California Homeowner Bill of Rights COLLABORATIVE

National Housing Law Project
Western Center on Law & Poverty
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Tenants Together

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Reverse Mortgages: Recent Developments for Surviving, Non-Borrowing Spouses*

An impending foreclosure can compound a widow or widowers' grief and devastation after losing his or her spouse. This heartbreaking scenario has gained national attention in recent years for its prevalence among older homeowners with reverse mortgages insured by the Department of Housing and Urban Development (HUD).[1] In the past year, two somewhat high-profile cases, *Bennett v. Donovan* and *Plunkett v. Donovan*, have shed light on what happens to surviving, non-borrowing spouses once their partner, who borrowed the reverse mortgage alone, passes away.[2] In each case, surviving spouses filed

* This article appears in NHLP's Housing Law Bulletin as Henna Choi, *Reverse Mortgages: Recent Developments for Surviving, Non-Borrowing Spouses*, 44 HOUS. L. BULL. 146 (Aug. 2014). Ms. Choi is a 2015 J.D. candidate at the University of California, Hastings College of the Law and was a 2014 summer law clerk at NHLP.

[1] *See* Jessica Silver-Greenberg, *A Risky Lifeline for the Elderly is Costing Some Their Homes*, N.Y. TIMES, Oct. 14, 2012, *available at* http://www.nytimes.com/2012/10/15/business/reverse-mortgages-costing-some-seniors-their-homes.html?mabReward=relbias:r,{%221%22:%22RI:9%22}&adxnnl=1&module=Search&pagewanted=all&adxnnlx=1407351770-7Rem2676WK7RXX8Ra+Wf4w.

[2] *See* Bennett v. Donovan, ___ F. Supp. 2d ___, 2013 WL 5424708 (D.D.C. Sept. 30, 2013); Class Complaint for Declaratory and Injunctive Relief, Plunkett v. Donovan, No. 14-cv-326 (D.D.C. Feb. 27, 2014) [hereinafter *Plunkett* Complaint]. As of press

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suit to prevent foreclosure on their homes, initiated by their lenders upon the deaths of their borrower spouses. In response to these lawsuits, HUD recently announced a prospective policy shift granting survivor spouses some protection from displacement. HUD's reaction to these suits, though, has been disjointed and inadequate, especially as applied to couples with *existing* reverse mortgages that pre-date HUD's new, forward-looking policy. This article provides an overview of HUD's reverse mortgage program, the non-borrowing spouse problem, and recent developments in the reverse mortgage landscape.

Background: HUD's Reverse Mortgage Program

In 1988, Congress created the Home Equity Conversion Mortgage (HECM) program,[3] commonly known as the "reverse mortgage" program. Ostensibly, reverse mortgages provide financial support to elderly homeowners,[4] allowing them to convert their home equity into cash:

> Instead of [the borrower] paying the bank, the bank pays [the borrower] -- either in a lump sum, or in monthly distributions[5] -- and interest accrues. When [the borrower] die[s] or move[s], [the borrower] or [his or her] heirs typically sell the home to pay off the loan, and keep

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time, the D.C. District Court had not yet ruled on the parties' opposing summary judgment motions in *Plunkett*.

[3] Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 417, 101 Stat. 1908 (1988) (codified as amended at 12 U.S.C.A. § 1715z-20 (West 2014)).

[4] For an elderly couple to qualify for a HUD-insured reverse mortgage, one of the homeowners must be at least 62 years old. 12 U.S.C.A. § 1715z-20(b)(1) (West 2014).

[5] *See id.* at § 1715z-20(d)(5), (9). For a full description of a borrower's payment options, see HUD, FREQUENTLY ASKED QUESTIONS ABOUT HUD'S REVERSE MORTGAGES, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm/rmtopten [hereinafter HUD FAQ]. Recently, an increasing number of borrowers are choosing the more easily understood lump sum option (as compared to the more complicated, adjustable rate, monthly payment option), leaving borrowers with fewer resources later in life. Consumer Financial Protection Bureau, REVERSE MORTGAGES: REPORT TO CONGRESS 113 (June 28, 2012), *available at* http://files.consumerfinance.gov/a/assets/documents/201206_cfpb_Reverse_Mortgage_Report.pdf [hereinafter CFPB].

any money left over if the house is worth more than the remaining balance.[6]

Unlike traditional, or "forward" mortgages, reverse mortgages do not require borrowers to make monthly payments. Approved borrowers must, however, meet several statutory requirements including occupying the home as their primary residence and paying property taxes, utilities, and hazard insurance.[7] The mortgaged property must also meet applicable housing quality standards determined by the Federal Housing Administration (FHA).[8] A number of different events can render a loan due and payable,[9] including the borrower's death.[10]

The HECM program offers the only federally-insured reverse mortgages available, and does so only through FHA-approved lenders.[11] Proprietary reverse mortgages, conversely, are offered by private banks and are not subject to the federal reverse mortgage statutes or HUD regulations. Because HUD reverse mortgages are FHA-insured and generally offer better terms than proprietary reverse mortgages, "HECMs account for nearly all reverse mortgages made

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[6] Ann Carrns, *Surviving Spouses with Reverse Mortgages Win Case*, N.Y. TIMES, Oct. 1, 2013, *available at* http://www.nytimes.com/2013/10/02/your-money/surviving-spouses-with-reverse-mortgages-win-case.html?module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22RI%3A8%22%7D (internal citation added).

[7] 12 U.S.C.A. § 1715z-20 (d)(3), (8) (West 2014). For a full list of eligibility requirements, see *id.* at § 1715z-20(d)(1)-(11).

[8] *See* HUD, FHA REVERSE MORTGAGES (HECMS) FOR SENIORS, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm/hecmabou.

[9] *See* 24 C.F.R. § 206.27(c) (2014). A borrower's extended absence in a nursing home or rehabilitation facility, for example, triggers a loan's acceleration clause. *Id.* at § 206.27(c)(2)(ii).

[10] *Id.* at § 206.27(c)(1).

[11] HUD, HOME EQUITY CONVERSION MORTGAGES FOR SENIORS, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm/hecmhome. HUD oversees the FHA, which provides mortgage insurance to reverse mortgage lenders. If, for example, a reverse mortgage borrower dies owing more than his home was worth, and the lender forecloses, FHA insurance will cover the difference between the amount owed and the fair market value of the home. *See* CFPB, *supra* note 5, at 18. For clarity, this article uses "HUD" when referring to HUD guidance and regulations that control the FHA-insured reverse mortgage program.

today in the U.S.," totaling nearly 880,000 mortgages since the program's inception.[12]

The Non-Borrowing Spouse Problem

Bennett and *Plunkett*, the two recent cases challenging HUD's reverse mortgage program, have revealed a loan origination issue that erupts only when foreclosure is imminent: the "non-borrowing spouse problem." Until very recently, HUD instructed lenders to calculate the size of the reverse mortgage payout based primarily on the younger borrower's age.[13] As an outgrowth of this policy, a borrower's advanced age increases the loan amount.[14] Therefore, even if a couple qualified for a reverse mortgage as co-borrowers, removing the younger borrower from the home's title rendered the older spouse the only potential borrower (and therefore the "youngest"); accordingly, the older spouse's age maximized loan proceeds.[15] This scenario became a tauntingly attractive option for retirees on fixed incomes facing a variety of expenses, including mounting healthcare costs.

Many lenders took advantage of HUD's age-determinative method of calculating loan proceeds (and of borrowers' legitimate financial insecurity concerns) to engage in predatory lending.[16]

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[12] Nat'l Reverse Mortg. Lenders Ass'n, *Annual HECM Production Chart* (July 3, 2014), http://nrmlaonline.org/rms/statistics/default.aspx?article_id=601. In contrast, there are "only a handful" of proprietary reverse mortgages. CFPB, *supra* note 5, at 17.

[13] *See* HUD FAQ, *supra* note 5. Until July or August 2014, HUD answered the question, "How much money can I get from my home?" simply: "The amount varies by borrower and depends on: Age of the youngest borrower." HUD recently added "or non-borrowing spouse" to its answer. *Id*.

[14] "Older borrowers may receive more money, because lenders include life expectancy in calculating loan payments." Nat'l Council on Aging, *Use Your Home to Stay at Home*, 15 (2013), *available at* http://www.ncoa.org/news-ncoa-publications/publications/ncoa_reverse_mortgage_booklet_073109.pdf.

[15] *See* René L. Robertson, *"But it's My House Too": HUD's Failure to Include Statutorily Required Protections for Non-Borrowing Spouses in Reverse Mortgage Regulations*, 27 QUINNIPIAC PROB. L.J. 94, 98 (2013) (noting that couples with one spouse younger than 62, or couples who married after the origination of the reverse mortgage, also suffer from the non-borrowing spouse problem).

