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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES DeAGUILERA,

Plaintiff and Appellant,

v.

PHH HOME LOANS, LLC, et al.,

Defendants and Respondents.

G050089

(Super. Ct. No. CIVDS 1000202)

O P I N I O N

Appeal from judgments of the Superior Court of San Bernardino County,
John M. Pacheco, Judge. Affirmed.

James DeAguilera, in pro. per.; Law Office of James DeAguilera and James
DeAguilera for Plaintiff and Appellant.

Severson & Werson, Kerry W. Franich, Jan T. Chilton and M. Elizabeth
Holt for Defendants and Respondents PHH Homes Loans, LLC and Scott Bradley.

Klinedinst, G. Dale Britton, Neil R. Gunny; and Thomas N. Thrasher, Jr.,
for Defendant and Respondent Carole Colone.

* * *

Plaintiff and appellant James DeAguilera appeals from the judgments entered after the trial court sustained the demurrers of defendants and respondents PHH Homes Loans, LLC (PHH), Scott Bradley, and Carole Colone without leave to amend. DeAguilera does not challenge the trial court's decision to sustain the demurrers, but rather contends the court erred in denying his request for leave to amend to allege a new cause of action for breach of fiduciary duty against Bradley and Colone. As explained below, we affirm because DeAguilera failed to meet his burden to show how the ultimate facts he proposed to allege stated a timely breach of fiduciary duty claim against either Bradley or Colone.¹

I

FACTS AND PROCEDURAL HISTORY²

DeAguilera is a real estate attorney who lives and works in Redlands, California. In February or March 2006, he visited a friend in Santa Ynez, California near Santa Barbara. His friend introduced him to Colone, a realtor, who showed DeAguilera and his friend one of her new listings while the group took a scenic drive through the Santa Ynez Valley. After seeing the property, DeAguilera told Colone he liked it, "but [he] was not in any position (financial or otherwise) to purchase."

Over the next few weeks, Colone phoned DeAguilera several times about the property, but he told her he did not have the funds to pay the \$2 million purchase price, and he was at least two years away from selling his Redlands home and possibly

¹ DeAguilera does not seek leave to allege any claim against PHH and does not otherwise assert any error in the trial court's ruling concerning PHH's demurrer. Accordingly, we affirm the judgment in PHH's favor without any further discussion.

² Because this appeal follows the sustaining of a demurrer, we summarize the underlying facts as alleged in the complaint. (*Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 456 (*Rosen*).)

relocating to Santa Ynez. Colone told DeAguilera she knew a loan broker, Bradley, who could arrange financing for him, and she could lease the property for DeAguilera until he was ready to relocate.

Bradley soon contacted DeAguilera and offered to arrange financing for the Santa Ynez property. After reviewing DeAguilera's financial information, Bradley told DeAguilera he could refinance his Redlands home to pull out approximately \$450,000 in equity, use that money as a downpayment to purchase the Santa Ynez property, take out a new loan for the balance of the purchase price, and then pay down that balance when he sold his Redlands home. Bradley explained at least a 20 percent downpayment was required because DeAguilera was self-employed and therefore required a "stated income loan." After DeAguilera agreed to the transaction, Bradley arranged for an appraisal on both properties and prepared the necessary paperwork for the two loans. Bradley acted as the loan broker for Countrywide Bank, N.A. (Countrywide) on both the refinance and purchase money loans. Although DeAguilera's pleadings do not provide a precise date, the transactions closed in 2006.

In 2007 and 2008, DeAguilera spent approximately \$200,000 to remodel the Santa Ynez property and initiated negotiations with a Santa Barbara law firm about merging practices to facilitate his future relocation. In late 2008, however, the real estate market began to decline significantly and the eventual crash prevented DeAguilera from selling his Redlands home and relocating to Santa Ynez. In July 2010, DeAguilera cut his losses and sold the Santa Ynez property for \$1.4 million despite paying more than \$2 million to purchase it and approximately \$200,000 to remodel it. After the sale, the \$450,000 refinance loan remained as an encumbrance on DeAguilera's Redlands home.

