GILBERT E. MAINES, Plaintiff and Appellant,
v.
AURORA COMMERCIAL CORP. et al., Defendants and Respondents.

No. C080838.

Court of Appeals of California, Third District, El Dorado.

Filed December 14, 2018.

Appeal from the Superior Court No. PC20130588.

NOT TO BE PUBLISHED

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HULL, Acting P. J.

Plaintiff Gilbert E. Maines challenged the nonjudicial foreclosure of his home. He alleged the foreclosure was wrongful and fraudulent. The trial court dismissed the action after sustaining the defendants' demurrer without leave to amend. It found plaintiff had no standing to bring the action because his claims belonged to his bankruptcy estate. The court also ruled that plaintiff did not and could not plead he tendered performance or plead fraud with specificity.

Plaintiff challenges the trial court's ruling, and the defendants contend a judgment in adversary proceedings defendants filed in his bankruptcy case bars this action under res judicata.

We conclude res judicata does not apply and plaintiff has standing to bring this action. However, we affirm the judgment of dismissal in all other respects.

FACTS AND PROCEEDINGS

"For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions,

or conclusions of fact or law. We may also consider matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)" (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. omitted.)

In 2006, plaintiff executed a note for a loan in the amount of $469,000. The loan was secured by a deed of trust recorded against his home. The lender was named in the deed of trust as "Sacramento Valley Mtg. Corp., dba Greater Valley Mortgage, a California Corporation."

According to the records of the Secretary of State, Sacramento Valley Mortgage Corp. was dissolved in 1987 and has not been in existence since. Greater Valley Mortgage was not authorized to do business in California any time thereafter.

Plaintiff fell into arrears, and in 2011, defendant Aurora Loan Services LLC (Aurora), then the trust deed's beneficiary, filed a notice of default. Shortly thereafter, plaintiff deeded a part of his interest in the property to his wife, who then filed a voluntary Chapter 7 bankruptcy petition. She was discharged from the bankruptcy action in May 2012.

The following month, plaintiff filed a voluntary Chapter 7 bankruptcy petition. Plaintiff was discharged in September 2012, but the bankruptcy case remained open. Shortly thereafter, Aurora assigned its beneficial interest in the deed to defendant Nationstar Mortgage LLC (Nationstar).

In December 2012, plaintiff filed an adversary proceeding in the bankruptcy action against Aurora, Nationstar, defendant Aurora Commercial Corp. (ACC), and others. Plaintiff filed a second amended complaint in that proceeding that raised substantially the same issues he raises in this action. The bankruptcy court dismissed the proceeding in August 2013 without leave to amend. It found plaintiff lacked standing to pursue his claims because they were property of his bankruptcy estate. Plaintiff did not appeal.

After the adversary proceeding was dismissed, plaintiff amended his bankruptcy Schedule B to list for the first time his claims against Aurora, Nationstar, and ACC as assets of his estate. The bankruptcy trustee took no action to administer or liquidate the claims, and the bankruptcy court closed plaintiff's case on August 30, 2013.

After the bankruptcy case closed, defendant Quality Loan Services, Inc. (not a party to this appeal), as the trustee on the deed of trust, noticed another trustee's sale. The property was sold on November 27, 2013, to a third party.

Plaintiff filed this action, and the trial court sustained in part and overruled in part defendants' demurer with leave to amend. Plaintiff then filed his first amended complaint, which is the pleading before us. He alleged four causes of action: wrongful foreclosure, cancellation of instruments, fraud and fraudulent concealment, and violation of the federal Fair Debt Collection Practices Act (15 U.S.C. § 1694 et seq.).

The trial court sustained defendants' demurrer without leave to amend and dismissed the action. The trial court determined plaintiff (1) lacked standing to bring the action because the claims belonged to the bankruptcy estate under the control of the bankruptcy trustee; (2) he could not bring his causes of action for wrongful foreclosure and cancellation of instruments because he failed to allege tendering performance before he filed the action; (3) he failed to plead facts showing wrongful foreclosure or entitling him to cancel instruments; (4) he failed to specifically plead detrimental reliance in his claims for fraud and fraudulent concealment; and (5) he could not state a claim under the Fair Debt Collection Practices Act.