[16] Many traditional lenders, like major banks, left the reverse mortgage business in the wake of the financial crisis. "Into the void . . . have moved smaller mortgage brokers and lenders. Some of them steer seniors into expensive, risky loans with deceptive sales pitches and high-pressure tactics." Silver-Greenberg, *supra* note 1; *see*

Advocates and industry experts report that lenders *encouraged* older couples to take out reverse mortgages with the older spouse as the only borrower because the resulting larger loans netted larger brokerage fees.[17] All six *Bennett* and *Plunkett* plaintiffs, for example, were persuaded by their lenders to remove their names from their home's title so their older spouses could qualify for larger loans. The plaintiffs were assured by their mortgage brokers that either spouse could remain in the home even if the named borrower passed away. In all six instances, however, the lenders demanded the surviving spouses immediately pay the loan balance or face foreclosure upon the borrowing spouse's death.[18]

Challenging HUD: *Bennett v. Donovan* & *Plunkett v. Donovan*

By allowing the lenders in *Bennett* and *Plunkett* to accelerate plaintiffs' mortgages, HUD violated the federal statute governing the reverse mortgage program, 12 U.S.C. § 1715z-20. This statute prevents HUD from "insur[ing] a home equity conversion mortgage . . . unless such mortgage provides that the homeowner's obligation to satisfy the loan . . . is deferred until the homeowner's death," or until another triggering event occurs.[19] Critically, the statute specifies: "For purposes of this subsection, the term 'homeowner' includes the spouse of a homeowner."[20] HUD regulation 24 C.F.R. § 206.27, by contrast, instructs lenders to accelerate loans upon the death of the borrower if the home is no longer the principal residence "of at least one surviving *mortgagor*."[21]

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also Robertson, *supra* note 15, at 98 (citing complaints from non-borrowing spouses that "lenders promis[ed] a better deal if only one spouse is named as a borrower or . . . assuring a borrower that a spouse could be added as a borrower later and then not allowing the addition").

[17] *See* Silver-Greenberg, *supra* note 1 ("The brokers earn more money when they make larger loans with the older spouse as the only borrower.").

[18] *See* Bennett v. Donovan, 703 F.3d 582, 585 (D.C. Cir. 2013); *Plunkett* Complaint, *supra* note 2, at 9-16.

[19] 12 U.S.C.A. § 1715z-20(j) (West 2014).

[20] *Id.*

[21] 24 C.F.R. § 206.27(c)(1) (2014). Lenders must follow strict foreclosing schedules to make timely insurance claims with FHA. *See* 24 C.F.R. § 206.125(a), (d) (2014).

The *Bennett* plaintiffs presented the first major challenge to this conflict between the statute and the regulation. Represented by the AARP Foundation, plaintiffs argued that by allowing a lender to foreclose on a surviving non-borrower, HUD had failed to comply with the plain language of § 1715z-20(j).[22] HUD argued that, to gain the protection of this federal statute, "a person must be a homeowner," and that since non-borrowers have "no 'obligation to satisfy the loan' . . . there is nothing to defer until [the non-borrower's] death."[23] On remand from the D.C. Circuit, the D.C. District Court found HUD's statutory construction unreasonable. The district court reasoned that if Congress had meant to deny surviving, non-borrowing spouses the opportunity to remain in their home, it would not have defined the term "homeowner" to explicitly include "the spouse of a homeowner."[24] The court granted plaintiffs' summary judgment motion, ruling the HUD regulation invalid and contrary to the controlling federal statute.[25]

The *Bennett* decision had the potential to mark a "turning point" for non-borrowing spouses facing foreclosure.[26] The court, however, stopped short of ordering HUD to provide plaintiffs specific relief. Instead, it remanded the dispute to HUD to fashion appropriate relief of its own making.[27] In previously remanding the case to the district court, the D.C. Circuit had suggested that HUD could provide

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[22] Bennett v. Donovan, ___ F. Supp. 2d ___, 2013 WL 5424708, at *2 (D.D.C. Sept. 30, 2013).

[23] *Id.* at *3 (quoting HUD's motion for summary judgment).

[24] *Id.* at *4.

[25] *Id.* at *12 (echoing the D.C. Circuit's expression that it was "somewhat puzzled as to how HUD can justify a regulation that seems contrary to the governing statute.") (citing Bennett v. Donovan, 703 F.3d 582, 586 (D.C. Cir. 2013)). The district court applied the two-step test from *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to § 1715z-20(j) and used traditional statutory interpretation to agree with plaintiffs: a homeowner's spouse need not be a borrower or mortgagor to be protected from displacement by § 1715z-20(j). Because the statutory plain language and congressional intent were unambiguous, the court did not reach *Chevron's* second step, which would have given HUD broad interpretive discretion. *See Bennett*, 2013 WL 5424708, at *3-7.

[26] Carrns, *supra* note 6 (quoting AARP attorney Jean Constantine-Davis).

[27] *See Bennett*, 2013 WL 5424708, at *12. Remanding to HUD was necessary for two reasons: 1) the suit was brought under the Administrative Procedures Act (APA) and federal agencies decide the form of relief for APA causes of action; and 2) the D.C. Circuit instructed the district court to so remand. *See Bennett*, 703 F.3d at 589.

"complete relief" to plaintiffs—and their lenders—by taking over the subject loans.[28] The lenders would assign (sell) the reverse mortgages to HUD and, as the new owner of the loans, HUD would refrain from foreclosing on plaintiffs.[29] As discussed below, HUD has rejected this somewhat straightforward solution.

Nearly five months after *Bennett*, and before HUD could muster an explicit response to that decision, four widows filed a class action against HUD on behalf of all surviving, non-borrowing spouses facing foreclosure after their spouses' deaths.[30] Mirroring *Bennett*, the *Plunkett* plaintiffs have challenged the HUD regulation allowing foreclosure despite the plaintiffs' status as "homeowners" under the governing federal statute.[31] Alongside their APA claim, the *Plunkett* plaintiffs seek injunctive relief to force HUD to "use its authority under the reverse mortgage statute to protect Plaintiffs and the Class from foreclosure and displacement."[32] The *Plunkett* litigation remains ongoing.

HUD's Disjointed Reactions to *Bennett & Plunkett*

Over the past few months, HUD has begrudgingly responded to *Bennett* and *Plunkett* in half-measures, providing no clear relief for anyone. HUD first reacted to *Bennett* with Mortgagee Letter 2014-07, issued seven months after the decision and remand, and two months into the *Plunkett* litigation.[33] HUD recognized the D.C. District Court's (and the D.C. Circuit's) interpretation of the operative HUD regulation and the "few viable options" left for non-borrowing spouses who want to remain in their homes.[34] Due to "existing, legally binding contracts"

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[28] Relief through assignment of the loans to HUD is outlined by 12 U.S.C.A. § 1715z-20(i)(2)(B) as a potential "action" the HUD Secretary "shall take" to "further the purposes of the program." *Bennett*, 703 F.3d at 588.
[29] *Bennett*, 703 F.3d at 588-89.
[30] *Plunkett* Complaint, *supra* note 2, at 9-16.
[31] *Id.* at 18-19.
[32] *Id.* at 21.
[33] The *Plunkett* plaintiffs filed their complaint February 27, 2014, and HUD issued Mortgagee Letter 2014-07 on April 25, 2014.
[34] HUD Mortgagee Letter 2014-07, at 2-3 (Apr. 25, 2014). The letter defiantly states: "FHA continues to believe that its original interpretation gives full force and effect to the intent of the [federal] statute [12 U.S.C.A. § 1715z-20(j)]. Nevertheless, recent events have advanced another possible interpretation." *Id.* at 2.

with FHA-lenders, however, HUD refused to provide direct relief to the *Bennett* plaintiffs, or anyone else similarly situated.[35] HUD did announce a significant change to its existing reverse mortgage scheme: for mortgages entered into on or after August 4, 2014, HUD will adopt the *Bennett* courts' interpretation of the governing HUD regulation. Going forward, then, lenders cannot foreclose on surviving, non-borrowing spouses as long as those spouses remain in the home and meet other criteria.[36]

Two months later, the D.C. District Court remanded *Plunkett* to HUD, ordering it to "provide notice to all HECM servicers clarifying . . . that servicers are eligible for two sixty-day deferrals without penalty (one prior to the initiation of foreclosure and one after)."[37] HUD complied, issuing an "update" instructing HECM lenders that HUD would not take negative action (like denying their insurance claims) if the lenders voluntarily delayed foreclosing on survivor spouses during the deferral periods.[38] HUD put the onus on the lenders, however, requiring them to "prepare . . . detailed Extension Requests" to delay foreclosure in each case.[39]

Days later, HUD issued Mortgagee Letter 2014-10, prohibiting lenders from engaging in misleading or deceptive program descriptions as they negotiate mortgages with potential borrowers.[40] Apparently, HUD had "become aware of a variety of marketing and advertising strategies currently employed or being proposed by mortgagees to

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[35] HUD has "no authority to alter [its regulation] with respect to existing loans." *Id.* at 3.

[36] HUD Mortgagee Letter 2014-07, at 4. HUD later issued a notice, subject to a formal comment period, referring potential commenters to the substance of the Mortgagee Letter. *See* Home Equity Conversion Mortgage (HECM) Program: Non-Borrowing Spouse—Solicitation of Comment, 79 Fed. Reg. 25,147-48 (May 2, 2014). The comment period has passed and the policy changes announced in Mortgagee Letter 2014-07 have been implemented.

[37] Order, Plunkett v. Donovan, No. 14-cv-326 (D.D.C. June 10, 2014). The court also ordered HUD to make a decision on the merits of the named plaintiffs' claims, and ordered plaintiffs to file a new complaint "regarding the agency's decision in *Bennett v. Donovan*," presumably the decision outlined in Mortgagee Letter 2014-07.