In January 2010, DeAguilera filed this action against Equity Title Company, First Capital Corporation, and Countrywide alleging claims for breach of contract and rescission. Two weeks later, DeAguilera voluntarily filed a first amended complaint alleging the same claims and naming the same defendants. After Bank of

America, as Countrywide's successor in interest, successfully demurred to both the first amended complaint and a later second amended complaint, DeAguilera filed the operative third amended complaint in February 2011.³

The third amended complaint alleges a single cause of action for "Promissory Fraud/Breach of Contract" and names the same three defendants. The complaint alleges Countrywide (1) breached its duty to DeAguilera by making the refinance loan based on an inflated appraisal and without following lending guidelines; (2) misrepresented that a \$450,000 downpayment was required to obtain the "stated income" loan and purchase the Santa Ynez property; and (3) exposed DeAguilera to substantial risks through its "irresponsible 'subprime' loans to unqualified buyers." DeAguilera also alleged he did not become aware of Countrywide's irresponsible lending practices until March 2009.

Although the third amended complaint alleged the foregoing conduct by Bradley and Colone, it did not name them as defendants. Indeed, none of DeAguilera's four complaints named Bradley or Colone as defendants, and he did not join them as parties until he named them as Doe defendants in October 2011.

Bradley demurred to the third amended complaint, arguing DeAguilera failed to allege the essential elements of a fraud claim and any claim for fraud was time-barred. Colone also demurred, arguing DeAguilera failed to allege the essential elements of a fraud claim or the existence of any contract between Colone and DeAguilera. DeAguilera did not oppose either demurrer on the merits, but rather filed a short "opposition" in which he merely sought leave to amend to allege a breach of fiduciary duty claim against Bradley and Colone. Bradley and Colone filed reply briefs

³ Bank of America was dismissed after its demurrer to the third amended complaint was sustained without leave to amend. DeAguilera does not challenge that ruling and Bank of America is not a party to this appeal. The parties provide no explanation how the claims against Equity Title Company and First Capital Corporation were resolved, but those defendants also are not parties to this appeal.

urging the court to deny leave to amend because the statute of limitations barred DeAguilera's proposed breach of fiduciary duty claim.

In May 2012, the trial court sustained both demurrers and denied DeAguilera's request for leave to amend because the third amended complaint showed the proposed breach of fiduciary duty claims were time-barred and DeAguilera failed to propose any facts to support a delayed discovery theory abating the limitations period. The trial court entered judgment against DeAguilera, and he timely appealed.

II

DISCUSSION

A. *DeAguilera Fails to Show the Trial Court Abused Its Discretion in Denying His Request for Leave to Amend*

DeAguilera's sole argument on appeal is that the trial court erred in denying his request for leave to allege a new cause of action for breach of fiduciary duty against Bradley and Colone. He does not challenge the trial court's decision to sustain the demurrers to the third amended complaint. We conclude the trial court did not abuse its discretion because DeAguilera fails to show how the new allegations he proposes would state a cause of action against Bradley and Colone.

“When a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect” [Citation.] The abuse of discretion standard governs our review of that question. [Citation.] “The plaintiff bears the burden of proving there is a reasonable possibility of amendment.” [Citation.] To satisfy that burden, the 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, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] . . . [¶] 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. [Citations.]’ [Citation.]” (*Rosen, supra*, 193 Cal.App.4th at p. 458; *Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*).)

Here, DeAguilera’s trial court opposition and his opening brief on appeal identify the facts he proposes to allege in an amended complaint. Specifically, he seeks to allege Bradley acted as the “loan consultant/loan broker” on the purchase and refinance transaction, and therefore owed DeAguilera fiduciary duties. He proposes to allege Bradley breached those duties because he “made material misrepresentations and/or omissions of material [fact]” and “arranged for an inflated appraisal of the value of . . . DeAguilera’s Redlands home in order to accomplish the refinancing and to acquire the \$450,000 down payment for the purchase of the Santa Ynez property.” Finally, DeAguilera explains “Bradley mislead [*sic*] . . . DeAguilera and did not provide . . . DeAguilera with advi[c]e regarding the problems and risks associated with the refinanced loan.”

