

**DWAYNE PATRICK DUMALANTA et al., Plaintiffs and Appellants,
v. ONEWEST BANK, N.A., Defendant and Respondent.**

Court of Appeals of California, Sixth District.

Filed November 21, 2017.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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GROVER, J.

Plaintiffs appeal from a judgment of dismissal entered after the trial court sustained a demurrer to their first amended complaint. They argue that sustaining the demurrer without leave to amend was an abuse of discretion, and that they have stated causes of action under the Fair Debt Collection Practices Act and Business and Professions Code section 17200. For the reasons stated here, we will affirm the judgment.

I. FACTUAL BACKGROUND

In 2006, plaintiffs obtained a \$640,000 adjustable rate mortgage loan from First Federal Bank of California, secured by a deed of trust to residential property in San Jose. First Federal Bank of California failed as a banking institution in 2009. It was acquired by the Federal Deposit Insurance Corporation, and in 2010 the deed of trust was assigned to defendant OneWest Bank, N.A. (formerly known as OneWest Bank, FSB). A notice of default was recorded against the property in 2013. A notice of trustee sale was recorded in 2014, and the property was purchased by defendant at a trustee sale in 2015.

II. TRIAL COURT PROCEEDINGS

Plaintiffs filed a complaint against OneWest Bank, N.A.¹ in June 2015, seeking to set aside the foreclosure sale and cancel the 2015 deed transferring the property to defendant. That complaint was premised on state law disclosure violations related to the loan's adjustable interest rate. The demurrer to that complaint was sustained with leave to amend. Plaintiff filed a first amended complaint in September 2015. The first cause of action alleged fraud based on violations of the federal Truth in Lending Act, 15 U.S.C. § 1601, et seq. The complaint also alleged violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(3) (second cause of action), wrongful foreclosure (third cause of action), and violation of Business and Professions Code section 17200 (sixth cause of action). Plaintiff's fourth cause of action to "vacate and set aside foreclosure sale" alleged a bad faith trustee sale, and the fifth cause of action for "cancellation of trustee's deed upon sale" alleged that defendant held no valid interest in the property.

The trial court sustained defendant's demurrer to the first amended complaint without leave to amend. The court ruled that the one-year statute of limitations had run on any allegation premised on a violation of the Truth in Lending Act; the cause of action for fraud failed for lack of specificity; the Fair Debt Collection Practices Act cause of action failed because foreclosure pursuant to a deed of trust does not constitute debt collection under that act; the causes of action related to the foreclosure sale failed because plaintiffs did not allege tender of the amount owed on the loan; and the Business and Professions Code cause of action failed because there were no predicate acts upon which to base that claim. The first amended complaint was dismissed with prejudice.

III. DISCUSSION

"We review de novo the trial court's order sustaining a demurrer. (*Moore v. Regents of University of California* (1990) [51 Cal.3d 120](#), 125.) We assume the truth of all facts properly pleaded, and we accept as true all facts that may be implied or reasonably inferred from facts expressly alleged, unless they are contradicted by judicially noticed facts." (*Cansino v. Bank of America*(2014) [224 Cal.App.4th 1462](#), 1468.) We do not assume the truth of

contentions, deductions or conclusions of fact or law, and we will affirm an order sustaining a demurrer on any proper grounds. (*Ibid.*)

"When the trial court sustains a demurrer without leave to amend, we review the determination that no amendment could cure the defect in the complaint for an abuse of discretion." (*Cansino v. Bank of America, supra*, 224 Cal.App.4th at p. 1468.) "The trial court abuses its discretion if there is a reasonable possibility that the plaintiff could cure the defect by amendment. [Citation.] The plaintiff has the burden of proving that amendment would cure the legal defect, and may meet this burden on appeal. [Citations.]" (*Ibid.*)

A. FIRST CAUSE OF ACTION (TRUTH IN LENDING ACT)

Plaintiffs argue that the trial court abused its discretion and displayed prejudice against "the entitlement to some form of relief" by ignoring the application of equitable tolling to the applicable one-year statute of limitations, which they argue is a factual question that may not be resolved on demurrer. In a related argument, they assert that the trial court erred by allowing defendant to present evidence in support of the demurrer.

Plaintiffs are incorrect in their view that they are entitled to some form of relief from the trial court or this court without stating a cause of action or showing how they can amend their complaint to state one. Plaintiffs have the burden of proving that a defect in pleading can be cured by amendment, and they have failed to meet that burden in the trial court and on appeal. Plaintiffs have not alleged facts that, if true, would entitle them to equitable tolling of the limitations period. Nor have they alleged facts to satisfy the specificity requirement of a fraud cause of action.

Plaintiffs are also incorrect in their view that the trial court acted improperly by considering evidence presented by defendant in support of the demurrer. In reviewing the sufficiency of a complaint against a demurrer, courts may consider matters subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a); *Blank v. Kirwan* (1985) [39 Cal.3d 311](#), 318.) Defendant requested judicial notice of documents recorded in Santa Clara County related to the

subject property. Those documents—most of which were referenced in the first amended complaint and attached to plaintiffs' initial complaint—were properly noticed by the trial court. Plaintiff fails to identify any contested facts averred by defendant on demurrer or relied on by the trial court in sustaining the demurrer, and our review of the record shows none. We therefore find no abuse of discretion in denying leave to amend the first cause of action.