[38] *See* FHA Info # 14-29 (June 16, 2014), http://portal.hud.gov/hudportal/documents/huddoc?id=SFH_FHA_INFO_14-29.pdf.

[39] *Id.* at 2.

[40] *See generally* HUD Mortgagee Letter 2014-10 (June 18, 2014).

encourage borrowers to obtain HECMs."[41] While the letter is silent on the non-borrowing spouse problem, HUD's language and the letter's timing suggest that HUD discovered these lender abuses by litigating *Bennett* and *Plunkett*.[42]

Finally, not two weeks later, HUD referred to a previous "determination" allowing only the *Bennett* and *Plunkett* lenders to assign the six reverse mortgages taken out by the named plaintiffs to HUD.[43] Additionally, HUD extended the two 60-day extensions conceded in its previous "update," allowing lenders to delay foreclosure "indefinitely" and still preserve their right to file insurance claims with FHA.[44] HUD subsequently released revised tables that lenders should use to calculate potential reverse mortgage proceeds for mortgages originating on or after August 4, 2014.[45]

Holes in HUD's Approach

HUD's halting and ad hoc approach is inadequate to resolve the non-borrowing spouse problem. First, it still leaves thousands of spouses at risk of displacement. Requiring mortgages entered into on or after August 4, 2014 to "contain a provision deferring due and payable status until the death of the last surviving Non-Borrowing Spouse"[46] is cold comfort to borrowers and their spouses with current reverse mortgages unaffected by this prospective policy shift.[47] The

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[41] *Id.* at 2.
[42] Though not a focus of this article, advocates should familiarize themselves with the marketing and advertising requirements in this letter to monitor potential abuses against elderly clients.
[43] FHA Info # 14-34 (June 25, 2014), http://portal.hud.gov/hudportal/documents/huddoc?id=SFH_FHA_INFO_14-34.PDF. It is unclear what previous "determination" HUD refers to: no mortgagee letters or FHA Info updates posted after the *Plunkett* order fit HUD's description. The assignment option described in FHA Info # 14-29 echoes HUD's policy change outlined in Mortgagee Letter 2014-07, issued before the *Plunkett* court order. *See supra* notes 33-36 and accompanying text.
[44] *Id.*
[45] *See* HUD Mortgagee Letter 2014-12 (June 27, 2014). The details of these tables—the new "Principal Limit Factors"—are beyond the scope of this article.
[46] HUD Mortgagee Letter 2014-07, at 4.
[47] Telephone Interview with Jean Constantine-Davis, Senior Attorney, AARP Foundation (July 29, 2014) (The proposed shift provides "no relief at all" to borrowers and spouses with mortgages originating before August 4, 2014.).

proposed change also applies only to married couples living together at loan origination.[48] If a couple marries *after* loan origination, the non-borrowing spouse has no displacement protections at all.[49] If the couple divorces, the non-borrowing spouse's HECM rights are terminated.[50] Second, the assignment solution[51] currently available to the *Bennett* and *Plunkett* plaintiffs, and being considered for wider application,[52] will not actually help the plaintiffs, as written. None of the named plaintiffs meet all of HUD's "murky" criteria for assignment eligibility.[53] Third, HUD's stop-gap measures—the assignment option and the time extensions—are *elective*, not required. Even if a plaintiff met all required assignment criteria, or if a non-plaintiff met the time extension criteria, their lenders could still foreclose.[54] Finally, HUD's many updates, determinations, and mortgagee letters are extraordinarily difficult to follow, for both attorneys and elderly borrowers.

Conclusion

HUD regulation 24 C.F.R. § 206.27 has left, and continues to leave, grieving and widowed spouses stripped of their family homes. While HUD has made a significant, pro-surviving spouse policy shift applied to reverse mortgages originating on or after August 4, 2014, the agency remains unwilling to *compel* lenders to refrain from foreclosing on current surviving spouses. Courts will likely decide the legality of HUD's proposed regulations, assignment option, and

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[48] "In order for the Deferral Period to apply to a Non-Borrowing Spouse, the Non-Borrowing Spouse must . . . [h]ave been the spouse of a HECM mortgagor at the time of loan closing and have remained the spouse of such HECM mortgagor for the duration of the HECM mortgagor's lifetime." HUD Mortgagee Letter 2014-07, at 5.
[49] *See* Telephone Interview, *supra* note 47 (referring to this scenario as the "after-acquired spouse problem").
[50] HUD Mortgagee Letter 2014-07, at 10.
[51] *See supra* notes 28-29, 43 and accompanying text.
[52] *See* FHA Info # 14-34, *supra* note 43 ("FHA, through its normal administrative process, is reviewing its policies to determine the possible application of [the assignment] option with respect to similarly situated Non-Borrowing Spouses.").
[53] Telephone Interview, *supra* note 47; *see also* FHA Info # 14-34, *supra* note 43, at 1-2 (June 25, 2014) for a full list of eligibility criteria.
[54] Telephone Interview, *supra* note 47.

elective time extensions later this year in *Plunkett*.[55] Until then, advocates representing reverse mortgagors and their families should closely follow the ongoing saga at HUD. As the general population ages and more elderly clients find themselves in precarious financial situations, monitoring the shifts in the reverse mortgage landscape can help advocates better serve their clients.

[55] *See* Telephone Interview, *supra* note 47. The *Plunkett* court is currently considering opposing summary judgment motions. Plaintiffs argue that the HUD's assignment option and time extensions are "arbitrary and capricious, and contrary to law." Reply Memorandum in Further Support of Plaintiffs' Motion for Summary Judgment, Plunkett v. Donovan, No. 14-cv-326, at 1-3 (D.D.C. July 28, 2014).

Summaries of Recent Cases

Unpublished & Trial Court Decisions[56]

Viable Deceit, Promissory Estoppel & Negligence Claims Based on Proprietary TPP

Akinshin v. Bank of Am., N.A., 2014 WL 3728731 (Cal. Ct. App. July 29, 2014): Deceit (a type of common law fraud) requires: 1) misrepresentation; 2) knowledge of falsity; 3) intent to defraud; 4) justifiable reliance; and 5) causal damages. Borrowers must plead a fraud claim with specificity. In the foreclosure context (involving mostly corporate defendants) specificity has come to include: "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." Here, borrowers alleged servicer made four misrepresentations: 1) borrowers "qualified" for a permanent loan modification; 2) they were "qualified" for a permanent modification *if* they made their trial period plan (TPP) payments; 3) they were being "considered" for a permanent modification during the TPP; and 4) after the TPP, they "qualified" for a permanent modification and would soon receive paperwork. Ultimately, servicer denied borrowers a permanent modification, rendering these statements deceitful. Borrowers identified the name of the servicer employee, their position in the corporation, and the date each statement was made. The Court of Appeal found these allegations specific enough to pass the pleading stage. The court rejected the trial court's narrow interpretation of the word "qualify" as denoting "some type of eligibility, not final [modification] approval." Borrowers reasonably understood "qualify" to mean that TPP payments were required to receive a permanent loan modification offer. Since "competing inferences are possible" at the demurrer stage, the court found borrowers had met the misrepresentation element of their claim.

[56] Cases without Westlaw citations can be found at the end of the newsletter. Please refer to Cal. Rule of Ct. 8.1115 before citing unpublished decisions.

The court also found borrowers to have adequately pled justifiable reliance and damages. Specifically, borrowers had "held off" exploring other foreclosure alternatives, including bankruptcy. This court found that mere forbearance, "the decision not to exercise a right or power—is sufficient . . . to fulfill the element of reliance necessary to sustain a cause of action for fraud." The court also concluded that making TPP payments during borrowers' default, choosing to resume paying at least part of their mortgage, in other words, *when they otherwise would have continued to pay nothing*, constitutes damages at the demurrer stage. The Court of Appeal therefore reversed the trial court's grant of servicer's demurrer to borrowers' deceit claim.

Promissory estoppel (PE) claims require borrowers to allege a clear and unambiguous promise, reasonable and foreseeable reliance on that promise, and injury caused by their reliance. "To be enforceable, a promise need only be 'definite enough that a court can determine the scope of the duty, and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages.'" Here, borrowers alleged a servicer representative promised that if borrowers made timely TPP payments, they would "qualify" for a loan modification. Borrowers' duty to make TPP payments is sufficiently definite; and it at least implied a resulting servicer duty to offer borrowers a permanent modification "unless [servicer] learned *new facts* that would affect their 'qualification'" (emphasis added). Because servicer based its denial on borrowers' insufficient income—a previously known fact, not a new one—servicer made a sufficiently clear and unambiguous promise. The court further found that borrowers' reliance, their TPP payments, were foreseeable as "an explicit condition o[f] the promise." The reasonableness of borrowers' reliance is a question of fact unfit for resolution at the pleading stage. The TPP payments themselves constituted sufficient damage (see deceit discussion above). The court reversed the grant of servicer's demurrer on borrower's PE claim.

