

KIANSI BONI, Plaintiff and Appellant,
v.
OCWEN LOAN SERVICING, LLC, Defendant and Respondent.

[2d Civil No. B280766.](#)

Court of Appeals of California, Second District, Division Six.

Filed February 22, 2018.

Appeal from the Superior Court County of Ventura, Super. Ct. No. 56-2016-00478498-CU-FR-VTA, Mark Borrell, Judge.

Kiansi Boni, in propria persona, for Plaintiff and Appellant.

McGlinchey Stafford and Kevin S. Kim, Brian A. Paino, for Defendant and Respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

YEGAN, Acting P.J.

Kiansi Boni appeals from the judgment entered after the trial court sustained, without leave to amend, defendant's Ocwen Loan Servicing, LLC (Ocwen), demurrer to appellant's First Amended Complaint for breach of a loan modification agreement. We affirm.

Facts and Procedural History

In 2007 appellant took out a \$712,500 loan from Quick Loan Funding, secured by a deed of trust on appellant's house at 951 Coe Street, Camarillo. Ocwen serviced the loan for Quick Loan Funding and its assigns.

Appellant sued for quiet title after the property was sold at a trustee's sale. The action was dismissed in 2012 pursuant to a settlement agreement in

which the foreclosure was rescinded and appellant signed a Loan Modification Agreement reducing the loan balance to \$523,000.

In 2015, appellant defaulted on the loan payments and a notice of default was recorded. Appellant sued for breach of the Loan Modification Agreement on February 23, 2016, alleging that loan balance was supposed to be reduced to \$210,000. Ocwen filed a motion for judgment on the pleadings that was opposed by appellant. Appellant's opposition papers included a copy of the Loan Modification Agreement reflecting that that loan balance was \$523,000. The trial court granted judgment on the pleadings with leave to amend.

On October 19, 2016, appellant filed a First Amended Complaint (FAC) for breach of contract, fraud, and negligent misrepresentation. The FAC alleged that, pursuant to the Loan Modification Agreement, Ocwen agreed to reduce the loan balance to \$223,000 with monthly payments of \$940.

Ocwen filed a demurrer on the ground that the complaint was time-barred and uncertain. Sustaining the demurrer, the trial court found that the causes of action for breach of contract and fraud were barred by the four and three year statute of limitations respectively. The trial court ruled that the third cause of action for negligent misrepresentation failed to state a cause of action.

Discussion

The function of a demurrer is to test whether, as a matter of law, the facts alleged in the complaint state a cause of action. ([Intengan v. BAC Home Loans Servicing LP \(2013\) 214 Cal.App.4th 1047, 1052.](#)) We review the order sustaining the demurrer de novo, assuming the truth of all facts properly pleaded and judicially noticed material facts, but not contentions, deductions, or conclusions of fact or law. ([Yvanova v. New Century Mortgage Corp. \(2016\) 62 Cal.4th 919, 924.](#))

Statute of Limitations

The trial court correctly found that the breach of contract and fraud causes of action were time-barred. **The four-year statute of limitations for breach of contract commenced to run in November 2011, when appellant made his first loan payment of \$2,761.** (Code Civ. Proc., § 337.) **The statute of limitations for fraud and negligent misrepresentation based on fraud is**

three years (Code Civ. Proc., § 338, subd. (d)) and commenced to run in November 2011 when appellant had information that would put a reasonable person on inquiry.

Appellant argues that the statute of limitations was tolled based on delayed discovery. "The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. . . . In other words, **plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation.**" ([Fox v. Ethicon Endo-Surgery, Inc. \(2005\) 35 Cal.4th 797, 807-808.](#))

The FAC alleges that the Loan Modification Agreement reduced the loan balance to \$223,000 and required appellant to make monthly loan payments of \$940. Ocwen, however, reduced the loan balance to \$523,000 and required that appellant pay \$2,761 a month. Appellant admits that he paid \$2,761 a month from November 2011 through June 2013 and was not credited for overpayments. The FAC states that appellant "would not have taken the action he took in making monthly payments of \$2,761, had he known the true facts."

Given the discrepancy in the loan balance (\$523,000 versus \$223,000) and the monthly mortgage payments (\$2,761 versus \$940), appellant knew or had reason to know of the alleged fraud and breach of contract as early as November 2011. Appellant did not file suit until February 23, 2016, well after the statute of limitations had run.

Negligent Misrepresentation

To state a claim for negligent misrepresentation, plaintiff must plead: ""(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.""

[Citation.]" ([Wells Fargo Bank, N.A. v. FSI, Financial Solutions, Inc. \(2011\) 196 Cal.App.4th 1559, 1573](#), italics added.)

The FAC alleges that "Ocwen orally and in writing represented to plaintiff that they *would* reduce the balance of his loan to \$223,000.00." (Italics added.) That is a representation of future events. **""IT IS HORNBOOK LAW THAT AN ACTIONABLE MISREPRESENTATION MUST BE**

MADE ABOUT PAST OR EXISTING FACTS; STATEMENTS REGARDING FUTURE EVENTS ARE MERELY DEEMED OPINIONS. [Citation.] "[A]bsent special circumstances . . . a loan transaction is at arm's length and there is no fiduciary relationship between the borrower and lender. [Citations.] [Citation.] . . ." ([Graham v. Bank of America, N.A. \(2014\) 226 Cal.App.4th 594, 607.](#))

Negligent misrepresentation, like fraud, must be plead with particularity. ([Small v. Fritz Companies, Inc. \(2003\) 30 Cal.4th 167, 184.](#)) "The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." ([West v. JPMorgan Chase Bank, N.A. \(2013\) 214 Cal.App.4th 780, 793,](#) citation omitted.)

None of those facts are set forth in the FAC. Appellant alleges that "Ocwen's representation was false" and Ocwen "knew or should have known that [it] did not, in fact, follow through and reduce the principal balance of the loan to \$223,000.00." The trial court correctly found that **a defendant cannot fraudulently intend to breach a contract and, at the same time, be negligently unaware of that intention.** Appellant makes no showing that the FAC can be amended to state a cause of action for negligent misrepresentation. ([Goodman v. Kennedy \(1976\) 18 Cal.3d 335, 349.](#))

Disposition

The judgment (order sustaining demurrer without leave to amend) is affirmed. Ocwen is awarded costs on appeal.

PERREN, J. and TANGEMAN, J., concurs.