On appeal, plaintiff challenges only three of the trial courts' rulings. He contends the court erred by holding (1) he lacked standing; (2) he was required to plead tender; and (3) he failed to state claims for fraud and fraudulent concealment. By limiting his appeal to these arguments, plaintiff forfeits all other arguments he raised at the trial court. (*Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1033.)

DISCUSSION

I

Res Judicata

Before addressing plaintiff's arguments, we review an argument the defendants raise in support of the trial court's order which, if accepted, would be dispositive. Defendants contend the trial court correctly sustained the demurrer without leave to amend because the bankruptcy court's involuntary dismissal of plaintiff's adversary proceeding without leave to amend bars this action under the doctrine of res judicata. Plaintiff's

adversary proceeding alleged the same causes of action alleged here against the same parties. Defendants contend the bankruptcy court's dismissal of the adversary proceeding with prejudice bars plaintiff from bringing the claims here. We conclude res judicata does not apply because the bankruptcy court's dismissal was based on a lack of subject matter jurisdiction and was not an adjudication on the merits.

"Generally, **`"[r]es judicata" describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, "precludes relitigation of issues argued and decided in prior proceedings."** [Citation].' (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896, fn. omitted.)" (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 226.)

The federal law of res judicata determines the preclusive effect of a federal court judgment on a state court action. (*Butcher v. Truck Insurance Exchange* (2000) 77 Cal.App.4th 1442, 1452-1453.) **Under federal law, "[t]he elements necessary to establish res judicata are: `(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties.'** [Citations.]" (*Headwaters Inc. v. U.S. Forest Service* (9th Cir. 2005) 399 F.3d 1047, 1052.)

Generally**, an involuntary dismissal in federal court operates as an adjudication on the merits and bars further litigation on the pleaded claim.** (Fed. Rules Civ. Proc., rule 41(b);*Cannon v. Loyola Univ. of Chicago* (7th Cir. 1986) 784 F.2d 777, 780 [**dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is an adjudication on the merits**].) **However, such a dismissal will not bar further litigation if the order states otherwise or is based on a lack of jurisdiction, improper venue, or failure to join a party.** (Fed. Rules Civ. Proc., rule 41(b).)

The bankruptcy court's order dismissing plaintiff's adversary proceeding was based on a lack of jurisdiction. Although the defendants moved to dismiss the proceeding under rule 12(b)(6) of the Federal Rules of Civil Procedure, the bankruptcy court dismissed it for lack of standing. All of the claims at that time belonged to the estate administered by the bankruptcy trustee, and plaintiff had no standing to prosecute them. In making its ruling, the bankruptcy court stated, "Because standing is jurisdictional, the court

declines to address the substance of the allegations pertaining to each of those claims."

Standing requirements affect subject matter jurisdiction. "The Article III case or controversy requirement limits federal courts' subject matter jurisdiction by requiring, inter alia, that plaintiffs have standing. . . . **Standing addresses whether the plaintiff is the proper party to bring the matter to the court for adjudication.** . . . [S]tanding and ripeness pertain to federal courts' subject matter jurisdiction. . . ." (*Chandler v. State Farm Mutual Auto Insurance Co.* (9th Cir. 2010) 598 F.3d 1115, 1121-1122.)

Because standing to bring an action in federal court pertains to subject matter jurisdiction, an order dismissing **A FEDERAL ACTION FOR LACK OF STANDING IS NOT RES JUDICATA IN A STATE COURT**. "A dismissal for want of jurisdiction bars access to federal courts and is res judicata only of the lack of a federal court's power to act. It is otherwise without prejudice to the plaintiff's claims, and the rejected suitor may reassert his claim in any competent court." (*Daigle v. Opelousas Health Care, Inc.* (5th Cir. 1985) 774 F.2d 1344, 1348, fn. omitted; Fed. Rule Civ. Proc., rule 41(b).)

Because the bankruptcy court dismissed the adversary proceeding for lack of standing, its judgment does not bar this action in state court under res judicata.

II

Standing

We turn now to plaintiff's arguments. The trial court determined plaintiff lacked standing to bring this action because his claims belonged to the bankruptcy trustee. Plaintiff contends the trial court erred in so ruling. We agree. **The claims became plaintiff's property after the bankruptcy case closed without the trustee taking any action on them.**

A. *Background*

When plaintiff filed his bankruptcy petition, he did not list as assets any legal claims against the defendants. The bankruptcy court discharged plaintiff in December 2012. That month, plaintiff filed his adversary proceeding against defendants.