Negligence claims require servicers to owe borrowers a duty of care. Within the context of a traditional borrower-lender relationship, banks generally do not owe a duty to borrowers. An exception applies,

however, if a lender's activities extend beyond this relationship, which some courts analyze using the six-factor *Biakanja v. Irving* test. This court took a unique approach to resolving borrowers' claim that servicer negligently withheld that borrowers' income was insufficient to obtain a modification. Servicer could (and should) have informed borrowers they *could not qualify* for the modification, rather than promising them they *would qualify* if they performed under the TPP. This court "construe[d] the cause of action for negligence as one for negligent misrepresentation, providing an alternate legal theory to fraud . . . and promissory estoppel." After agreeing that the "no-duty" rule is a general rule, not absolute, and citing the *Biakanja* factor test with approval (but avoiding applying the factors here), the court cited *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th (2013) for the proposition that banks have a general duty not to lie to borrowers about their modification applications. Rather than granting borrowers leave to amend their complaint to bring a claim for negligent misrepresentation, as the *Lueras* court did, this court (somewhat confusingly) held that borrowers had sufficiently stated a claim for negligent misrepresentation, but then reversed the trial court's grant of servicer's demurrer to borrower's negligence claim.

CCP 1161a: Tenants, Former Homeowners Defend Eviction by Alleging Improper Notice & Failure to Prove Duly Perfected Title

Opes Invs., Inc. v. Yun, No. 30-2013-661818 (Cal. App. Div. Super. Ct. Orange Cnty. July 16, 2014): In post-foreclosure unlawful detainer (UD) actions, both former homeowners and existing tenants require notice to quit before an eviction can commence. To be effective, these notices must be properly served: 1) by personal service; 2) if personal service fails, by substitute service and by mailing a copy; 3) if the first two methods fail, by posting the notice at the residence and mailing a copy. CCP § 1162. Plaintiff bears the burden of showing compliance with these notice requirements as part of his or her prima facie UD case. Here, the purchaser of a foreclosed home brought a UD against the former homeowner and the tenant residing in the home and

prevailed on its summary judgment motion. Defendants appealed, arguing that while plaintiff *alleged* compliance with post-foreclosure notice requirements, it submitted no evidence showing notice was actually served on tenant. Tenant provided his lease agreement as evidence of his tenancy and continued possession of the property. He also gave evidence that he was never personally served a notice to quit, never received notice by mail, and that the notice was never posted at the property. The Appellate Division agreed that plaintiff failed to meet its burden of demonstrating proper service of tenant's notice to quit. Further, the former homeowner disputed that plaintiff's proffered copy of her notice to quit was ever personally served, mailed, or posted at the home, contrary to plaintiff's declaration of service. This creates a triable issue of material fact and renders summary judgment improper. The Appellate Division reversed the trial court's grant of plaintiff's motion for summary judgment.

In addition to properly served notice(s) to quit, post-foreclosure UD plaintiffs must demonstrate that the foreclosure sale complied with the foreclosure procedures outlined in CC 2924, that plaintiff purchased the property, and duly perfected title. CCP § 1161a. And "to prove compliance with [CC] 2924, a plaintiff must necessarily prove the sale was conducted by the trustee authorized to conduct the trustee's sale." Here, the Appellate Division found plaintiff had failed to show either that it purchased the home, or that the foreclosure sale complied with CC 2924. As evidence of purchase, plaintiff offered the declaration of a man "with a beneficial interest in [an unidentified] trust" who was "personally familiar with . . . plaintiff's books and records that relate to the subject premises." Confusingly, the declarant also stated that *he*, not plaintiff, was the "bona fide purchaser" of the property. The court found the trial court erred in not sustaining defendants' evidentiary objections based on declarant's lack of foundation and contradictory statements. Additionally, the trustee's deed upon sale listed the purchaser as "Opes Investments," while the plaintiff identifies itself in its complaint as "Opes Investments, Inc." Plaintiff offered no evidence that these two entities are identical. Nor did plaintiff offer any evidence whatsoever that the sale complied with CC 2924. Accordingly,

the court reversed the trial court's grant of summary judgment to plaintiff.

"Pursuing" Foreclosure Sale Can Constitute Dual Tracking; Distinguishing HAMP from Proprietary TPP Contract Claims

Pittell v. Ocwen Loan Servicing, LLC, No. 34-213-00152086-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 28, 2014): CC 2923.6 prevents a servicer from "conduct[ing]" a foreclosure sale while a borrower's modification application is pending. After a failed TPP and servicing transfer, this borrower faxed in another complete loan modification application to her new servicer, as per servicer's instructions, more than two weeks before a scheduled sale. Servicer refused to cancel the sale, forcing borrower to get a TRO and preliminary injunction. Consistent with its PI ruling, this court found an adequately pled dual tracking claim. Servicer's continued pursuit of the foreclosure sale after receiving borrower's complete application, and before making a written determination on that application, violated CC 2923.6. "Regardless of whether the language in . . . 2923.6(c) prohibiting [servicers] from 'conducting a trustee's sale' requires postponing the sale or canceling the sale . . . [servicer] did neither." Servicer's unabated pursuit of the sale violated HBOR's dual tracking provision. The court overruled servicer's demurrer to borrower's HBOR claim.

California borrowers who comply with HAMP TPP agreements are entitled to permanent modifications; if a servicer refuses to offer a modification, borrowers may sue for breach of contract. There are currently no published cases to support this proposition applied to non-HAMP ("proprietary") TPPs.[57] Here, borrower entered into a proprietary TPP agreement and made the first two payments. Servicer returned the second payment and transferred borrower's loan to a new servicer, which refused to re-instate the TPP, instead soliciting a new application. Borrower brought breach of contract claims against each

[57] *Akinshin v. Bank of Am., N.A.*, No. A138098 (Cal. Ct. App. July 29, 2014), for example, applies this reasoning to a proprietary TPP but is not published.

servicer alleging that each had failed to provide her with a permanent modification. This court distinguished the HAMP TPP cases from this case in three ways. First, borrowers in *West* and *Corvello* alleged they fully complied with their TPP agreements. Here, borrower alleged she only made two of three TPP payments. Second, the TPPs at issue in the HAMP cases explicitly promised borrower a permanent modification upon TPP completion. It used the words "will offer" a permanent modification. By contrast, the TPP at issue here used the permissive "may" to describe a servicer's obligations after successful TPP completion. Third, the courts in the HAMP cases grafted HAMP directives onto the TPP agreements, rendering them enforceable contracts. Here, borrower's proprietary TPP enjoys no such outside support. The court granted servicer's demurrer to borrower's contract claim.

Pleading Requirements: "Change in Financial Circumstances" & Pre-NOD Outreach; Negligence Claim Survives under *Lueras* Logic; UCL Standing

Lee v. Wells Fargo Bank, N.A., No. 34-2013-00153873-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 25, 2014): Evidence is not required for a borrower to proceed past the pleading stage. These borrowers based their wrongful foreclosure claim on dual tracking violations and a pre-NOD outreach allegation; servicer demurred largely based on borrower's failure to provide evidence. First, borrowers had not demonstrated a "material change in financial circumstances" that would have triggered dual tracking protections applied to their second modification application. The court rejected this argument because borrowers' complaint was not required to "contain or identify 'evidence' to withstand demurrer." Further, borrowers pled they faxed servicer a note stating they were separating and their "home and financial situation had changed." Servicer did not argue the fax was insufficient to state a material change in financial circumstances. Relatedly, the court rejected servicer's argument that "judicially noticeable documents indicate that [borrowers were] 'unable to submit bank documents' in support of [their] requested

modification." Servicer had not demonstrated it is *impossible* for borrowers without bank accounts to obtain modifications, and servicer would have to submit "extrinsic evidence," inappropriate at the demurrer stage, to do so. Second, borrowers alleged servicer's recorded NOD declaration (alleging compliance with CC 2923.5) was false, and that borrowers were never contacted before servicer recorded the NOD. The court granted judicial notice to the declaration's existence, but not to its veracity. The court also accepted borrowers' factual allegations as true at the pleading stage, so their pre-NOD outreach claim and alleged dual tracking violation formed the basis for borrowers' valid wrongful foreclosure claim. The court overruled servicer's demurrer.

To allege negligence, borrowers must show their servicer owed them a duty of care. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. Under *Lueras v. BAC Home Loan Servicing*, however, servicers do owe a duty "to not make material misrepresentations about the status of an application for a loan modification or about the date, time, or status of a foreclosure sale." Here, borrowers alleged servicer simultaneously mailed them two packets: one offering a TPP agreement, the other stating servicer had not received all the necessary paperwork. A servicer representative told borrowers to "ignore" the TPP offer. Over the next several months, borrowers submitted all requested documentation and servicer continually sent conflicting correspondence, acknowledging receipt of documents and then requesting the same documents again. As pled, these allegations amount to "material misrepresentations about the status of [borrowers'] application." Rather than granting borrowers leave to amend to state a negligent misrepresentation claim, as the *Lueras* court did, this court cited *Lueras* in overruling servicer's demurrer to borrower's general negligence claim.

Viable UCL claims must establish that the borrower suffered economic injury *caused by* defendant's misconduct. If borrower's default occurred prior to any alleged misconduct, standing is difficult to show because the default most likely caused the economic injury (foreclosure), regardless of a defendant's misdeeds. Here, servicer argued borrowers' default caused the foreclosure, not servicer's mishandling of borrowers'

modification application. In their opposition to the demurrer (but not in their complaint), borrowers differentiate between the foreclosure, which they admit was largely caused by their default, and other losses including moving expenses, lost equity, lost income (two boarders had been renting from borrowers), and lost business (borrowers ran a home-based business from the property). These other losses, borrowers argued, resulted from servicer's mishandling of the modification process. Though skeptical on borrowers' ability to "parse out" these injuries and their causes, the court sustained the demurrer but granted borrowers leave to amend to adequately allege UCL standing.