As to Colone, DeAguilera seeks to allege she acted as a real estate agent for both him and the seller of the Santa Ynez property, and therefore owed him fiduciary duties. He also proposed to allege Colone breached those duties by acting in her own best interest to obtain a large commission because she arranged for the financing through Bradley, misrepresented the Santa Ynez property’s value and the stability of the real estate market in the Santa Ynez Valley, and failed to disclose “the Long Valley area of

Santa Ynez where the subject property was located had a long history of being a bad real estate market and a bad investment and that homes in this area required a substantial amount of time to resell.” Finally, DeAguilera explains he seeks to allege Colone “urged [him] to quickly close the escrow because movie stars were looking to purchase the Santa Ynez property, [which] DeAguilera believes [is] untrue.”

DeAguilera, however, fails to explain how these vague and conclusory facts state a cause of action for breach of fiduciary duty against either Bradley or Colone. His trial court opposition cited no authority whatsoever, and his opening brief in this court merely cites general case authority stating the standard of review on a trial court’s decision sustaining a demurrer without leave to amend. DeAguilera fails to identify the elements of a breach of fiduciary duty claim and does not cite any authority addressing that claim. For example, he provides no explanation or authority to show a loan broker breaches his fiduciary duties by failing to advise his real estate attorney client on the problems and risks associated with a refinancing loan. Similarly, he provides no explanation or authority to show a real estate agent breaches her fiduciary duties by failing to tell her real estate attorney client the area where the property is located has a history of underperforming in the real estate market. Asserting these alleged breaches is not sufficient without also showing Bradley and Colone actually owed the underlying duties.

Moreover, DeAguilera fails to explain how his proposed claims are timely after the trial court relied on the statute of limitations to deny him leave to amend. A breach of fiduciary duty claim based on actual or constructive fraud is subject to a three-year limitations period under Code of Civil Procedure section 338, subdivision (d), and a breach of fiduciary duty claim based on a real estate agent’s or broker’s professional negligence is subject to a two-year limitations period under Code of Civil Procedure section 339, subdivision (1). (*Thomson v. Canyon* (2011) 198 Cal.App.4th

594, 606-607; *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1158-1159.)

The breach of fiduciary duty claims DeAguilera seeks to allege are based on fraud and professional negligence because they allege Bradley and Colone misrepresented information about the property and transaction, and failed to properly advise him. Accordingly, DeAguilera was required to assert these causes of action not later than three years after the transaction closed, and possibly earlier. His allegations, however, show he did not file this action until more than three years after the transaction closed, and did not seek to allege any cause of action against Bradley and Colone until approximately five years after the transaction closed. Bradley and Colone both raise the statute of limitations in their briefs as a ground for affirming the trial court's decision and DeAguilera did not file a reply brief to respond to that argument.⁴

The burden was on DeAguilera to identify the specific facts that would state a cause of action against Bradley and Colone, and also to cite legal authority and explain how those facts would state a cause of action. DeAguilera failed to do so, and therefore failed to show the trial court abused its discretion in denying his request for leave to amend. (*Rosen, supra*, 193 Cal.App.4th at p. 464 [no abuse of discretion in denying leave to amend when appellant failed to explain how he could allege cause of action under governing authority]; *Rakestraw, supra*, 81 Cal.App.4th at p. 53 [no abuse of discretion in denying leaving to amend when appellants failed to "provide[] adequate legal authority or factual allegations . . . to satisfy their burden of showing that there is a reasonable possibility that they can amend the legal effect of their complaint"].)

⁴ The third amended complaint alleges DeAguilera did not "bec[o]me aware that Countrywide at the time it made the mortgage loan for the Santa Ynez Property was engaged in irresponsible lending practices . . ." DeAguilera, however, provides no explanation or authority to show how this allegation delayed the accrual of his alleged breach of fiduciary duty claim against Bradley or Colone.

III
DISPOSITION

The judgments are affirmed. PHH, Bradley, and Colone shall recover their costs on appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.