage  
Electronic Registration Systems, Inc. (MERS) and EMC Mortgage LLC, formerly known

as EMC Mortgage Corporation (EMC)<sup>1</sup> to plaintiff Michael Bland's third amended complaint without leave to amend. On December 30, 2011, judgment was entered accordingly.

Plaintiff appeals, contending that the trial court abused its discretion in sustaining the demurrer without leave to amend because he demonstrated a reasonable probability that the defects could be cured. However, after framing this issue as the only issue on appeal, he goes on to argue that he has alleged a cause of action for violation of Business and Professions Code section 17200 et seq.<sup>2</sup>

## I

### STANDARD OF REVIEW

With regard to plaintiff's argument that he alleged a cause of action under section 17200, our standard of review is the same as it is for any demurrer.

A demurrer is used to test the sufficiency of the factual allegations of the complaint to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The facts pleaded are assumed to be true, and the only issue is whether they are legally sufficient to state a cause of action.

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.

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<sup>1</sup> Subsequent to the filing of the lawsuit, EMC was acquired by purchase by JPMorgan Chase Bank, N.A.

<sup>2</sup> Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

[Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

With regard to Bland’s argument that the trial court abused its discretion in denying him leave to amend his third amended complaint further, *Blank* goes on to state, “And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

“Leave to amend is properly denied when the facts are not in dispute and the nature of the claim is clear, but there is no liability under substantive law. [Citation.] ‘[All] intendments weigh in favor of the regularity of the trial court proceedings and the correctness of the judgment. Unless clear error of abuse of discretion is demonstrated, the trial court’s judgment of dismissal following the sustaining of defendants’ demurrer will be affirmed on appeal [citation].’ [Citation.]” (*Wilhelm v. Pray* (1986) 186 Cal.App.3d 1324, 1330.)<sup>3</sup>

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<sup>3</sup> The quote in *Wilhelm* is from *Owens v. Foundation for Ocean Research* (1980) 107 Cal.App.3d 179, 185. *Owens* was disapproved on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 521, fn. 10.

## II

### FACTS AND PROCEDURAL HISTORY

The original complaint was filed on July 15, 2010. It consisted of 11 alleged causes of action against X Bancorp, MERS, and EMC. The seventh cause of action was against all defendants for alleged unfair business practices under sections 17200 et seq. Specifically, the complaint alleged that defendants used bait-and-switch tactics and made loans without giving borrowers specific information about the terms and conditions of the loans or the financial risks borrowers were assuming by accepting the loans.

After demurrers were sustained with leave to amend, plaintiff filed a second amended complaint on March 18, 2011. Additional defendants were named. The general allegations, totaling 75 paragraphs, alleged that a loan officer employed by X Bancorp solicited Bland to refinance his home into an adjustable rate loan on very unfavorable terms. Plaintiff further alleged that MERS was the “Nominee Beneficiary” under the loan and that this device was used to hide the identity of successive beneficiaries when the loan was subsequently sold. Plaintiff then alleged that MERS’s failure to transfer beneficial interests as the note and deed of trust were sold invalidated the deed of trust. As for EMC, plaintiff only alleged that payments became due to EMC as a beneficiary of the deed of trust. In addition to numerous allegations of misconduct before plaintiff signed the deed of trust, plaintiff alleged defendants had a duty to modify his loan. Ultimately, plaintiff alleged that the business practices of defendants violated section 17200 et seq.

The demurrer of defendants MERS and EMC to the second amended complaint was sustained with leave to amend on June 2, 2011. However, the trial court admonished plaintiff that he needed to allege specific facts to support his allegations under section 17200 and other causes of action.

The third amended complaint was filed on June 24, 2011. The allegations were generally the same as the earlier allegations. With respect to MERS, plaintiff alleged that it was not a beneficiary of the loan and had no ability to bring foreclosure proceedings. No specific facts were added to the cause of action under section 17200. The only allegations were general allegations that defendants' "unfair, unlawful, and fraudulent business practices and false and misleading advertising present a continuing threat to members of [the] public in that other consumers will be defrauded into closing on similar fraudulent loans."

Defendants MERS and EMC again demurred, and a hearing was held on October 3, 2011. After reviewing the allegations of the earlier complaints and the third amended complaint, the trial court sustained the demurrer without leave to amend.

### III

#### DOES THE COMPLAINT STATE A CAUSE OF ACTION

#### UNDER SECTION 17200?

Plaintiff focused on his negotiations with X Bancorp and its loan practices. Although he alleged that all defendants violated section 17200, we agree with the trial court that he failed to allege facts sufficient to state a cause of action under section 17200

against MERS and EMC. There was no allegation that MERS or EMC was even involved in the negotiations for the original loan.

The deed of trust in this case named the lender as “X Bancorp,” the trustee as Alliance Title Co., and MERS as the beneficiary “solely as a nominee for Lender and Lender’s successors and assigns.”

This is not an uncommon arrangement. Since the original complaint was filed, our appellate courts have examined and clarified the role of MERS in deed of trust transactions.

In *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1508-1511, we held that “[t]he courts in California have universally held that MERS, as nominee beneficiary, has the power to assign its interest under a DOT. Plaintiffs granted MERS such authority by signing the DOT.” (*Id.* at p. 1498.) We relied on the general description of MERS in *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 and *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149.

In *Fontenot*, the court said, “Plaintiff’s claim against MERS challenges an aspect of the ‘MERS System,’ a method devised by the mortgage banking industry to facilitate the securitization of real property debt instruments. As described in *Mortgage Electronic Registration Systems v. Nebraska Dept. of Banking & Finance* (2005) 270 Neb. 529 [704 N.W.2d 784], MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights.