HBOR Violations are Outside "Scope" of Unlawful Detainer Actions and Not Barred by Res Judicata

Bolton v. Carrington Mortg. Servs., LLC, No. 34-2013-00144451-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 24, 2014):[58] Generally, an unlawful detainer (UD) judgment has a limited res judicata effect and does not prevent UD defendants from bringing post-UD actions to resolve title. The *Malkoskie* exception to this general rule, however, states: if the title suit is "founded on allegations of irregularity in a trustee's sale," res judicata bars the subsequent action. Here, borrowers brought a post-UD suit against servicer, but not to resolve a title issue. Rather, borrowers alleged dual tracking and SPOC violations and sought damages under CC 2924.12. HBOR violations are "not within the scope of the unlawful detainer action. Indeed, nothing in [CCP 1161a] requires that an unlawful detainer plaintiff show that it complied with [HBOR] as part of proving tits right to possession." CCP 1161a only requires UD plaintiffs to show, *inter alia*, the sale complied with foreclosure procedures outlined in CC 2924, and duly perfected title. A suit based on HBOR violations does not, then, "necessarily challenge the validity of the foreclosure sale,"

[58] This case was originally summarized in our March 2014 Newsletter, as *Bolton v. Carrington Mortg. Servs. LLC*, No. 34-2013-00144451-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Feb. 24, 2014). That opinion established the validity of borrower's dual tracking claim.

and were not fully litigated as part of the UD. Accordingly, the court overruled servicer's demurrer to borrower's HBOR claims.

Pleading Requirements: "Issue with [Borrower's] Mortgage Title" Negating Contract Formation is Factual Issue

Barnett v. Ocwen Loan Servicing, LLC, No. 34-2013-00155929-Cu-BC-GDS (Cal. Super. Ct. Sacramento Cnty. July 22, 2014): A borrower's factual allegations asserted in the complaint must be taken as true for purposes of evaluating a demurrer. Here, borrower brought a breach of contact claim against her servicer, alleging full compliance with her TPP and servicer's breach of borrower's permanent modification. After mailing borrower the permanent modification agreement, servicer informed borrower that she was ineligible for the modification because "there was 'an issue with your mortgage title.'" Because valid title was a condition precedent to contract formation, servicer argued no contract had formed. This "argument is a factual one that is not appropriately resolved on demurrer." Borrower alleged full compliance with *all* TPP requirements, including making TPP payments and submitting all required documentation. At the pleading stage, these allegations sufficiently state a breach of contract claim under *West*. The court overruled servicer's demurrer.

Preliminary Injunction & Bond: Dual Tracked NTS is Void and must be Rescinded, Hearsay is Not Evidence of HBOR Compliance

Pugh v. Wells Fargo Home Mortg., No. 34-2013-00150939-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 7, 2014): To win a preliminary injunction in California state court, a borrower must show a likelihood of prevailing on the merits and that they will be more harmed if the injunction does *not* issue, than the servicer would be if the injunction *did* issue. Here, borrowers alleged a valid dual tracking claim. After submitting a complete loan modification application, borrowers received a denial letter from servicer, but without explanation or a notice regarding their appeal period. This, and

servicer's subsequent recording of an NTS, violated different aspects of HBOR's dual tracking statute (CC 2923.6(f) and (c), respectively). Servicer argued it had remedied its dual tracking violations, since the court's grant of the TRO, by providing borrowers with an appeal period and denying their appeal. The court found two problems with this reasoning. First, the NTS, by violating HBOR's dual tracking provision, is void and servicer needs to rescind that NTS and re-record a valid NTS before moving forward with foreclosure. "In an analogous situation under the foreclosure statutes, a filing of a notice of default before complying with Civil Code 2923.5 renders the notice void." Second, servicer submitted no admissible evidence to support a finding that it had indeed remedied its dual tracking violations. Servicer's attorney submits a declaration "not based on personal knowledge and all documents attached thereto are hearsay." The court found borrowers likely to prevail on their dual tracking claim, and because the foreseeable harm to borrowers far outweighs the potential harm to servicer, the court granted the preliminary injunction. The court ordered borrowers to post a one-time $15,000 bond, as well as $1,600 monthly payments, the estimated fair market rent for the property.

CC 2924.17 Claim; Fraud Claim Based on Verbal Forbearance Agreement Is Not Subject to Statute of Frauds; Promissory Estoppel Claim

Doster v. Bank of Am., N.A., No. 34-2013-00142131-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 1, 2014): One of the most well-known aspects of HBOR is its "robo-signing" statute, CC 2924.17. Specifically, section (b) requires a servicer to "ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and [its] right to foreclose." Here, borrower adequately pled two separate CC 2924.17 violations. First, servicer recorded an NOD, citing borrower's default, apparently before reviewing borrower's loan information. Specifically, borrower "had fully paid under his forbearance agreement," and was not in default at all. The court agreed with borrower that, had servicer verified the borrower's loan status as statutorily required, it would have discovered

borrower's forbearance agreement. Second, borrower alleged that in response to his request for servicer to verify its right to foreclose, servicer "could not identify the party on whose behalf it was servicing the note," citing two separate entities. The court overruled servicer's demurrer to borrower's CC 2924.17 claims.

Fraud allegations require: 1) a misrepresentation; 2) servicer's knowledge of its falsity; 3) intent to induce borrower's reliance; 4) borrower's actual reliance; and 5) damages. Here, borrower alleged servicer falsely promised a forbearance agreement, followed by loan modification negotiations, and finally, a modification. In reliance on these promises, borrower tendered over $30,000 to servicer, believing it would result in the promised forbearance agreement or modification. Borrower alleged servicer never intended to execute a forbearance agreement because it "was not the true servicer of the loan." In addition to the significant payment, borrower chose to forgo a deed in lieu or an earlier foreclosure (he still would have lost the house, but would have saved $30,000). The court found that borrower sufficiently alleged intent to induce reliance, actual reliance, and resulting damages. The court also rejected servicer's argument that the statute of frauds foils borrower's fraud claim. The statute of frauds merely prevents borrowers from bringing claims to *enforce* a verbal forbearance agreement. It does not prevent borrowers from anchoring fraud claims on verbal promises, even if those promises relate to land contracts and would—as contracts—be subject to the statute of frauds. The court overruled servicer's demurrer to borrower's fraud claim.

To state a claim for promissory estoppel, a borrower must allege: 1) a clear and unambiguous promise; 2) reasonable and foreseeable reliance on that promise; and 3) actual injury to the alleging party. Here, borrower alleged servicer promised to offer him a loan modification and to *negotiate* a "forbearance/modification." Relying on *Aceves v. US Bank*, 192 Cal. App. 4th 218 (2011), the court found that borrower's allegations regarding the promise to negotiate sufficiently supported his promissory estoppel claim. In this amended complaint, borrower also pled an unambiguous promise to *offer* a modification because he specified the exact terms of the proposed modification. Borrower's

reliance was detrimental and resulted in damages, for instead of allowing servicer to foreclose and "cutting his losses," he made significant payments to servicer. The court overruled servicer's demurrer.

Federal Cases

The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) Requires Borrowers to Exhaust Administrative Remedies before Affirmatively Suing Failed Bank

Rundgren v. Wash. Mutual Bank, F.A., __ F.3d __, 2014 WL 3720238 (9th Cir. July 29, 2014): FIRREA "grant[s] 'the FDIC, as receiver, broad powers to determine claims asserted against failed banks.'" FIRREA maps out a precise process by which borrowers may assert claims against failed banks outside of the judicial system. Specifically, 12 U.S.C. § 1821(d)(13)(D) requires borrowers to exhaust administrative remedies by requesting relief from the receiver and, if their claim is denied, requesting an administrative review. Only then can borrowers bring claims against the bank in a state or federal court. Here, borrowers did not assert a claim with the FDIC, but instead brought affirmative claims against WaMu, a failed bank that was placed into an FDIC receivership, in state court. Chase, the current owner and servicer of borrowers' loan, had initiated nonjudicial foreclosure proceedings against borrowers, who sued to stop the foreclosure. The Ninth Circuit panel found borrowers' fraud-based claims to be "claims" within the meaning of FIRREA's exhaustion statute, and not "affirmative defenses" as borrowers argued. In nonjudicial foreclosures, a borrower's affirmative suit can bar or stop an impending foreclosure, but it is still an *affirmative* suit, not a defense. And because borrowers' claims relate to WaMu's "act or omission," the Ninth Circuit affirmed the district court's finding that FIRREA applies to borrowers' claims and borrowers had not exhausted FIRREA's administrative remedies. The panel dismissed the suit for lack of jurisdiction.

