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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MAJID FOROOZANDEH,

Plaintiff and Appellant,

v.

CAL-WESTERN RECONVEYANCE
CORPORATION et al.,

Defendants and Respondents.

G045690

(Super. Ct. No. 30-2010-00435808)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Majid Foroozandeh, in pro. per., for Plaintiff and Appellant.

Morrison & Foerster, Janie F. Schulman and Giancarlo Urey, for Defendants and Respondents JPMorgan Chase Bank, N.A., EMC Mortgage Corporation, Chase Home Loans, JP Morgan, Mortgage Electronic Registration Systems, Inc., and Wells Fargo Bank, as Trustee, etc.

No appearance for Defendants Cal-Western Reconveyance Corporation and CMG Mortgage.

* * *

Plaintiff Majid Foroozandeh appeals from a judgment of dismissal entered after the court sustained a demurrer to his first amended complaint without leave to amend. Plaintiff contends the court “should have, as a matter of judicial policy[,] granted [his] request for leave to amend” But plaintiff failed to identify any specific allegations that could cure his fatal pleading defects. We affirm.

FACTS

The First Amended Complaint

Plaintiff filed the initial complaint in December 2010. He asserted causes of action for declaratory relief and accounting against Cal-Western Reconveyance Corporation, CMG Mortgage, EMC Mortgage Corporation, JPMorgan Chase Bank, N.A., Chase Home Loans, and JP Morgan. Plaintiff alleged they improperly instituted a nonjudicial foreclosure, recording a notice of default and notice of trustee’s sale against his San Clemente real property. Plaintiff also applied for a temporary restraining order enjoining the property sale.

The court instead issued a stay and directed the parties to attend a loan modification settlement conference. (Cf. Civ. Code, § 2923.5, subd. (a)(1), (2)¹ [trustee may not file notice of default until 30 days after contacting the borrower in person or by telephone to explore foreclosure alternatives]; *Mabry v. Superior Court* (2010) 185

¹ All further statutory references are to the Civil Code unless otherwise stated.

Cal.App.4th 208, 214 [§ 2923.5 creates a private right of action “limited to obtaining a postponement of an impending foreclosure to permit the lender to comply with section 2923.5”].) The settlement conference commenced on April 22, 2011, and was continued to May 13, 2011. But the stay expired on April 29, 2011.

Plaintiff filed a 48-page first amended complaint (FAC) on May 2, 2011. He set forth the procedural history, including the stay and loan modification settlement conference. He also described the “**CASE AT A GLANCE:**” “Plaintiff is now, and at all times relevant to this complaint [was,] the owner of the real property known as 301 Calle Fiesta, San Clemente, CA 92627 (hereinafter ‘subject property’). The current value according to Zillow as of 4/30/2011 is \$655,000. . . . The value of the 1st and 2nd Mortgages with JP MORGAN CHASE are in the amounts of \$975,000 (8%, 5 year Adjustable Option Arm Rate Note) and [\$]195,000 (11.875%) respectively.” Plaintiff took out these loans when he refinanced the property in November 2006.

The FAC included 15 pages of “common facts.” Plaintiff alleged defendants were part of an “enterprise” that induced plaintiff to take out his loans by overstating the appraised value of the property and “homes throughout Plaintiff’s community,” and by disregarding their own underwriting requirements. Defendants “knew the foregoing would lead to a liquidity crisis and the likely collapse of the enterprise,” as well as create “ghost-town-foreclosure-communities.” Plaintiff further alleged: “With specific aim, JP MORGAN, knowing of the massive fraud perpetrated by the enterprise they sought to acquire, swooped in to profiteer. Like Civil War carpetbaggers, the JP MORGAN Defendants sought to conceal the fraud of which they were aware and which gave legitimate defenses to borrowers and to ramrod through foreclosures. This was all done while the JP MORGAN Defendants have put window dressing on their business strategy, seeking to obfuscate their actions by press releases of diametrically opposite actions. This conspiracy has all been to further crush values, realize losses and collect government bail-out money, and then to take their foot off the

neck of the California homeowner market and profiteer from rises in portfolio asset values.” Plaintiff then asserted six causes of action against defendants.²

The first cause of action was for fraudulent concealment. Plaintiff alleged, “The enterprise purchased by the JP MORGAN Defendants [failed to disclose] that the mortgages would be ‘pooled,’ and ‘securitized sale’”; its “investors would discover that the enterprise’s mortgagors could not afford their loans and the result would be foreclosures and economic devastation”; and it “was more dependent than many of [its] competitors on selling loans it originated into the secondary market.” Plaintiff further alleged the “enterprise purchased by the JP MORGAN Defendants” failed to disclose its “lax underwriting guidelines,” the “‘matching strategy’ in which it matched the terms of any loan being offered in the market,” “[t]he high percentage of loans it originated that were outside its own already widened underwriting guidelines,” the “‘prime’ loans” that “included loans made to borrowers with FICO scores well below any industry standard definition of prime credit quality,” “[t]he high percentage of the enterprise’s subprime originations that had a loan to value ratio of 100%,” and the “significant additional risk factors” in its subprime loans. Plaintiff alleged concealing these facts allowed defendants to depress the California real estate market, reducing the value of plaintiff’s real property.

