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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CYNTHIA LOUISE BROWN,

Plaintiff and Appellant,

v.

MARTIN FOIGELMAN et al.,

Defendants and Respondents;

THE BANK OF NEW YORK MELLON,

Defendant and Appellant.

G048422

(Super. Ct. No. 30-2008-00113526)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William D. Claster, Judge. Affirmed.

Law Offices of Lenore Albert, Lenore L. Albert; and Cynthia Louise Brown, in pro. per., for Plaintiff and Appellant.

Mark Butler & Associates and Mark J. Butler for Defendants and
Respondents Martin Foigelman and Loanlenders of America, Inc.

Glaser Weil Fink Jacobs Howard Avchen & Shapiro and Craig H. Marcus
for Defendant and Appellant the Bank of New York Mellon.

* * *

Plaintiff Cynthia Louise Brown allegedly lost hundreds of thousands of dollars to fraudsters in a scam. The three defendants that are parties to this appeal — Martin Foigelman, Loanlenders of America, Inc. (Loanlenders), and the Bank of New York Mellon (Mellon) — are not accused of directly participating in the fraud committed against Brown. But each of the defendants had a connection to a secured loan of \$880,000 taken out by Brown, which was the biggest source of funds for Brown’s losses. The trial court granted summary judgment in defendants’ favor and we affirm.

FACTS¹

In October 2005, defendants Michael Osmon, Kela Holmes, Craig Dimond, Tony Denardo, and Marcus Bancroft (collectively, the alleged con artists) promised to procure a \$15 million standby letter of credit for Brown in exchange for a fee of

¹ We review the evidence “in the light most favorable” to Brown. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) This appeal concerns only Brown’s claims against Foigelman, Loanlenders, and Mellon. The allegations of wrongdoing against other defendants in this case are serious and the record before us suggests that someone must have defrauded Brown. But, by stating the facts as accepted by the parties to this appeal for purposes of summary judgment, we do not intend to convey the impression that these allegations have been proven against any particular individual. Indeed, the record is unclear as to the status of Brown’s attempts to recover her losses from the alleged fraudsters. Early in the case, Brown suggested these individuals were “judgment proof” as a result of a bevy of other civil cases filed against them.

approximately \$500,000. The alleged con artists represented to Brown that they were experienced in financing start-up businesses, that they would help Brown grow her business, and that the standby letter of credit would “pay for itself.” Brown relied on these representations, and agreed to pay the fee. On October 21, Brown gave the alleged con artists \$20,000 as a partial payment of the fee.

Prior to October 2005, Brown owed approximately \$370,000 on an existing, legitimate mortgage secured by her residence, which was worth approximately \$1,100,000. Brown took out a \$500,000 secured loan from New Century Mortgage at the request of the alleged con artists; this loan was supposed to be a home equity line of credit from which she could pay the remainder of the fee to the alleged con artists. Instead, a mistake occurred and the New Century loan paid off the existing \$370,000 loan at closing. Using the remaining proceeds of the New Century loan, Brown paid an additional \$98,000 to the alleged con artists in November 2005.

Thus, as of November 18, 2005, Brown had paid \$118,000 of the fee to the alleged con artists. Unable to pay the remainder of the fee at that time, Brown agreed to repay \$380,000 to defendant Dimond, who supposedly would advance the money to the other alleged con artists.² Brown admits she signed a promissory note agreeing to pay Dimond \$380,000 and a deed of trust pledging her residence as collateral for the purported Dimond loan. These documents are dated December 2, 2005. But Brown denies that she actually delivered the promissory note or deed of trust to Dimond or anyone else.³ Somehow, however, the deed of trust, which noted that it was securing the

² As described in her original verified complaint, Brown was pressured by the alleged con artists to accept this “bridge loan” and pursue a second refinancing of her home to pay back the bridge loan under threat of the project failing.