TILA Rescission Rights: Ninth Circuit Declines to Extend Yamamoto; Equitable Tolling of RESPA's SOL

Merritt v. Countrywide Fin. Corp., __ F.3d __, 2014 WL 3451299 (9th Cir. July 16, 2014): Under TILA's rescission provision, a borrower exercising their rescission rights must first notify the creditor of his or her intent to rescind. Once the creditor returns the security interest, the borrower must tender the property to the creditor. The goal, basically, is to return the parties to their original, pre-loan positions. This rescission sequence "shall apply except when otherwise ordered by a court." Here, borrowers exercised their rescission rights on a mortgage loan and with a home equity line of credit ("HELOC"). When their lender did not respond to the rescission, borrowers filed suit. Borrowers did not allege in their complaint, however, that they tendered their HELOC payment to their lender before filing suit. The district court therefore dismissed borrower's TILA claim. This district court ruling dangerously extended *Yamamoto v. Bank of New York*, 329 F.3d 1167 (9th Cir. 2003). The *Yamamoto* court held that district courts may require borrowers to provide evidence of their ability to tender the rescinded loan as a condition of defeating a creditor's summary judgment motion. The *Merritt* district court extended that holding to require borrowers to plead tender in their *complaint*, just to survive the pleading stage. The Ninth Circuit panel reversed, holding that alleging tender, or the ability to tender, is not required to support a rescission claim at the pleading stage. Moreover, the panel held that courts may only alter TILA's statutory rescission sequence (requiring tender before rescission, for example) at the summary judgment stage. Even then, courts may do so only on a case-by-case basis once the creditor has established a potentially viable defense.

RESPA prohibits settlement-service providers, like real estate agencies and title insurers, from accepting fees or kickbacks for business referrals. Borrowers must bring their claims within one year of the violation. Here, borrowers sued almost three years after loan origination. The district court dismissed borrower's RESPA claim as time-barred without considering whether equitably tolling may apply to when borrowers actually *received* their loan documents. Here, the

loan documents revealed the alleged mark-ups that tipped borrowers off to the alleged appraisal kickback scheme. The Ninth Circuit panel vacated the dismissal, holding that, despite RESPA's SOL, equitable tolling may apply to suspend the SOL until the borrower discovers (or has a reasonable opportunity to discover) the alleged violations. "Just as for TILA claims, district courts may evaluate RESPA claims case-by-case 'to determine if the general rule [of limitations] would be unjust or frustrate the purpose of the Act.'" The panel remanded for reconsideration.

Preliminary Injunction & Bond: "Complete Application" & HBOR's National Mortgage Settlement (NMS) Safe Harbor

Gilmore v. Wells Fargo Bank, N.A., 2014 WL 3749984 (N.D. Cal. July 29, 2014):[59] In the Ninth Circuit, a borrower seeking a preliminary injunction must show, *inter alia*, at least serious questions going to the merits of their claim: here, a dual tracking claim. Borrower submitted an allegedly complete application, using only his income information, as instructed by a servicer representative. Instead of processing the application, servicer called borrower repeatedly to request unnecessary income information from borrower's live-in girlfriend. Servicer's requests were confusing and not made in writing, as was its practice in the past. Servicer also sent borrower a letter openly admitting to dual tracking: "Foreclosure is active and a foreclosure sale date is currently scheduled . . . . However, your mortgage loan is currently being reviewed for possible payment assistance . . . ." Finally, servicer never provided borrower a written denial. Proceeding with the scheduled sale then, would violate HBOR's dual tracking statute. The court found "at least serious questions" regarding the completeness of borrower's application and granted the preliminary injunction. Bond was set at borrower's previous monthly mortgage payments ($1,800), paid to a trust, not directly to servicer.

[59] This case originally appeared in our July 2014 Newsletter, where the court granted a TRO. Gilmore v. Wells Fargo Bank, N.A., 2014 WL 2538180 (N.D. Cal. June 5, 2014). This is the follow-up preliminary injunction hearing.

As long as the NMS is in place, a signatory that is NMS-compliant, with respect to the individual borrower bringing suit, is not liable for various HBOR violations, including dual tracking. CC § 2924.12(g). Here, servicer proffered three arguments invoking the NMS safe harbor, none of which worked. First, servicer argued its compliance with the NMS is more or less presumed, and that *borrower* bears the burden of proving servicer was *not* compliant. The court disagreed, rightly reading the HBOR safe harbor as an affirmative defense and NMS compliance to be proved by the servicer. Second, servicer argued it *was* compliant. The court found two possible NMS violations to defeat this argument: 1) servicer did not provide an online portal for borrower to check the status of his application; and 2) servicer dual tracked borrower by proceeding with foreclosure when he had submitted an application more than 37 days pre-sale. Finally, and somewhat uniquely, servicer "argue[d] that its compliance can only be determined according to the report issued by the [national NMS] monitor. . . . [and to] the extent that [HBOR] is interpreted to create a different standard of 'compliance' that is not in the NMS, . . . allowing California courts to interpret the NMS would invade the District of Columbia court's exclusive jurisdiction." This court disagreed with servicer's jurisdictional interpretation, finding HBOR's safe harbor provision crystal clear: "The plain meaning of that [safe harbor provision] demonstrates that a defendant must comply with the terms *with respect to the borrower in question*." There is no ambiguity to be interpreted. Further, the national NMS monitor "does not govern the administration of California law." The court quickly dispatched with servicer's NMS-related arguments.

Diversity Jurisdiction: Trustee's Nonmonetary Status & Amount in Controversy

Fisk v. Specialized Loan Servicing, LLC, 2014 WL 3687312 (C.D. Cal. July 24, 2014): A defendant may remove a state action to federal court based on diversity jurisdiction if the amount in controversy exceeds $75,000 and the claim(s) arise between citizens of diverse (different) states. Diversity jurisdiction requires *complete* diversity

between all opposing parties and the defendant bears the burden of showing that removal is proper. Here, a California citizen brought state HBOR claims against her servicer and the foreclosing trustee. Servicer, a citizen of Delaware and Colorado, removed the case to federal court. The complaint identified trustee as a Texas company "but [did] not provide any further allegations regarding its citizenship." Nor did servicer "elaborate" on trustee's citizenship in the notice of removal or their opposition to borrower's motion to remand. In sum, servicer did not prove complete diversity between the borrower and trustee. The court also rejected servicer's argument that trustee's citizenship "is irrelevant for jurisdiction purposes" because trustee filed an uncontested declaration of nonmonetary status. Rather, the court found, such entities are still bound by any nonmonetary aspects of the judgment, and "the citizenship of [trustee] may not be ignored for diversity purposes because it has filed a Declaration of Nonmonetary status." Even if diversity *had* been established, the court found servicer had failed to show, by a preponderance of the evidence, that the amount in controversy exceeded $75,000. Servicer argued the value of the subject property currently in foreclosure (but not yet sold) should constitute the amount in controversy. While that valuation may be accurate for cases where borrowers seek to quiet title or rescind their loan, borrower here seeks damages "in an unspecified amount" and injunctive relief related to her HBOR claims. As such, servicer has not proven that the amount in controversy exceeds the statutory requirement. The case was remanded.

Diversity Jurisdiction: Filing Notice of Removal Required for Removal to Take Effect

Roberts v. Greenpoint Mortg. Funding, 2014 WL 3605934 (C.D. Cal. July 22, 2014): A defendant may remove a state action to federal court if the federal court has subject matter jurisdiction ("SMJ") over the matter. Federal courts can exercise SMJ in two ways: 1) over a federal claim; or 2) over a state claim arising between citizens of diverse (different) states. If it appears, at any time before final judgment, that the federal court lacks SMJ, that court must remand

the case to state court. Diversity jurisdiction requires *complete* diversity between all opposing parties and the defendant bears the burden of showing that removal is proper. Here, a California borrower brought state law claims in state court against his servicer and the trustee conducting the foreclosure sale, a California company. As allowed by California law, trustee filed a Declaration of Non–Monetary Status under CC 2924l. Servicer then removed the case to federal court based on diversity, arguing that trustee's California citizenship was irrelevant to the court's diversity analysis because the Declaration rendered trustee a "nominal" party. Borrowers, however, filed a timely objection to the Declaration *before* servicer filed its notice of removal with the state court, a necessary part of making a removal effective. And because original federal jurisdiction must exist *at the time removal became effective*, borrower's timely objection thwarted servicer's removal attempt. Relatedly, borrower's objection renders trustee's participation in the action necessary, and its citizenship an indispensable part of the court's diversity analysis. Failing to find complete diversity, then, the court granted borrower's motion to remand.

Viable Pre-NOD Outreach and UCL Claims; Failed "Authority to Foreclose" Claim; Dual Tracking Claim Must Assert Specific Facts to Support "Complete" Application

Woodring v. Ocwen Loan Servicing, LLC, 2014 WL 3558716 (C.D. Cal. July 18, 2014): Servicers must contact (or diligently attempt to contact) borrowers at least 30 days before recording an NOD to assess the borrowers' financial situation and explore foreclosure alternatives. Servicers must include a declaration of their compliance with this pre-NOD outreach requirement with the recorded NOD. Here, servicer's NOD declaration attested to its compliance. Borrower, however, specifically alleged that servicer never contacted her or made efforts to contact her. At the pleading stage, this clear factual contradiction was enough to defeat servicer's motion to dismiss. Borrower's multiple loan modification applications did not change the court's calculus because borrower also alleged servicer "failed to respond meaningfully" to these

applications. There was no pre-NOD discussion, in other words. Finally, servicer's continual postponement of the foreclosure sale does not leave borrower without a remedy. Both a sale postponement and a servicer's compliance with the statute—*the actual pre-NOD outreach*—are essential parts of a CC 2923.5 remedy. Servicer has made no attempts to discuss foreclosure alternatives with borrower, so it has yet to remedy its statutory violation. The court denied servicer's MTD.