The bankruptcy court dismissed the adversary proceeding on August 6, 2013. As stated above, it did so in part because the claims were part of the estate, and as a result, plaintiff lacked standing to pursue them. The court stated: "In this case the court notes that the plaintiff's claims against the named defendants were not scheduled as property of the estate on his originally filed Schedule B or on any amended copy of Schedule B filed in the parent case, but the plaintiff's failure to schedule the claims does not prevent them from becoming property of the bankruptcy estate. [¶] As property of the plaintiff's bankruptcy estate, the claims are under the control of the chapter 7 trustee. The claims have not been abandoned by the trustee, nor have they revested in the plaintiff as a result of dismissal or closure of the parent bankruptcy case. Only the chapter 7 trustee has prudential standing to prosecute [the claims]."

On the same day the bankruptcy court dismissed the adversary proceeding, plaintiff filed an amended Schedule B listing his claims against defendants as assets. Approximately one month later, the bankruptcy court closed plaintiff's bankruptcy case. The trustee took no steps to administer or liquidate the claims against defendants.

The trial court sustained the demurrer against plaintiff's complaint in this action in part on plaintiff's lack of standing. It relied on the bankruptcy court's finding that because plaintiff had not properly scheduled the claims, the claims belonged to the trustee and were not abandoned. The court also stated it did not have to accept plaintiff's allegation that the claims were abandoned by the bankruptcy trustee, as that point was a legal conclusion. It found no evidence in the record showing the trustee abandoned the claims.

B. ***Analysis***

A CHAPTER 7 DEBTOR MAY NOT PROSECUTE A CAUSE OF ACTION BELONGING TO THE BANKRUPTCY ESTATE UNLESS THE TRUSTEE HAS ABANDONED THE CLAIM. (*Bostanian v. Liberty Savings Bank* (1997) 52 Cal.App.4th 1075, 1080-1081; 11 U.S.C. § 554.) **Property which the debtor disclosed in his schedules but the trustee did not administer is automatically abandoned and becomes the debtor's property when the bankruptcy case is closed unless the court orders otherwise.** (11 U.S.C. § 554(c)**.) However, a claim which the debtor did not schedule and the trustee did not administer is not automatically abandoned when the case is closed, and it remains**

property of the estate under the trustee's control. (11 U.S.C. § 544(d); see *Stein v. United Artists Corp.* (9th Cir. 1982) 691 F.2d 885, 891.)

As the bankruptcy court found, plaintiff's claims against defendants were assets of the estate. Thus, plaintiff has no standing to prosecute them as a matter of law unless they were abandoned to him because he scheduled them timely and the trustee did not administer them prior to closing the case.

Plaintiff scheduled the claims in a timely manner. **A debtor may amend a schedule "as a matter of course at any time before the case is closed" and without court authority.** (Fed. Rules Bankr. Proc., § 1009, 11 U.S.C.; *In re Michael* (9th Cir. 1998) 163 F.3d 526, 529, abrogated on another ground in *In re Gray* (Bankr. 9th Cir. 2014) 523 B.R. 170, 174-175.) Plaintiff amended his schedule approximately one month before the bankruptcy court closed his case.

Defendants do not contend plaintiff amended his schedule in bad faith or caused prejudice to creditors. Rather, they contend plaintiff does not have standing because he amended his schedule after he had been discharged. The date of discharge, however, has no effect on the date by which the debtor may amend his schedules**. A DEBTOR MAY AMEND HIS SCHEDULES EVEN AFTER THE DATE OF DISCHARGE SO LONG AS HE DOES SO BEFORE THE CASE IS CLOSED. (**See *In re Michael, supra*, 163 F.3d at p. 529 [amendment to schedule filed after discharge but before case was closed was permissible].)

For the same reason, the trial court's reliance on the bankruptcy court's minute order of August 6, 2013, to support its ruling was improper. It is true that prior to August 6, plaintiff had not amended his schedule and the case remained open. Thus, the bankruptcy court correctly stated that as of *that* date, the claims against defendants were property of the estate that had not been abandoned by the trustee nor reverted to plaintiff due to plaintiff's discharge or the case's closure. The case had not been closed. However, that status changed when the court subsequently closed the case after plaintiff amended his schedule.