³ As stated in her verified special interrogatory response, “Because of slip ups in the original financing, . . . Brown decided not to deliver and turn over the documents she had signed until she saw proof of the interim funding”

sum of \$380,000, was recorded on December 9, 2005. Brown theorizes that the alleged con artists “obtained possession of the Deed of Trust . . . from [her] home by stealth, theft and without the consent or knowledge of . . . Brown.” Brown was suspicious (but not suspicious enough) of the alleged con artists; she inquired with the Santa Ana Police Department about the alleged con artists and her contracts with them sometime in November 2005.

By a December 5, 2005 letter to Brown, the alleged con artists acknowledged receipt of the remainder of the fee from Dimond and promised to obtain the standby letter of credit. Pursuant to an October 19, 2005 agreement signed by Brown and one of the alleged con artists, the alleged con artists (operating under the company name Start Up Business Capital, LLC) had 21 “banking days” to obtain the \$15,000,000 standby letter of credit for Brown. Brown’s fee payment was fully refundable if the alleged con artists failed to meet their deadline. A schedule to the agreement indicated that \$5 million would “be paid immediately at the close of escrow, no more than 21 business days from the day that the \$485,000 has cleared funds into the attorney trust account.” As of December 5, 2005, Brown “‘had done everything that [she was] being asked to do’ and she ‘had paid all money that [she was] being asked to pay for the standby letter of credit.’”

The three defendants involved in this appeal (i.e., Foigelman, Loanlenders, and Mellon) had nothing to do with Brown’s interactions with the alleged con artists as described above, including her payment of the initial \$118,000 to the alleged con artists and her agreement to repay Dimond for his advancement of the remainder of the fee. Instead, these defendants are linked to an \$880,000 loan from lender Home Loan Mortgage Corporation (HLM) to Brown that closed in late December 2005 or early January 2006. HLM “had no involvement in the conspiracy to defraud [Brown] and was not a co-conspirator.” The purpose of this loan, however, was to reimburse Dimond for his (fraudulent) advancement of the (fraudulent) fee to the alleged con artists. Mellon

obtained the note and deed of trust referencing the \$880,000 loan after the loan closed. Loanlenders, a mortgage loan brokerage firm operating under the license of Foigelman, received roughly \$2,600 out of escrow (i.e., loan origination fee — \$1,600, loan processing fee — \$495, and administration fee — \$500) for acting as broker on the \$880,000 HLM loan.⁴

On December 13, 2005, Brown signed an adjustable rate note in the amount of \$880,000 and an accompanying deed of trust against her residence in favor of HLM.⁵ A signature purporting to be that of Brown appears on a document with the escrow company's letterhead.⁶ The document purports to authorize the escrow company "to obtain and comply with transfer instructions and pay-off 'demands' from the lenders or parties" listed on the document; the document lists New Century (in the amount of

⁴ Brown finds fault with Loanlenders because of its affiliation with Denise Anderson, who was introduced to Brown by the alleged con artists. Brown infers that Anderson participated in the fraud, and that her participation in procuring the HLM loan implicates Loanlenders and Foigelman. Foigelman's declaration indicates that Anderson referred loans to Loanlenders "on occasion," but that he was unaware of Anderson "doing anything to mislead, deceive, or harm . . . Brown." According to Foigelman, Anderson was the only individual "with any relationship to Loanlenders that was involved in any way with" Brown. Brown admits that Foigelman himself did not conspire to harm Brown; her claim is that Foigelman and Loanlenders should be held to account for the alleged conduct of Anderson.

⁵ Although Brown acknowledges her signature on these documents, she claims she was forced to rush through the documents she signed. The notary public who met with Brown denied this accusation, declaring that, consistent with her "established custom and practice," she "allowed Brown to carefully read and review every one of the HLM Loan Documents before she signed them."

⁶ Fidelity National Title Company (Fidelity) served as escrow agent for this transaction and was also sued by Brown in this case. This court dismissed Brown's appeal as to Fidelity, because Fidelity obtained only summary adjudication of certain causes of action and not summary judgment.

\$502,956.08) and Dimond (in the amount of \$364,000) as secured lenders.⁷ In a declaration filed in opposition to the motions for summary judgment, Brown implicitly admits she signed the second page of this document, but denies that the first page was put together with this document such that she could recognize she was authorizing payment to Dimond out of escrow. Brown's purported signature also appears on the escrow company's estimated closing statement, which provided for all of the proceeds to be used to pay off New Century, Dimond, and various closing costs. Brown does not indicate in her declaration whether she signed this document and/or whether she was similarly misled by the placement of the signature page.