CC 2924(a)(6) restricts "the authority to foreclose" to the beneficiary under the DOT, the original or properly substituted trustee, or a designated agent of the beneficiary. When a substitution of trustee occurs after an NOD is recorded, but before an NTS is recorded, servicers must mail a copy of the substitution to anyone who should receive a copy of the NOD, and include an affidavit of compliance with this requirement. CC § 2934a. Here, the servicer mailed a copy of the substitution of trustee, and an affidavit, to all relevant parties prior to recording the NTS. The court therefore dismissed borrower's CC 2924(a)(6) claim.

Servicers may not move forward with foreclosure while a borrower's complete, first lien loan modification is pending. The "completeness" of an application is determined by the servicer. CC § 2923.6(h). Here, borrower alleged she had "submitted 'a multitude of complete' first lien loan modification applications within the meaning of [CC] 2923.6(c)" to her servicer. She did not provide, however, further factual support such as the dates of her submissions or any documents showing that servicer deemed her applications "complete." The court dismissed borrower's dual-tracking claim but granted her leave to amend to allege specific facts supporting her complete application claim.

To have UCL standing, a borrower must suffer an injury-in-fact and lost money or property as a result of alleged unfair competition. Here, borrower alleged servicer's failure to engage in pre-NOD outreach caused her to "suffer[ ] 'pecuniary loss' . . . due to the imposition of 'unjustifiable foreclosure fees.'" Although an actual foreclosure sale has not yet occurred, this court concluded that the initiation of foreclosure

proceedings satisfies the injury-in-fact requirement and confers UCL standing. The court denied servicer's MTD.

Breach of Permanent Modification, Damages

Le v. Bank of New York Mellon, 2014 WL 3533148 (N.D. Cal. July 15, 2014): To allege breach of contract, a borrower must show, *inter alia*, the existence of a contract and damages. Here, borrower alleged servicer sent him a Loan Modification Agreement that permanently modified his mortgage, requiring interest-only payments for ten years and establishing a stable interest rate for seven years. Borrower signed and returned the agreement to servicer and commenced making modified payments. Soon after, servicer sent borrower letters referring to significant arrears and a higher monthly payment. Over a year after one of borrower's early modified payments, servicer returned the payment as insufficient. Borrower applied for subsequent modifications until finally a new servicer initiated foreclosure proceedings. Borrower brought contract-related claims against the original servicer, which the court agreed were valid. The Loan Modification Agreement was a contract with specific terms and borrower had adequately pled damages. Servicer's modification breach directly caused the current foreclosure proceedings – the NOD referred to a default on *principal* and interest and, under the agreement, borrower was only required to pay *interest* during the artificial default period. The default, then, would not exist absent servicer's failure to accept borrower's modified payments. Nor are damages limited to borrower's returned payment, as servicer argued. Instead, borrower lost the stability of his interest rate, accrued late fees, and damaged his credit. Borrower's default alone, over $200,000, constitutes damages because servicer caused the default. Lastly, borrower's arrears likely "hindered" is attempts at other modifications. The court denied servicer's motion to dismiss borrower's contract-related claims.

Servicing Transfer Notice Requirements under TILA: Equitable Tolling, Actual & Statutory Damages

Vargas v. JP Morgan Chase Bank, N.A., __ F. Supp. 2d __, 2014 WL 3439062 (C.D. Cal. July 15, 2014): TILA requires any new creditor or assignee of a debt to notify the borrower in writing of the transfer or assignment of a loan. Borrowers have a private right of action to recover damages for violations of this TILA provision, but must bring their claims within one year of the violation. This statute of limitations is subject to equitable tolling, however, in limited circumstances. A borrower must allege specific facts explaining his failure to discover the violation within the statutory period. Here, borrower's loan was transferred in 2011 without proper notice. Borrower did not file his TILA claim until 2014, arguing the SOL should toll as he was unaware of assignee's claimed ownership interest because he did not receive the required copy of the assignment. Further, he argued he was not obliged to check the recorder's office for evidence of any transfer. Essentially, borrower alleged the violation *itself* constituted the conditions necessary for equitable tolling. The court disagreed, noting that "the violation and tolling are not one and the same." Tolling the SOL whenever a borrower alleged improper disclosures would effectively render the SOL meaningless. The court granted servicer's MTD on the SOL issue.

A transferee servicer (assignee) must notify the borrower of a loan's transfer, in writing, within 30 days. 15 U.S.C. § 1641(g). To recover actual damages for violations of this TILA provision, borrowers must show they detrimentally relied on the failed disclosure. They must, in other words, demonstrate how knowledge of the transfer would have resulted in a benefit to them, or conversely, how their *lack* of knowledge of the transfer proved detrimental. Here, borrower alleged his loan was assigned in 2013 (a separate assignment from the 2011 transfer, discussed above) without proper notice. He further claimed proper notice would have given him ample time to protect his "property interests." The court disagreed; borrower failed to demonstrate a causal connection between the transferee servicer's failure to disclose the transfer and borrower's property interests. Borrower is entitled to

statutory damages, however. While acknowledging the split among district courts as to whether a borrower must plead actual damages to also recover statutory damages, the court followed central district precedent and allowed borrower's independent recovery of statutory damages under a plain reading interpretation of 15 U.S.C. § 1640.

Valid Former CC 2923.5 Claim with No Pending Sale

Tavares v. Nationstar Mortg., LLC, 2014 WL 3502851 (S.D. Cal. July 14, 2014): Former CC 2923.5 required servicers to contact borrowers (or to diligently attempt to contact borrowers) to discuss their financial situation and possible foreclosure options and to then wait 30 days before filing an NOD. The only available remedy was a postponement of the foreclosure sale to allow for the statutorily required discussion. Here, borrowers alleged servicer made no actual or attempted contact prior to recording the NOD. The court accepted this allegation at the pleading stage and denied servicer's motion to dismiss. In so doing, the court rejected servicer's arguments that: 1) its NOD declaration, subject to judicial notice, establishes CC 2923.5 compliance; 2) the five-year, continual postponement of the trustee's sale renders borrowers' claim without a remedy; and 3) a computer printout of a letter allegedly sent to borrowers shows servicer's CC 2923.5 compliance. On the last point, the court pointed out that nothing in the printout indicates that the letter was actually sent or received by borrowers.

Diversity Jurisdiction: Timing of Trustee's Nonmonetary Status Filing & Meaning of a "Nominal" Party

Pardo v. Sage Point Lender Servs., LLC, 2014 WL 3503095 (S.D. Cal. July 14, 2014): A defendant may remove a state action to federal court based on diversity jurisdiction if the claim(s) arise between citizens of diverse (different) states. The defendant bears the burden of showing that removal is proper and "all grounds for removal must be stated in the notice of removal." In evaluating diversity, federal courts "disregard nominal . . . parties and [evaluate diversity] jurisdiction

only upon the citizenship of real parties to the controversy." In the foreclosure context, CC 2924l allows trustees to file a Declaration of Nonmonetary Status," basically excusing them from the lawsuit. Trustees are therefore frequently considered "nominal" parties. Here, a Californian borrower brought state-law claims against the foreclosing trustee, also a "citizen" of California. Evaluating the parties' diversity, the court analyzed whether the trustee's nonmonetary status rendered it a nominal party, which would have allowed the court to discount its Californian citizenship for diversity purposes and ensured removal. The court agreed with borrower, however, that trustee had *not* met its removal burden for three reasons. First, the court granted that filing a Declaration of Nonmonetary Status *may* grant a trustee nominal status, but only if filed properly. Under CC 2924l, fifteen days must pass—without plaintiffs' objection—before the Declaration is effective. Here, defendants removed the case to federal court a mere six days after trustee filed its Declaration, which therefore had "no effect at the time of removal." Second, just because trustees are "often" considered nominal parties does not mean they should be considered such in *every* instance. Here, for example, borrower "actually su[ed trustee] for wrongdoing, not merely as a formal party in order to facilitate collection." Unlike true nominal parties then, this trustee has something "at stake" in the litigation. Finally, the court refused to consider trustee's additional arguments not included in the notice of removal. The court remanded the case.

Borrowers Fraudulently Induced to Sign Unfavorable Modification with Promises of a Better Mod in the Future; Equitable Tolling Analysis on Promissory Estoppel Claim; UCL Causation

Peterson v. Wells Fargo Bank, N.A., 2014 WL 3418870 (N.D. Cal. July 11, 2014): Fraud claims have a heightened pleading standard that requires borrowers to allege "the who, what, when, where, and how" of the alleged fraudulent conduct. Here, borrower pled his servicer fraudulently induced him to agree to a financially burdensome "modification" agreement, promising that a better modification would

be forthcoming in one year and would "negate" the unfavorable terms of the first modification. No new modification was granted and borrower now faces foreclosure. Borrower met the heightened pleading standard: 1) he identified the servicer representative who made the fraudulent promise by name; 2) the month and year of the promise; 3) where the promise was made (over the phone); and 4) the "what" and "how" –the exact representations servicer made and how they never came to pass. The court also found that borrower had adequately pled damages resulting from servicer's fraudulent promise: borrower's attorney's fees and accumulating late fees. The court denied servicer's motion to dismiss borrower's fraud claim.