B. SECOND CAUSE OF ACTION (FAIR DEBT COLLECTION PRACTICES ACT)

Plaintiffs argue that the trial court erred by failing to classifying defendant as a debt collector. **To establish a claim under the Fair Debt Collection Practices Act (the Act), plaintiffs must show that defendant "was a `debt collector' as defined by the Act, that [defendant's] challenged conduct constituted `debt collection,' and that the debt collection actions violated a provision of the Act."** (*Pfeifer v. Countrywide Home Loans, Inc.* (2012) [211 Cal.App.4th 1250](#), 1261-1262.) **The court in *Pfeifer* held that FORECLOSURE ON A PROPERTY PURSUANT TO A DEED OF TRUST IS NOT DEBT COLLECTION WITHIN THE MEANING OF THE ACT (*id.* at pp. 1263-1264), and the Ninth Circuit reached the same conclusion in *Vien-Phuong Thi Ho v. Recontrust Co., NA* (9th Cir. 2017) [858 F.3d 568](#) (*Vien-Phuong Thi Ho*). The Ninth Circuit explained that "actions taken to facilitate a non-judicial foreclosure, such as sending the notice of default and notice of sale, are not attempts to collect `debt' as that term is defined by the [the Act]," that the "object of a non-judicial foreclosure is to retake and resell the security, not to collect money from the borrower," and that "non-judicial foreclosure `does not in and of itself collect a debt, but rather calls for the vesting and divesting of title to real property according to the parties' prior agreement.'" (*Id.* at pp. 571-572.) We agree with the reasoning set forth above, and find no error in the trial court's conclusion that plaintiff failed to state a claim for relief under the Act, or in the denial of leave to amend the second cause of action.**

Plaintiffs rely on an unpublished decision from the United States District Court for the Western District of Washington, *Williams v. Wells Fargo Bank, N.A.* (W.D.Wa. Jan. 10, 2012, No. C10-5880BHS) 2012 U.S. Dist. LEXIS 2871, to argue that defendant is a debt collector under the Act. In declining to adopt a *per se* holding that foreclosing on property is not debt collection under the Act, the *Williams* court considered nonjudicial foreclosure under a deed of trust to be no different than traditional debt collection. (*Id.* at pp. 16-17.) We are not aware of other courts following *Williams*, and the decision is not binding on us. We reject its view that the holder of a mortgage loan engages in debt collection by initiating a nonjudicial foreclosure for the reasons stated in *Vien-Phuong Thi Ho*.

Plaintiff has failed to state a claim under the Act for the additional reason that defendant does not come within the Act's definition of "debt collector." A "debt collector" under the Act is a person who uses interstate commerce to collect debts *owed to another person*, or a creditor who uses the name of a third person in the process of collecting its own debts. (15 U.S.C. § 1692a(6), italics added.) **A lender who forecloses on a deed of trust is not collecting debt owed to another**, and plaintiffs do not claim that defendant was using the name of a third party to collect money owed.

C. THIRD, FOURTH, AND FIFTH CAUSES OF ACTION (WRONGFUL FORECLOSURE)

Aside from arguing that the trial court abused its discretion by not allowing leave to amend generally, plaintiffs do not address the trial court's ruling sustaining the demurrer to the third, fourth, and fifth causes of action related to the foreclosure. As to those causes of action, the trial court ruled that plaintiffs had failed to establish prejudice as they did not allege that they had tendered the debt, an element of a claim for wrongful foreclosure. Plaintiffs did not argue in the trial court, nor do they argue here, that they had tendered the debt, and nothing in the record demonstrates an intent or ability to do so. Thus, they have failed to meet their burden of establishing that the trial court abused its discretion by denying leave to amend the third, fourth, and fifth causes of action.

D. THE SIXTH CAUSE OF ACTION (BUSINESS AND PROFESSIONS CODE SECTION 17200—UNFAIR COMPETITION)

Plaintiffs argue that the trial court erred by "set[ting] forth requirements that are not contained within the [unfair competition law]." Their unfair competition cause of action is premised on alleged violations of the Truth in Lending Act and the Fair Debt Collection Practices Act. Given that plaintiffs have failed to state a claim under either statute, their unfair competition law claim necessarily fails. (*Krantz v. BT Visual Images* (2001) [89 Cal.App.4th 164](#), 178.) Plaintiffs have not argued to the trial court or on appeal that they can allege facts to otherwise state a cause of action against defendant for an unlawful, unfair, or fraudulent business practice. We find no abuse of discretion in denying leave to amend this cause of action.

IV. DISPOSITION

The judgment is affirmed.

Premo, Acting P. J. and Bamattre-Manoukian, J., concurs.

FootNotes

1. The complaint erroneously named IndyMac Foreclosure Services, a division of OneWest Bank, as a defendant. OneWest Bank is now known as CIT Bank, N.A. We refer to defendant in the singular.