Dimond did not provide an actual copy of the promissory note to the escrow company to satisfy HLM's instructions to the escrow company requiring a copy of the note for the second trust deed lienholder (i.e., Dimond). Instead, on December 16, Dimond delivered a "lost note affidavit" to the escrow agent affirming under penalty of perjury that the note (for \$380,000) and deed of trust had "been lost or accidentally destroyed." How Dimond could have lost the note and deed of trust mere days after its execution (on December 2) is unclear, especially given that the deed of trust was recorded on December 9. Brown cites to the lost note affidavit as proof that she really did not deliver a signed note and deed of trust to Dimond.

Brown also claims she orally told a representative of the escrow company that no money should be sent to Dimond unless the escrow company "saw verification that [Dimond] had actually deposited the funds for his contribution." Assuming Brown's testimony to be true, this suggests Brown was uncertain as to whether Dimond really had

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There is an unexplained discrepancy between the \$380,000 supposedly advanced by Dimond and the \$364,000 paid to Dimond out of escrow.

advanced the money to the other alleged con artists. She did not want Dimond “repaid” for something he never paid.⁸

Fidelity documentation indicates the scheduled closing date was January 2, 2006, while Brown’s operative complaint suggests closing occurred on December 20, 2005. Regardless of the precise closing date, the HLM loan paid off the \$500,000 New Century loan, money transferred directly to New Century out of escrow. The remaining \$364,000 (after the New Century payment and the payment of fees) went to Dimond directly out of escrow. Brown did not receive a single dollar out of escrow.

After the \$880,000 loan closed, defendant Osmon continued to provide assurances to Brown that the letter of credit was on its way. But Brown never received the standby letter of credit or other assistance promised by the alleged con artists. Instead, she was duped into paying the alleged con artists nearly \$500,000 for nothing. On January 17, 2006, the Department of Corporations sent Brown a letter (which she acknowledges she received within a week or two of its date) informing her of “an inquiry regarding the investment activities of [defendant] Michael Osmon” and related business

⁸ It is unclear why Brown’s method of ascertaining these facts and protecting herself was to sign the HLM loan documents then orally instruct an escrow company employee to investigate the existence of a transfer between Dimond and the other alleged con artists. Brown already had received notice from the other alleged con artists that they had received the entire fee as of December 5; presumably, she could have asked Dimond or the other alleged con artists for additional proof that she had actually received value for the note she had executed on December 2. It is also unclear precisely what Brown expected the escrow agent to do. She claims the escrow agent should have obtained a copy of the Dimond promissory note (which according to her other testimony was hidden in her residence). Obtaining an actual copy of the Dimond promissory note would not have proven that Dimond paid the other alleged con artists money on behalf of Brown. Even proof that Dimond transferred funds to the other alleged con artists (e.g., by check or wire transfer) would not have somehow guaranteed that Brown would receive the standby letter of credit. Brown’s pleadings and testimony in this case do not quite come to terms with the apparent truth: she was swindled from the beginning of her interactions with the alleged con artists and there never was any intention to provide her with a \$15 million letter of credit, regardless of whether the alleged con artists actually moved money around between their respective accounts.

entities including Start Up Business Capital, LLC. The letter requested information from Brown about her investment with Osmon, and noted that “the Department has not made any determination of any legal violations” On July 21, 2006, Brown drafted a letter to defendant Osmon accusing him of “a complete scam” and offering to compromise her claims against him for a cash payment. Brown claims that until she sent that letter, she “continued to believe with doubts that there really was a letter of credit in the works”

All scheduled monthly payments were made on the HLM promissory note until September 2006. Assuming the validity of the HLM promissory note, Brown owed \$863,207.43 in principal at the time of the parties’ summary judgment motions. Brown was unable at that time to pay the outstanding principal balance owed on the HLM note.