The second cause of action was for intentional misrepresentation. Plaintiff alleged “the enterprise purchased by the JP MORGAN Defendants misled the public, including Plaintiff, by falsely assuring them that the enterprise was primarily a prime

² The term “defendants” refers to the following defendants named in the FAC: “EMC Mortgage Corporation; JPMorgan Chase Bank, N.A.; Chase Home Loans; JP Morgan; Mortgage Electronic Regstartion [*sic*] Systems Inc. aka MERS; and Wells Fargo Bank, National Association as Trustee for the Certificateholders of Structured Asset Mortgage Investments II Inc., Bear Stearns Mortgage Funding Trust 2007-AR2 Mortgage Pass-Through.” Defendant JPMorgan Chase Bank, N.A., has defended the action for itself and as a successor to the rest of these defendants. The FAC names two other defendants, Cal-Western Reconveyance Corporation and CMG Mortgage, who have not appeared in the action.

quality mortgage lender which had avoided the excesses of its competitors.” Moreover, the “enterprise” failed to disclose its “aggressive business model,” “the unprecedented expansion of its underwriting guidelines,” and the fact “its prime category loans” included risky loans. And the enterprise “made affirmative misleading public statements . . . that were designed to falsely reassure Plaintiff about the nature and quality of the enterprise’s underwriting.” “As a result of relying upon the foregoing misrepresentations, Plaintiff entered into a mortgage contract with the enterprise” But “[t]he enterprise’s financial condition was not sound, but was a house of cards ready to collapse, as the enterprise well knew, but Plaintiff did not.” Eventually, “Plaintiff could not afford the mortgages when the variable rate features and/or balloon payments kicked in,” and “could not refinance or sell [his] residence without suffering a loss of [his] equity investment[.]”

The third cause of action was for misrepresentation. Plaintiff alleged: “Although the enterprise purchased by the JP MORGAN Defendants and other members of the Network may have reasonably believed some or all of the representations they made, described in this Complaint, were true, none of them had reasonable grounds for believing such representations to be true”

The fourth cause of action was for violation of section 2923.5. Plaintiff alleged defendant recorded the notice of default “without first making contact” with plaintiff “and then interacting with [him] in the manner set forth in detail under § 2923.5.”

The fifth cause of action was for unfair competition. (Bus. & Prof. Code, § 17200.) Plaintiff alleged: “The forgoing fraudulent concealment, material misstatements, and the intentional violations of state and federal statutes cited herein constitute unlawful, unfair and fraudulent business acts or practices and so constitute unfair business practices”

The sixth cause of action was for breach of contract. Plaintiff alleged: “Defendants’ acceptance of TARP [(Troubled Asset Relief Program)] money created an obligation to modify loans outstanding on Plaintiff’[s] real estate to the extent Defendants were pronouncing rights thereto, to assist borrowers, and to otherwise use the TARP funds for the benefit of, among others, the Plaintiff herein. [¶] In fact, the Plaintiff is [an] intended third party beneficiar[y] of the contracts between the United States Government, certain intermediaries and the Defendants.”

The Demurrer

Defendants demurred to the FAC, contending it was uncertain and failed to state any cause of action. In plaintiff’s opposition to the demurrer, he set forth the case’s procedural history, including the outcome of the May 13, 2012 continuation of the loan modification settlement conference. The presiding temporary judge had found “[p]laintiff failed to furnish information justifying modification and did not show adequate income.” The opposition also included a “**CASE AT A GLANCE**” section and a recitation of the standard of review.