The notes may thereafter be transferred among members without requiring recordation in the public records. [Citation.] [¶] Ordinarily, the owner of a promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust. [Citation.] Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as ‘nominee’ for the lender, and granted the authority to exercise legal rights of the lender. This aspect of the system has come under attack in a number of state and federal decisions across the country, under a variety of legal theories. The decisions have generally, although by no means universally, found that the use of MERS does not invalidate a foreclosure sale that is otherwise substantively and procedurally proper.” (*Id.* at p. 267.)

In *Gomes*, the trial court sustained a demurrer without leave to amend. It stated: “The role of MERS is central to the issues in this appeal. As case law explains, ‘MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members’ interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.’ [Citation.] ‘A side effect of the MERS system is that a transfer of an interest in a mortgage loan between two MERS members is unknown to

those outside the MERS system.’ [Citation.] [¶] The deed of trust that Gomes signed states that ‘Borrower [(i.e., Gomes)] understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property . . . .’” (*Id.* at p. 1151.)

Subsequently, in *Robinson v. Countrywide Home Loans, Inc.* (2011) 199 Cal.App.4th 42, we quoted *Gomes* and held that “[In *Gomes*], the court concluded that the plaintiff failed to identify a legal basis for an action to determine whether MERS had authority to initiate a foreclosure proceeding. [Citation.] We agree with the *Gomes* court that the statutory scheme ([Civil Code, ] §§ 2924-2924k) does not provide for a preemptive suit challenging standing. Consequently, plaintiffs’ claims for damages for wrongful initiation of foreclosure and for declaratory relief based on plaintiffs’ interpretation of section 2924, subdivision (a), do not state a cause of action as a matter of law. [Citation.]” (*Id.* at p. 46, fn. omitted.)

Generally, our cases have approved the MERS concept, in which MERS acts solely as the nominee (agent) of the lender and exercises some of the powers of the lender under the trust deed.<sup>4</sup> There is no legal support in the cases for plaintiff’s assertion that

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<sup>4</sup> The use of the term “beneficiary” is something of a misnomer, as explained in *Gomes*. (*Gomes v. Countrywide Home Loans, Inc.*, *supra*, 192 Cal.App.4th at p. 1157, fn. 9.) It would be more accurate to say that the lender is the beneficiary and MERS is the agent of the beneficiary. Of course, under section Civil Code section 2924, subdivision (a)(1), MERS can initiate proceedings either as beneficiary or as agent of the beneficiary.

the MERS system itself constitutes an unlawful business practice under section 17200. More importantly, plaintiff has not alleged any specific facts that arguably would provide a basis for arguing that a specific act of MERS was improper. As noted above, plaintiff's main attack is focused on the negotiation of his loan with X Bancorp and the allegedly fraudulent acts of his lender. When the transaction closed, plaintiff signed a trust deed acknowledging the role of MERS in the transaction. He cannot now complain of that role without alleging specific facts sufficient to state a cause of action against MERS.

Plaintiff's allegations against EMC are even more general. For example, he alleges that none of the defendants, including EMC, were disclosed as the beneficiary even though the deed of trust names MERS as the beneficiary. Other references to "defendants" can be construed to be allegations against EMC, but no specific facts are alleged to support an unfair business practice cause of action against EMC.

Plaintiff failed to allege facts against MERS or EMC sufficient to constitute a cause of action for unfair business practices under section 17200 et seq. Accordingly, the trial court did not err in sustaining the demurrer of MERS and EMC to the complaint.

#### IV

#### DENIAL OF LEAVE TO AMEND

As noted above, plaintiff bears the burden of showing that there is a reasonable possibility of that the defect in the complaint can be cured by further amendment. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

Plaintiff does not focus on this issue by describing what additional facts he could allege against MERS or EMC, despite the trial court's prior warning that additional

specific facts were required. Instead, he recites his grievances against X Bancorp arising from the manner in which the loan was presented to him and negotiated. For example, he argues that the loan documents were a contract of adhesion, but he does not state any facts supporting the argument. (See *Powell v. Central Cal. Fed. Sav. & Loan Assn.* (1976) 59 Cal.App.3d 540, 550-551.) He also argues that he has alleged a breach of the covenant of good faith and fair dealing even though he does not allege a contract existed between himself, MERS, and/or EMC. (See *Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.) Nor does he allege that MERS or EMC even participated in the loan negotiations for the original loan or negotiations for modification of the original loan. The same is true of his fraud argument, which again focuses only on the negotiations for the original loan with X Bancorp.

Plaintiff's argument that he should be given the opportunity to amend his complaint again suffers from the same defect. It focuses on the alleged loan practices and misrepresentations of X Bancorp. But there is no allegation that MERS or EMC was involved in the loan negotiations in any way. Considering the legal structure of MERS as described above, there is no reasonable possibility that the complaint could be amended to show that MERS participated in the initial negotiations for the loan.

Plaintiff has totally failed to explain why there is a reasonable possibility that the complaint can be amended to state any cause of action against MERS and EMC. Despite three attempts and a specific warning by the trial court after the second attempt, he has failed to allege any facts constituting a cause of action against MERS or EMC.

Accordingly, the trial court did not abuse its discretion in sustaining the demurrer of MERS and EMC to the third amended complaint without leave to amend.

V

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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RICHLI  
Acting P. J.

We concur:

KING  
J.

CODRINGTON  
J.