DISCUSSION⁹

Most of Brown’s contentions on appeal pertain to the court’s grant of summary judgment in favor of defendants. Our review of the court’s grant of summary judgment is de novo. (*Benson v. Superior Court* (2010) 185 Cal.App.4th 1179, 1185.) Brown also contends the court erred when it refused to allow her leave to file a sixth amended complaint. We review the court’s denial of Brown’s motion for leave to amend for an abuse of discretion. (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1124.)¹⁰

⁹ Brown represented herself at oral argument. Her argument consisted largely of references to purported evidence (e.g., a supposed 2006 notice of rescission, an alleged fraudulent loan application) that is not actually in the record. “As a general rule, documents and facts not before the trial court cannot be included as a part of the record on appeal.” (*Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 449.)

¹⁰ Defendants take issue with the sufficiency of the record designation by Brown, contending Brown’s appeal should fail because defendants had to counter-

Before turning to the issues raised by Brown, we first address the parties' respective requests for judicial notice. Implicitly invoking Evidence Code sections 452, subdivision (c), and 459, Brown requests that we take judicial notice of various documents from unrelated proceedings that were not presented to the trial court (i.e., out-of-state regulatory matters concerning Loanlenders' business practices, a Federal Reserve cease-and-desist order governing Mellon, and a state bar matter regarding Brown's former attorney). As to defendants, this is essentially character evidence, an attempt to impugn the integrity of defendants without regard to the particular facts of this case. As to prior counsel for Brown, Brown's theory is that her counsel was distracted at the time of the summary judgment motions. We deem these materials irrelevant to the issues raised on appeal and deny Brown's request for judicial notice. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4.)

Citing Evidence Code sections 452, subdivisions (d) and (h), and 459, Loanlenders and Foigelman request that we take judicial notice of a volume of Brown's deposition transcript, for the particular purpose of considering three specific pages of testimony that were not included in the summary judgment hearing record. Defendants cite no authority for the proposition that a deposition transcript is a "[r]ecord[] of (1) any court of this state" (*id.*, subd. (d)) or is comprised of "[f]acts and propositions that are not reasonably subject to dispute" (*id.*, subd. (h)). We deny this request for judicial notice. But we comment further on this material in our discussion of Loanlenders' and Foigelman's motions for summary judgment; the rationale for taking notice of the

designate numerous documents necessary for our review (e.g., defendants' summary judgment moving papers and opposition papers regarding the motion for leave to amend). Moreover, Brown's appellate briefs do not provide an adequate summary of the relevant factual record. But because we affirm the trial court's rulings on the merits, we need not address whether the shortcomings in the record and/or Brown's briefs should result in an affirmance separate and apart from the merits.

deposition testimony is that it supposedly would have been included in the trial record had Brown made the argument below that she is now making in her appellate briefs.

Grant of Mellon's Motion for Summary Judgment

The operative fifth amended complaint alleged only two causes of action against Mellon: (1) the sixth cause of action, for cancellation of instruments, and (2) the eighth cause of action, for quiet title. In reality, this is only one cause of action, as the quiet title cause of action against Mellon is premised on cancelling the deed of trust securing the \$880,000 HLM loan. (See *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 216.) The trial court granted summary judgment, observing at the hearing that “[i]t didn’t seem like [Mellon or its predecessors in interest] did anything wrong. They just happened to fund a loan for \$880,000.”

Brown contends the fraud perpetrated by the alleged con artists infected the \$880,000 loan transaction, thereby voiding the HLM promissory note and deed of trust subsequently obtained by Mellon.¹¹ “A deed is void if the grantor’s signature is forged or if the grantor is unaware of the nature of what he or she is signing.” (*Schiavon v. Arnaudo Brothers* (2000) 84 Cal.App.4th 374, 378.) Brown likens this case to forgery or fraud in the execution of the instrument, suggesting that even a bona fide purchaser for value like Mellon cannot enforce the loan documents against her. (*Ibid.*) The problem for Brown is that she signed the HLM note and deed of trust (i.e., they were not forged). Moreover, the trickery employed by the alleged con artists in obtaining Brown’s

