

TENTATIVE RULING

This is an action for partition and damages. Plaintiff Heidi De Mayo filed her complaint on June 6, 2024, against defendants Alfred Oseguera, Benjamin Lerner, Guaranteed Rate, Inc. dba Certainty Home Lending and Flagstar Bank. The complaint alleges the following causes of action: (1) partition and injunction against Oseguera; (2) breach of promissory notes against Oseguera; (3) breach of fiduciary duty against Lerner, Flagstar, and Guaranteed Rate Inc.; (4) accounting against Oseguera; (5) professional negligence against Lerner, Flagstar, and Guaranteed Rate Inc.; (6) fraudulent concealment against Lerner, Flagstar, and Guaranteed Rate Inc.; (7) disgorgement of profits against Oseguera.

Defendant Flagstar Bank filed its demurrer to the 3rd, 5th, and 6th causes of action on September 20, 2024, and set it for hearing on October 30, 2024. On October 18, 2024, plaintiff filed a notice of non-opposition to the demurrer, conceding that discovery produced suggests the complaint must be amended to address the issues raised in demurrer. Plaintiff reports she has tried to obtain a stipulation to withdraw the demurrer and amend the complaint. She states that defendant Guaranteed Rate was dismissed from the case based on discovery (there is no dismissal in the record as of October 22, 2024) and that “Flagstar has presented factual evidence to Plaintiff outlining the employment and broker status of Mr. Benjamin Learner as well as the internal workings of Guaranteed Rate. In addition, the moving party has outlined facts which are known and that can be pled that would cure the alleged defects in Plaintiff’s pleading.” (Non-Opposition filed 10/18/24.) No such facts were outlined in the non-opposition.¹

As plaintiff has conceded the merits of the demurrer, the demurrer will be sustained, and the court must determine whether leave to amend the complaint should be granted. Leave to amend the complaint after a demurrer is sustained is routinely granted. Courts are very liberal in permitting amendments, not only where a complaint is defective in form, but also where substantive defects are apparent: “Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given.” (*Angie M. v. Sup.Ct. (Hiemstra)* (1995) 37 Cal.App.4th 1217, 1227; *Stevens v. Sup.Ct. (API Ins. Services, Inc.)* (1999) 75 Cal.App.4th 594, 601.) However, no abuse of discretion will be found for denying leave to amend unless a potentially effective amendment is “both apparent and consistent with the plaintiff’s theory of the case.” (*Camsi IV v. Hunter Tech. Corp.* (1991) 230 Cal.App.3d 1525, 1542.)

¹ Plaintiff had the opportunity to submit an amended pleading without court order up to the date opposition was due. (Code Civ. Proc. § 472—if defendant files a demurrer or motion to strike, plaintiff has a right to amend the complaint without leave of court up to the date for filing an opposition to the demurrer or motion to strike.) Here, the opposition was due on October 17, 2024. (Code Civ. Proc., § 1003, subd. (b).) Having missed that deadline, plaintiff may amend the complaint only upon stipulation of the parties (Code Civ. Proc., § 472) or leave of court. Plaintiff may obtain leave of court upon noticed motion or by court order after demurrer is sustained. Noticed motion has not been filed. Thus, the court will hear the demurrer.

The complaint alleges as follows: Plaintiff Heidi De Mayo owned real property in Santa Barbara County free and clear. She wanted to have the property remodeled, and defendant Oseguera agreed to perform the remodeling, but the cost was a burden on plaintiff's cash flow. They consulted with defendant Benjamin Lerner, a broker who worked for Guaranteed Rate Inc., and he proposed that plaintiff transfer a 1% interest in the property to Oseguera; Oseguera would obtain a loan (procured by Lerner) against the property; and the loan would fund the remodeling expenses. The loan was funded by Flagstar Bank. Oseguera stopped paying the mortgage payments to Flagstar in May 2023, which initiated a nonjudicial foreclosure of the property. During the course of this transaction, Oseguera also entered into and breached two separate agreements in favor of plaintiff.

As is relevant to this proceeding, the third cause of action alleges a breach of fiduciary duty against Flagstar. The allegations in support of the cause of action, however, only describe the ways in which *Lerner* violated his fiduciary duties to plaintiff by advising her to enter into this transaction. (Complaint, ¶¶ 63-68.) Even if such allegations could be made against Flagstar, it has long been established that a lender does not owe a fiduciary duty to its borrower. (See, e.g., *Nymark v. Hart Federal Savings & Loan Assoc.* (1991) 231 Cal.App.3d 1089, 1092, fn.1 [“The relationship between a lending institution and its borrower–client is not fiduciary in nature”].) Flagstar is alleged to be a lender. (Complaint, ¶ 16.) It seems unclear whether an amendment can in fact be made as to Flagstar given these well-settled rules. Plaintiff should be prepared to advise the court how this cause of action can be amended to implicate Flagstar.

The fifth cause of action for professional negligence suffers from the same infirmity [e.g., all allegations implicate Lerner, who has no pled relationship to Flagstar] (Complaint, ¶¶ 74-76), as does the sixth cause of action for fraudulent concealment. (Complaint, ¶¶ 78-81.) Plaintiff should be prepared to advise the court how these causes of action can be amended to implicate Flagstar.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)