Plaintiff’s opposition contained this short analysis. “Even without resorting to liberal construction, the Plaintiff has appropriately pleaded the causes of action in the FIRST Amended Complaint, which establishes violations of the Plaintiff[’s] legal rights. The Plaintiff[] hereby oppose[s] the Demurrer of Defendants on the following grounds: [¶] 1. Contrary to the defendant[s]’ general and vague and across the board assertions that all six causes of action ‘fail[] to state sufficient facts to constitute a valid cause of action,’ plaintiff argues each cause of action is replete with competent factual allegations for the court to overrule the demurrer in its entirety. In the alternative plaintiff is entitled as a matter of law leave to cure any deficiencies the court might find by way of amending

the FAC accordingly. [¶] Rule 2.211 [*sic*]³ has been complied with in that plaintiff has identified ‘all defendants’ as ‘JP MORGAN or JP MORGAN GROUP.’ Each cause of action therefore is against all named defendants.”

At the hearing, plaintiff asked for leave to amend. He stated: “I can see specifically what the court is asking for and what the court is looking for. As to the causes of action that have been indicated that the defendants were grouped together, I was — I thought that [in] the 28 or 29 pages of facts that I had laid out before the court, the interaction of these defendants as to these causes of action were laid out. But it would be very simple for me to take those facts and attribute each one of those facts to particular defendants under particular cause[s] of action that have been pled.” Plaintiff concluded: “So, Your Honor, if the court is gracious enough to allow me ten to fifteen days, I can go ahead and revamp the complaint and present it.”

After defendants’ counsel addressed the court, plaintiff claimed he could allege new facts. He stated: “Your Honor, in due course of discovery over the past two or three weeks I have had a complete forensic audit done on this transaction. And there are new facts that have surfaced that [are] not before the court at the present time.” He claimed “there has been a separation of the note and the deed” and “there are issues in reference to signatures that have been signed by different people that at the time they were not working for these entities.” He asked for “the opportunity to amend this complaint and bring out those facts, present to the court the results of [the] forensic audit, and at the same time serve some discovery on the other side to find out how they’re coming up with these figures.”

³ California Rules of Court, rule 2.112, provides: “Each separately stated cause of action, count, or defense must specifically state: [¶] (1) Its number (e.g., ‘first cause of action’); [¶] (2) Its nature (e.g., ‘for fraud’); [¶] (3) The party asserting it if more than one party is represented on the pleading (e.g., ‘by plaintiff Jones’); and [¶] (4) The party or parties to whom it is directed (e.g., ‘against defendant Smith’).”

The court sustained the special demurrer on the ground of uncertainty. It found: “The First Amended Complaint groups all Defendants together; making it difficult to determine what wrongdoing each Defendant is alleged to have committed Here, there are no clear allegations to assist the parties in determining what role each defendant is alleged to have in each of the six Causes of Action.”

The court also sustained the general demurrer on several grounds. First, it found the four causes of action sounding in fraud were time-barred. It found they “are based upon the allegations that Defendant[s] deceived Plaintiff into entering into loan agreements ‘on or about November 2006.’ . . . This action was not filed until December 2010, i.e., more than 4 years after the alleged misrepresentations.” Second, it found “fraud is not pled with the requisite specificity” in these causes of action. Third, it found the section 2923.5 cause of action was barred by the parties’ participation in the loan modification settlement conference. Finally, it found the breach of contract cause of action was barred because “there is no private right of action under TARP.”

The court denied leave to amend. It told plaintiff at the hearing: “Your offer to amend to clarify the vagueness issues for all causes of action in and of itself is not sufficient to resolve the key issues here. Your additional suggestion that you have discovered more information does not clarify any of these causes of action, [but] instead leads to new causes of action for which you would need authority to amend.” Plaintiff’s offer to amend lacked “the specificity . . . to truly demonstrate an ability to amend that would satisfy the pleading problems” The court later entered a judgment of dismissal.⁴

⁴ The judgment broadly provides “this action is dismissed with prejudice” — apparently including plaintiff’s causes of action against the non-appearing defendants, Cal-Western Reconveyance Corporation and CMG Mortgage. But plaintiff raises no issue in this regard.

DISCUSSION

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. 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.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (*Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967.)

“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. [Citations.] ¶ 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. [Citation.] The plaintiff must clearly and specifically set forth the ‘applicable substantive law’ [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary.” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43-44 (*Rakestraw*)).

“The burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will

rewrite a complaint. [Citation.] Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend.” (*Rakestraw, supra*, 81 Cal.App.4th at p. 44.)

Plaintiff does not seriously dispute the court’s decision to sustain the special demurrer on the ground of uncertainty. In his written opposition, at the hearing, and in his opening brief on appeal, plaintiff basically accepts the court’s conclusion the FAC is uncertain. As well he should — the FAC’s 48 pages are full of sound and fury, but their allegations are largely directed at some amorphous “enterprise” rather than any particular defendant. The FAC lacks specific “who, what, and when” allegations that would give the defendants notice of what they had to defend.