¹¹ Although Brown refuses to acknowledge it, she clearly received some value from the \$880,000 loan, in that it paid off her legitimate mortgage debt (i.e., the initial \$370,000) encompassed within the \$500,000 New Century loan. Indeed, Brown does not attempt to undo the New Century loan in this case, even though she used the proceeds to pay the alleged con artists nearly \$100,000. Besides its greater size, the only distinction between the New Century loan and the HLM loan is that the alleged con artists received funds directly from escrow as a result of the HLM loan.

signature on the loan documents did not pertain to hiding the fact that she was taking out an \$880,000 secured loan (i.e., fraud in the execution), but rather the end to which the proceeds of the loan would be put to use by individuals unrelated to the party (HLM) providing the loan (i.e., fraud in the inducement). Certainly, Brown is entitled to rescind and cancel any contracts with the alleged con artists. But the \$880,000 note and deed of trust are not void.

Mellon aptly cites to precedent from our Supreme Court. (See *Carroll v. Carroll* (1940) 16 Cal.2d 761.) In *Carroll*, a wife sought cancellation of a deed of trust based on both her own incompetency at the time of execution and her husband's inducement of her signature on the relevant documents (*id.* at pp. 763-765) "by persuasion, threats and misrepresentations" (*id.* at p. 764). As to the financial institution defendants, the *Carroll* court rejected both contentions and affirmed the judgment. (*Id.* at p. 771.) The wife had no right to rescind contracts entered with the defendants other than her husband because there was "no evidence and no finding connecting the remaining defendants in any way with any duress, menace, fraud, or undue influence exercised by plaintiff's husband. On the contrary, it appeared and the trial court found and concluded that the note and deed of trust were executed by plaintiff for a valuable consideration and without the remaining defendants 'participating in or having any knowledge or notice' of any of the acts of plaintiff's husband of which plaintiff complained." (*Id.* at pp. 770-771, citing Civ. Code, § 1689 [grounds for rescinding contracts].)

Here, similarly, there is no evidence that Mellon or its predecessor-in-interest HLM did anything wrong. There were two deeds of trust recorded against Brown's residence, the New Century deed of trust and the Dimond deed of trust, which roughly equaled the \$880,000 funded by HLM. Brown signed all loan and escrow documents, including several that explicitly acknowledged Dimond's purported note would be paid off (even assuming the escrow company and/or notary public hid this information from Brown, there is no evidence HLM or Mellon participated in such

conduct). The \$880,000 loan was paid until September 2006, long after the supposed \$15 million letter of credit should have been received by Brown. It is possible the escrow company botched Brown's alleged oral instructions and/or was negligent in accepting a lost note affidavit from Dimond. But none of these allegations void the \$880,000 note and deed of trust.

This result makes sense. "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." (Civ. Code, § 3543.) By her claims against Mellon, Brown seeks to upend this maxim of jurisprudence for a rule that would require lenders (and bona fide purchasers of mortgage loans) to ferret out fraudulent schemes that provide the motivation for the borrower's loan application. We affirm the grant of summary judgment to Mellon. We need not address Mellon's protective cross-appeal pertaining to its attempt to join in the other defendants' motions for summary judgment.

Grant of Foigelman's and Loanlenders' Motions for Summary Judgment

Unlike Mellon, Foigelman and Loanlenders were listed as defendants to all eight causes of action in the operative complaint: (1) fraud; (2) breach of fiduciary duty; (3) willful misconduct; (4) tortious interference with economic advantage; (5) broker, lender, escrow misconduct; (6) cancellation of instruments; (7) conversion; and (8) quiet title. Neither Foigelman nor Loanlenders actually claimed an interest in any instrument or title to Brown's residence; thus, the court properly granted summary adjudication in favor of Foigelman and Loanlenders as to the cancellation of instruments and quiet title causes of action. In her appeal, Brown does not contest the propriety of granting summary adjudication on these causes of action.