Plaintiff alleges, and the defendants do not dispute, that the bankruptcy court did not administer the claims against defendants prior to the case's closure. Thus, under bankruptcy law, those claims were abandoned by the trustee and became plaintiff's property to prosecute.

III

Failure to Tender

Plaintiff contends the trial court erred when it sustained the demurrer in part because he did not allege tendering performance of the note. He argues he was excused from tendering because he pleaded that the underlying note was void ab initio due to the purported lender's lack of corporate existence. We disagree. **The pleaded facts establish plaintiff was estopped from challenging the lender's corporate status after he received the note's benefits. Even if he was not estopped, plaintiff still was obligated to tender performance because the note was voidable, not void ab initio.**

When a trustor or mortgagor challenges a trustee sale for wrongful foreclosure, he must allege he tendered the amount of the secured indebtedness unless he is excused from doing so. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1184-1185.) He may be excused from tendering when, among other grounds, the underlying debt is void. (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062.) **"[I]f the borrower's action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt."** (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112.)

In both of his complaints, plaintiff did not allege tendering performance. He contends he was not required to allege tender because he was attacking the validity of the loan, claiming it was void ab initio due to the lack of an identifiable party. The purported lenders "did not exist and as such lacked the capacity to conduct business anywhere." He alleged the original lender, Sacramento Valley Mortgage, was dissolved and not in existence at the time of the loan, and its dba entity, Greater Valley Mortgage, never existed as a California corporation.[1]

Plaintiff correctly states a **borrower is not required to allege tender as part of a wrongful foreclosure claim that attacks the validity of the underlying loan.** (*Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 568.) However, his pleaded facts contradict his assertion that the loan was void ab initio.

Although we must accept as true plaintiff's allegation that the lender was a dissolved corporation, that allegation does not end the matter. Because

plaintiff accepted the benefits of the note, he is estopped from challenging the note based on the lender's corporate status. UNDER COMMON LAW, AN ENTITY NOT AUTHORIZED TO FUNCTION AS A CORPORATION MAY BE DEEMED TO BE A CORPORATION BY ESTOPPEL FOR PURPOSES OF ENFORCING AN AGREEMENT. (See 9 Witkin, Summary of Cal. Law (11th ed. 2017) Corporations, § 24, pp. 828-829; 18A **Am.Jur.2d (2018) Corporations, § 203 et seq.**) This court stated and relied upon this rule in *Home Owners' Loan Corp. v. Gordon* (1939) 36 Cal.App.2d 189 (*Gordon*). There, the trial court issued an order of sale to foreclose on real property. On appeal, the appellant borrowers contended the foreclosing lender, the Home Owners' Loan Corporation, was created by an entity, the Federal Home Loan Bank Board, which had no authority to create a corporation. (*Id.* at pp. 191-192.)

We agreed with the appellants' contention that the Federal Home Loan Bank Board did not have authority to create the lender corporation. (*Gordon, supra*, 36 Cal.App.2d at pp. 191-192.) However, we stated that **"appellants, as makers of the note secured by the mortgage, having contracted with the respondent as a corporation and received the benefits of that contract, are now estopped to deny as against the corporation, in an action to enforce such contract, that it has been legally organized or to assert in any manner any defect or irregularity in such organization.** This rule is established by a long line of authorities, among others being *Grangers' Business Assn. of California v. Clark* [(1885)] 67 Cal. 634; *Bank of Shasta v. Boyd et al.* [(1893)] 99 Cal. 604; *McCann v. Children's Home Soc. of California* [(1917)] 176 Cal. 359; *Raphael Weill & Co. v. Crittenden* [(1903)] 139 Cal. 488; *Curtin v. Salomon* [(1926)] 80 Cal.App. 470; *Gregory v. Hecke* [(1925)] 73 Cal.App. 268." (*Gordon, supra*, 36 Cal.App.2d at p. 192.)