Plaintiff instead contends the court abused its discretion by refusing him leave to amend. But his reasoning here is just as nebulous as his FAC: he offered to amend, so the court should have let him. His unadorned offer is not compelling. How could he clarify the FAC’s allegations? He does not say. He did not give the trial court any idea of how he could amend the FAC to allege exactly which defendant said (or did not say) what to whom, and when it did so. Nor does he tell us. All he does is promise greater clarity: plaintiff insists “it was rather apparent that he could easily cure what *appeared* to the trial court to be pleadings that needed clarification”

This bald assurance is insufficient to justify leave to amend. To meet his “burden of proving there is a reasonable possibility of amendment,” plaintiff ““must show in what manner he can amend his complaint.”” (*Rakestraw, supra*, 81 Cal.App.4th at p. 43.) He “must set forth factual allegations that sufficiently state all required elements of that cause of action.” (*Ibid.*) “The assertion of an abstract right to amend does not satisfy this burden.” (*Ibid.*) But that very assertion is all that plaintiff has offered.

Nor can plaintiff obtain leave to amend with veiled references to new facts. He told the court “a complete forensic audit [had been] done on this transaction.” When

the court pressed him for the new facts revealed by this purported audit, plaintiff claimed “there has been [a] separation of the note and the deed” and “there are issues in reference to signatures that have been signed by different people that at the time they were not working for these entities.” But plaintiff already alleged as much in the FAC. He alleged “in many instances the Defendants herein do not have in their possession, custody or control the original or an authentic copy of the promissory notes or other indicia of realty rights regarding Plaintiff. . . . Defendants are incapable of establishing (and do not have any credible knowledge regarding) who owns the promissory notes Defendants are purportedly servicing.” And he alleged defendants recorded “false” documents. If the purported audit uncovered any other new facts, plaintiff has failed to share them. He offers no “factual and specific” allegations (*Rakestraw, supra*, 81 Cal.App.4th at p. 44) “that sufficiently state all required elements of [any] cause of action” (*id.* at p. 43).

Plaintiff does contend the fraud-related causes of action are not time-barred on their face.⁵ But again, plaintiff offers no analysis to support his position. In the FAC, he alleges defendants’ fraudulent concealment and misrepresentations induced him to enter into the mortgages in November 2006 — more than three years before he filed the original complaint in December 2010. (See Code Civ. Proc., § 338, subd. (d) [three-year limitations period for fraud].)

To avoid the time-bar, plaintiff contends he had not discovered the fraud when he took out the loans in November 2006. But plaintiff must “affirmatively plead[] that he did not discover the facts constituting the fraud until within three years prior to the date he filed his complaint.” (*Bainbridge v. Stoner* (1940) 16 Cal.2d 423, 430.) The “averment of lack of knowledge within the statutory period is not sufficient; a plaintiff must also show that he had no means of knowledge or notice which followed by inquiry

⁵ We summarily reject plaintiff’s specious claim the court’s use of the “transient” verb “appear” in its minute order (“These causes of action appear to be time-barred”) “in and of itself justifies” leave to amend.

would have shown the circumstances upon which the cause of action is founded. Moreover, he must also show when and how the facts concerning the fraud became known to him.” (*Ibid.* [affirming dismissal upon demurrer].) To invoke the delayed discovery rule, “the plaintiff must specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. [Citations.] Mere conclusory assertions that delay in discovery was reasonable are insufficient and will not enable the complaint to withstand general demurrer.” (*Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 297.) But plaintiff does not identify what specific facts he would allege to plead his delayed discovery of the fraud, let alone the reasonableness of his delay.

Finally, plaintiff offers no reasoned defense of the section 2923.5 or breach of contract causes of action. To the contrary, he himself defeated the section 2935.5 claim by alleging the parties’ participation in the stay and settlement conference. (See *Mabry v. Superior Court, supra*, 185 Cal.App.4th at p. 214 [statute allows borrower to stay foreclosure to meet with lender].) And his contract claim is based on his being a third party beneficiary of “[d]efendants’ acceptance of TARP money” from the “United States Government.” But “this kind of third party beneficiary theory is ‘incompatible with the statutory regime.’” (*Warner v. Wells Fargo Bank, N.A.* (C.D.Cal. June 21, 2011, No. SACV 11–00480 DOC (PLAx)) 2011 WL 2470923, *3 [granting motion to dismiss].) Congress did not create any express or implied “private right of action against TARP fund recipients.” (*Pantoja v. Countrywide Home Loans, Inc.* (N.D.Cal. 2009) 640 F.Supp.2d 1177, 1185 [granting motion to dismiss].)

DISPOSITION

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

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.