As to the remainder of the causes of action, the court concluded that the applicable statute of limitations had run before Brown sued Foigelman and Loanlenders. The court found and plaintiff concedes in her opening brief on appeal that the longest

statute of limitations period at issue is three years. (See Code Civ. Proc., § 338, subd. (d) [fraud, three years]; *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607 [breach of fiduciary duty claim sounding in fraud, three years]; *Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 915 [conversion, three years]; *Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 168 [interference with economic advantage, two years].)¹² Indeed, Brown focuses only on her fraud cause of action in her briefs, ignoring the related causes of action such as conversion, interference with economic advantage, and breach of fiduciary duty. Thus, the question presented is whether there is a triable issue of fact as to whether the three-year statute of limitations ran on Brown's fraud claim against Loanlenders and Foigelman.

The following facts are undisputed: (1) Brown had already provided \$118,000 to the alleged con artists by November 18, 2005; (2) sometime in November 2005, Brown demonstrated her suspicion of the alleged con artists by inquiring with the Santa Ana Police Department; (3) on December 5, 2005, the alleged con artists notified Brown that they had received her fee (the remainder supposedly having been provided by Dimond) and would provide the standby letter of credit; (4) the alleged con artists had 21 days (alternatively referred to as business or banking days) from December 5, 2005 to make good (at least in part) on their promise to obtain a standby letter of credit for Brown; (5) at no time did Brown receive a full or partial standby letter of credit; (6) the \$880,000 loan brokered by Loanlenders and Foigelman closed by early January 2006; (7)

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In her reply brief, Brown cites in passing an alternate statute of limitations. (Code Civ. Proc., § 337, subd. (3) [four year statute of limitation for “action based upon the rescission of a contract in writing” including one relying on the ground for rescission of fraud].) Brown forfeited this argument by failing to raise it in her opening brief or provide any reasoned discussion of the issue in either brief. (*Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1115.) We also note that the pertinent causes of action against Foigelman and Loanlenders seek the recovery of damages for fraud (and related torts); they do not pertain to the rescission of a written contract (like the Mellon causes of action discussed above).

Brown did not directly receive any funds out of closing; (8) at the end of January 2006, Brown received a letter from the Department of Corporations, indicating that they were investigating one of the alleged con artists; and (9) Brown accused the alleged con artists of a scam on July 21, 2006.

The following procedural history is undisputed: (1) Brown filed her initial complaint on October 31, 2008; (2) the initial complaint did not name Foigelman or Loanlenders as defendants; (3) Brown filed her first amended complaint, which named Foigelman and Loanlenders as defendants, on February 24, 2009; (4) Foigelman and Loanlenders moved for summary judgment on the grounds that the three-year statute had run before February 24, 2009, because Brown had suffered her damages and discovered the facts constituting the fraud by January 2006; and (5) Brown opposed the statute of limitations argument by contending the statute did not begin to run until July 21, 2006, when she accused the alleged con artists of a scam. Brown did not argue in her opposition that her addition of Foigelman and Loanlenders should relate back to October 2008 for statute of limitations purposes, and the court deemed any such argument to be waived.

A cause of action for fraud “is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud” (Code Civ. Proc., § 338, subd. (d).) “The courts interpret discovery in the context [of fraud] to mean not when the plaintiff became aware of the specific wrong alleged, but when the plaintiff suspected or should have suspected that an injury was caused by wrongdoing. The statute of limitations begins to run when the plaintiff has information which would put a reasonable person on inquiry. A plaintiff need not be aware of the specific facts necessary to establish a claim since they can be developed in pretrial discovery. Wrong and wrongdoing in this context are understood in their lay and not legal senses.” (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1374.) The court concluded that Brown failed to sue Loanlenders and Foigelman within three years of her discovery of the facts

constituting the fraud (i.e., her payment of nearly \$500,000 through various means, including but not limited to the closing of the \$880,000 loan, to the con artists in return for nothing of value).

We agree. Brown suffered her entire injury and had information that put her on notice that she had been defrauded by the end of January 2006. The evidence suggests Brown subjectively wavered between suspicion and credulity from November 2005 through July 2006. But the objective facts at her disposal in January 2006 were sufficient as a matter of law to begin the running of the statute of limitations.