This rule applies equally here. **PLAINTIFF CONTRACTED WITH THE LENDER AS A CORPORATION AND RECEIVED THE BENEFIT OF THAT CONTRACT IN THE FORM OF THE LOAN. As a result, he is estopped from claiming the note was void due to the lender's lack of corporate existence.**

An exception to this rule of corporation by estoppel likely exists where the purported corporation obtains the agreement with the borrower by means of fraud. This is because **estoppel is an equitable remedy**. It "does not apply in the case of fraud, as where the recognition of a pretended corporation is

itself brought about by false representations that it is incorporated, or by fraudulent dealings carried on for the very purpose of entrapping the party into the action on which such recognition is based." (8 Fletcher Cyclopedia of the Law of Private Corporations § 3917 (1992) fns. omitted.) "Knowledge, on the part of the one claiming the estoppel, that there is no corporation, precludes an estoppel, without regard to whether the estoppel is relied upon by the corporation or by the party other than the alleged corporation." (*Id.* at § 3905, fns. omitted.)

Plaintiff alleged defendants defrauded him in part by misrepresenting the ownership and status of the loan and the original lender and by concealing the arrangements between persons purporting to be the original lender and defendants. While this allegation of fraud may preclude an estoppel, it does not determine whether an agreement is void.

IN ORDER FOR FRAUD TO VOID THE NOTE, IT WOULD HAVE TO HAVE BEEN ONE BY WHICH PLAINTIFF WAS INDUCED TO AGREE TO A NOTE DIFFERENT FROM THE ONE HE APPARENTLY MADE. **"`"[T]he courts distinguish between those cases in which a purported instrument never had any legal inception or existence — due to the fact that one party was induced to execute an agreement totally different from that which he apparently made, or where, due to the fraud, there was no execution at all[,] and those cases in which the agreement was induced by fraudulent misrepresentations or concealments which in no degree make the instrument anything other than it purports to be. In the first case it is clear that the purported agreement is void ab initio and an action to avoid it may be brought at any time, or it may be treated as nonexistent; while in the second case the agreement is voidable and may be rescinded at the election of the party defrauded.** . . ."" (*Costa Serena Owners Coalition v. Costa Serena Architectural Com.* (2009) 175 Cal.App.4th 1175, 1193, quoting *Erickson v. Bohne* (1955) 130 Cal.App.2d 553, 556.)

Plaintiff's only challenge to the note is that the lender is a dissolved corporation. In all other respects, **PLAINTIFF RECEIVED EVERY BENEFIT OF THE NOTE INCLUDING THE LOAN. Under such circumstances, the note, at most, is voidable.** "A voidable transaction . . . `is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.' (Rest.2d

Contracts, § 7.) It may be declared void but is not void in itself. (*Little v. CFS Service Corp* [(1987)] 188 Cal.App.3d [1354,] 1358.) **Despite its defects, a voidable transaction, unlike a void one, is subject to ratification by the parties**. (Rest.2d Contracts, § 7; *Aronoff v. Albanese* (N.Y.App.Div. 1982) 85 A.D.2d 3, [446 N.Y.S.2d 368, 370].)" (*Yvanova v. New Century Mortgage Corp., supra*, 62 Cal.4th at pp. 929-930.)

Under state statute**, "[a] contract entered into by a suspended corporation is not void but is merely voidable by the other party**. (Rev. & Tax. Code, § 23304.1, subd. (a); *Myrick v. O'Neill* (1939) 33 Cal.App.2d 644, 647-648.) **That other party can have the contract declared voidable `only in a lawsuit brought by either party with respect to the contract in a court of competent jurisdiction.**' (Rev. & Tax. Code, § 23304.5.)" (*Performance Plastering v. Richmond American Homes of Cal., Inc.* (2007) 153 Cal.App.4th 659, 669.) While the case before us does not concern merely a suspended corporation, the principle is the same. **PLAINTIFF RATIFIED THE NOTE BY ACCEPTING THE LOAN AND PAYING THE MONTHLY INSTALLMENTS FOR A TIME. Having done so, he is estopped from claiming the note is void. Any fraud in the making of the note did not result in a note different from what plaintiff bargained for. At most, he could have sought rescission and to have a court declare the note voidable, but the note was not void ab initio. And, because the note was not void ab initio, plaintiff was required to plead he tendered performance before he brought this action.**

On two occasions, plaintiff has not pleaded making tender, and no where has he indicated he could honestly amend his pleadings to indicate he made tender. Because there is no reasonable possibility he can plead tender, he cannot as a matter of law plead causes of action for wrongful foreclosure and cancellation of instruments, and the trial court correctly sustained defendants' demurrer to those causes of action without leave to amend.