In her appellate briefs, Brown attempts to argue for the first time that her insertion of Loanlenders and Foigelman as defendants in February 2009 should relate back to Brown's filing of the initial complaint in October 2008 and thereby satisfy the statute of limitations. "The general rule is that an amended complaint that adds a new defendant does not relate back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date the original complaint is filed." (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 176.) The initial complaint was not amended by way of adding Foigelman and Loanlenders as doe defendants.¹³ Instead, the first amended complaint added a long list of additional

¹³ "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint . . . and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly." (Code of Civ. Proc., § 474.) "A plaintiff ignorant of the identity of a party responsible for damages may name that person in a fictitious capacity, a Doe defendant, and that time limit prescribed by the applicable statute of limitations is extended as to the unknown defendant. A plaintiff has three years under section [583.210] after the commencement of the action to discover the identity of the unknown defendant and effect service of the complaint. [Citation.] When the complaint is amended to substitute the true name of the defendant for the fictional name, the defendant is regarded as a party from the commencement of the suit, provided the complaint has not been amended to seek relief on a different theory based on a general set of facts other than those set out in the original complaint." (*Munoz v. Purdy* (1979) 91 Cal.App.3d 942, 946, fn. omitted.)

defendants based on a broadened view of the case and new allegations by new counsel for Brown.

And regardless of the merits of her new relation back theory, Brown has forfeited it by her failure to assert the same argument in her opposition to summary judgment. (See *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-30.) Brown tries to characterize her relation-back theory as a legal issue arising from undisputed facts that may be raised for the first time on appeal. But as pointed out by Loanlenders and Foigelman, the factual record could have developed differently had the relation back question been raised below. The Brown testimony included with Loanlenders' and Foigelman's request for judicial notice is addressed to the question of whether Brown was on notice of the identity of Loanlenders and Foigelman at the time the initial complaint was filed. To the extent we have discretion to consider Brown's relation back argument, we decline to do so. (*Hussey-Head v. World Savings & Loan Assn.* (2003) 111 Cal.App.4th 773, 783, fn. 7.) The grant of summary judgment to Loanlenders and Foigelman is affirmed.

Denial of Brown's Motion for Leave to Amend Operative Complaint

Finally, Brown contends the court abused its discretion by rejecting her motion for leave to amend the fifth amended complaint. As previously noted, this case commenced with the filing of the initial complaint in October 2008. After several rounds of demurrers, the operative fifth amended complaint was filed in August 2010.

In September 2012, Brown moved for leave to file a sixth amended complaint. The proposed pleading included new factual allegations concerning the alleged failure of defendants to provide required forms regarding Brown's right to cancel the HLM loan. Brown contended her proposed amendment was based on newly discovered facts.

Defendants opposed this motion on several grounds: (1) the four year delay in adding these allegations; (2) an imminent deadline to file a motion for summary judgment; (3) the lack of an opportunity to conduct additional discovery before the summary judgment deadline; (4) the lack of evidence suggesting that anything new in discovery had actually led to Brown’s amended allegations; and (5) the lack of merit to Brown’s new allegations. As to the last factor, it was pointed out that Brown produced copies of the alleged “missing” notices of her right to cancel from her own documents. It was further noted that this was essentially a claim made under the Truth in Lending Act (15 U.S.C. § 1601 et seq.; TILA) regulations and was barred by the statute of limitations and Brown’s inability to tender the proceeds of the loan.

The court, troubled by the “parallel universe that is being introduced and the delay that it’s going to create” through the proposed introduction of a TILA claim, found that the amendment was tardy and prejudicial. “[E]ven if a good amendment is proposed in proper form, unwarranted delay in presenting it may — of itself — be a valid reason for denial.” (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) “Leave to amend is properly denied when the facts are undisputed and as a substantive matter no liability exists under the plaintiff’s new theory.” (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746.)

Brown’s briefs fail to engage with the court’s stated concerns or the defendants’ pointed questions about the propriety of allowing amendment under the circumstances of this case. Instead, Brown relies solely on general principles of liberality in allowing amendment. Our review of the record discloses no abuse of discretion by the court.

DISPOSITION

The judgment is affirmed. We deny the parties' requests for judicial notice. Foigelman, Loanlenders, and Mellon shall recover costs incurred on appeal.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.