IV

Fraud

The trial court sustained the demurrer to defendant's cause of action for fraud and fraudulent concealment on the ground that plaintiff did not adequately allege detrimental reliance. Plaintiff contends the trial court erred because he pleaded fraud with sufficient specificity. As to

pleading the element of detrimental reliance, plaintiff argues only that "[f]actual allegations regarding reasonable reliance were also set out specifically."

Plaintiff has forfeited this argument. Except to acknowledge with a case citation that fraud must be pleaded specifically, plaintiff provides no legal analysis arguing why his allegations of fraud satisfy that standard. He merely states in conclusory terms that he alleged the elements of the torts specifically, and that he was unable to identify specific persons because they withheld their identities. **An appellant's failure to provide any adequate legal analysis in his opening brief to support his contention that he has stated a cause of action forfeits the claim.** (See *Tilbury Constructors, Inc. v. State Compensation Ins. Fund* (2006) 137 Cal.App.4th 466, 482.)

Even if plaintiff had not forfeited the claim, we would disagree with his contention. **Detrimental reliance is an element of both intentional misrepresentation and fraudulent concealment. The plaintiff must allege with specificity justifiable reliance on the misrepresentation or concealment and resulting damages.** (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469; *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248.) **"DECEPTION WITHOUT RESULTING LOSS IS NOT ACTIONABLE FRAUD.** (*Hill v. Wrather* (1958) 158 Cal.App.2d 818, 825.) **`Whatever form it takes, the injury or damage must not only be distinctly alleged but its causal connection with the reliance on the representations must be shown.'** (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 680, p. 131 [see now 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 731, p. 150].) Viewed in terms of materiality, **`[a] false representation which cannot possibly affect the intrinsic merits of a business transaction must necessarily be immaterial because reliance upon it could not produce injury in a legal sense.**' (*Hill v. Wrather, supra,* 158 Cal.App.2d at p. 824.)" (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818.)

Plaintiff's allegations do not establish he suffered recoverable damages caused by defendants' alleged misrepresentations. In his first amended complaint, he alleged defendants misrepresented who the owner and servicer of the loan were and that Sacramento Valley Mortgage was the lender. He also alleged ACC employees misrepresented the qualifications and requirements for refinancing the loan. Plaintiff alleged these misrepresentations and omissions damaged him by preventing him "from

obtaining other more conventional investors and satisfying and paying any indebtedness which may have existed." The misrepresentations also drove him "so far in arrears that when the notice of default was issued it was impossible to cure the default and further impossible to obtain alternative financing."

Plaintiff also alleged the defendants' misrepresentations caused him to suffer "severe and ongoing emotional stress as well as physical distress and financial losses." They also "forced [him] to take severe measures, including the filing of bankruptcy in order to attempt to save his home and business."

None of these alleged harms constitute damages recoverable for fraud. "Under California law, **A DEFRAUDED PARTY IS ORDINARILY LIMITED TO RECOVERING OUT-OF-POCKET DAMAGES**. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240.) **The out-of-pocket measure of damages `"is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received.**'" (*Ibid.*)" (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 66.)

Plaintiff cannot recover for any fraud in the making of the note because he suffered no out-of-pocket damages. HE RECEIVED EXACTLY WHAT HE BARGAINED FOR. He also cannot recover for lost opportunities to refinance, as his allegations that he could have refinanced are pure speculation. There are no allegations he actually took steps to obtain a different loan.

With no reasonable possibility to allege quantifiable damages due to justifiable reliance, plaintiff cannot state causes of action for fraud and fraudulent concealment.

DISPOSITION

The judgment of dismissal is affirmed. Costs on appeal are awarded to respondents. (Cal. Rules of Court, rule 8.278(a).)

BUTZ, J. and MAURO, J., concurs.

[1] In sustaining the demurrer due to the failure to plead tender, the trial court did not address whether plaintiff was excused from tendering because he alleged the underlying loan was void. Rather, the court found that exceptions to the tender rule other than the debt's illegality did not apply. Under those exceptions**, tender is not required where the trustee's deed is void on its face, or where imposing the condition on the borrower would be inequitable.** (*Lona v. Citibank, N.A., supra,* 202 Cal.App.4th at p. 112.)