There is a two-year statute of limitations for promissory estoppel claims, unless the borrower can take advantage of equitable tolling. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: 1) that he has been pursuing his rights diligently; and 2) that some extraordinary circumstances stood in his way." Here, borrower alleged that servicer reneged on its promise more than two years before borrower initiated his suit. He argued for equitable tolling, however, because servicer kept stringing him along after its initial denial of a second loan modification, urging borrower to "try again later." The court accepted servicer's argument that these representations were statutorily required because servicer was "obligated to continue to consider borrowers for loan modification options as long as programs remain available." Borrower could not show, then, that extraordinary circumstances stood in his path toward litigation. The court granted servicer's motion to dismiss borrower's promissory estoppel claim as time-barred.

Viable UCL claims must establish that the borrower suffered economic injury *caused by* defendant's misconduct. Here, borrower's valid fraud claim served as a basis for their "unlawful" prong UCL cause of action. Further, this court adopted the view that borrowers may allege "causation more generally" at the pleading stage. Here, for example, borrower alleged he spent financial resources improving the property, relying on servicer's promise that a better modification would be

granted in the near future. At the pleading stage, this allegation was enough to establish UCL standing. The court denied servicer's MTD.

Debt Collector, as Third-Party Contractor and Agent for HOA, May be Liable under FDCPA & UCL for Davis-Stirling Violations

Hanson v. JQD, LLC, 2014 WL 3404945 (N.D. Cal. July 11, 2014):[60] California's Davis-Stirling Act "regulates a [home owner association's (HOA)] ability to collect debts owed by its members." Specifically, HOAs may not "impose or collect an assessment or fee that exceeds the amount necessary to defray the costs for which it is levied," or refuse a homeowner's partial debt payment. Further, an HOA may only recover "reasonable costs incurred in collecting the delinquent assessment," and capped late fees and interest. In other words, an HOA cannot *profit* from debt-collection. California courts have interpreted the Act to mean: 1) while an HOA cannot profit from debt collection, third-party debt-collectors hired by an HOA are not so restricted; and 2) a debt-collector's fees, while legal, cannot "exceed the [HOA's] costs." Here, the HOA hired a third-party debt-collector to recover homeowner's delinquent assessments. The debt-collector provided "*No Cost* Non-Judicial Collections" (emphasis added), charging homeowners directly for any costs associated with collecting delinquent fees. In this particular debt-collection attempt, debt-collector charged homeowner "collection fees," "vesting costs," "management collection costs" and "other charges." These fees would have clearly violated the Davis-Stirling Act had the *HOA* charged them. On a previous motion to dismiss, the court decided that a *debt-collector* participating in these activities, as an agent for the HOA, could also violate the Act. The court concluded that a third-party debt collector's rights cannot exceed those of the HOA that hired them because the debt-collector has no independent rights against the homeowner. The "right" to impose debt

[60] This case originally appeared in our March 2014 Newsletter as *Hanson v. Pro Solutions*, 2014 WL 644469 (N.D. Cal. Feb. 19, 2014). In that case, the court dismissed homeowners' FDCPA and UCL claims with leave to clarify the distinct aspects of the debt-collector's activities that violated the FDCPA and UCL, vis-à-vis the constraints imposed on the HOA by the Davis-Stirling Act.

collection fees stems directly from the HOA's right to do so. On this second motion to dismiss, the court echoed its prior reasoning: "If the Davis-Stirling Act prohibits an HOA from engaging in a particular debt collection practice, the [HOA] cannot circumvent the act's protections simply by employing [the third-party debt collector] as its agent." The court found all of debt-collector's business practices at issue here to violate the Davis-Stirling Act and provide the basis for homeowner's FDPCA and UCL claims. Specifically, debt-collector had charged homeowner fees "never incurred" by the HOA; charged prohibited late fees and interest rates; initiated foreclosure when homeowner owed less than the statutory minimum ($1,800); refused to accept homeowner's partial payments;[61] and failed to apply homeowner's payments to her assessment debt. The court denied debt-collector's motion to dismiss homeowner's complaint.

Preliminary Injunction & Bond: Denied on "Document & Submit" Requirements, Granted on SPOC Claim

Shaw v. Specialized Loan Servicing, LLC, 2014 WL 3362359 (C.D. Cal. July 9, 2014): In the Ninth Circuit, a borrower seeking a preliminary injunction must show, *inter alia*, at least serious questions going to the merits of their claim: here, a dual tracking claim. Dual tracking protections are afforded to borrowers who submit a second modification application if they can "document" and "submit" to their servicer a "material change in financial circumstances." Here, borrower agreed to a permanent modification pre-HBOR and then applied for a second modification post-HBOR. Though borrower alleged in his ex parte preliminary injunction application that he was discharged from bankruptcy, lost income and health benefits, and that he submitted these financial changes to his servicer, he did not provide evidence that he *actually submitted specific documentation* to his servicer. As other courts have found, this court reasoned that alleging a change in financial circumstances in a complaint (or PI application) does not

[61] *See* Huntington Cont'l Town House Ass'n, Inc. v. JM Tr., 222 Cal. App. 4th Supp. 13 (2014) (summarized in our February 2014 Newsletter).

fulfill the "document" and "submit" requirements of CC 2923.6(c). The court denied borrower a PI based on his dual tracking claim.

HBOR requires servicers to provide a single point of contact (SPOC) "[u]pon request from a borrower who requests a foreclosure prevention alternative." CC § 2923.7(a). SPOCs may be an individual or a "team" of people and have several responsibilities, including informing borrowers of the status of their applications and helping them apply for all available loss mitigation options. Here, borrower pled he specifically requested a SPOC "more than once," and was shuffled from one unknowledgeable representative to another. On several occasions, he could not even speak with a person, but was sent directly to an automated recording. No one could provide him with the status of his loan or modification application. These allegations sufficiently stated a SPOC claim. After finding irreparable harm, that the balance of hardships tips in borrower's favor, and the public interest of allowing homeowners "the opportunity to pursue what appear to be valid claims before they are evicted from their homes," this court granted borrower's request for a preliminary injunction. The court set the bond at borrower's monthly mortgage payments under his first, pre-HBOR modification level.

A SPOC "Team" Must Still Perform Statutory Duties; Rescinding an NOD Cures Dual Tracking Violation

Diamos v. Specialized Loan Servicing, LLC, 2014 WL 3362259 (N.D. Cal. July 7, 2014): HBOR requires servicers to provide borrowers with a "single point of contact," or SPOC, during the loan modification process. SPOCs may be an individual or a "team" of people and have several responsibilities, including: facilitating the loan modification process and document collection, possessing current information on the borrower's loan and application, and having the authority to take action, like stopping a sale. Importantly, *each member* of a SPOC team must fulfill these responsibilities. Here, borrower was encouraged to submit four loan modification applications by several servicer representatives and received "conflicting information by multiple

[servicer] employees." The court disagreed with servicer that borrower had to allege these representatives were *not* a SPOC team to successfully state a SPOC claim. Rather, borrower need only plead "sufficient facts to reasonably support the inference that the person she spoke with regarding her loan modification were not members of a team." Borrower adequately pled those facts: none of the representatives she spoke with had the "'knowledge and authority' to perform the required statutory responsibilities." No one could provide her with a "straight answer" on the status of her application(s). The court dismissed the complaint on jurisdiction grounds, but allowed that if borrower can correct those pleading issues, she has a valid SPOC claim.

"A mortgage servicer . . . shall not be liable for any [HBOR] violation that it has corrected and remedied prior to the recordation of a trustee's deed upon sale . . . ." CC § 2924.12(c). Here, servicer improperly recorded an NOD while borrower's first lien loan modification application was pending, violating HBOR's dual tracking provision. Servicer argued their rescission of the NOD mooted borrower's dual tracking claim and the court agreed. "By rescinding the [subject] notice of default, [servicer] is currently free of liability stemming from recording that [NOD]." This holding provides support for advocates arguing that rescission of an NOD or NTS is necessary before a servicer may move forward with the foreclosure process—simply denying a borrower's modification and then moving ahead with sale is insufficient to "correct and remedy" an invalid NOD or NTS.

A National Bank May Invoke HOLA to Defend its Own Conduct

Hayes v. Wells Fargo Bank, N.A., 2014 WL 3014906 (S.D. Cal. July 3, 2014): The Home Owners' Loan Act (HOLA) and the (now defunct) Office of Thrift Supervision (OTS) governed lending and servicing practices of federal savings banks. HOLA and OTS regulations occupied the field, preempting any state law that regulated lending and servicing. Here, borrower brought a UCL claim against her servicer, a national bank, alleging improper escrow fees. Normally,

national banks are regulated by the National Banking Act and Office of the Comptroller of the Currency (OCC) regulations. Under those rules, state laws are only subject to conflict preemption and stand a much better chance of surviving a preemption defense. Borrower's loan originated with a federal savings association, which then assigned the loan to Wachovia, which merged with Wells Fargo, a national bank. Rather than apply the HOLA preemption analysis to a national bank without evaluating that logic, this court acknowledged the "growing divide in the district courts' treatment of this issue" and its three different options: 1) HOLA preemption follows the loan, through assignment and merger; 2) national banks can never invoke HOLA; or 3) application of HOLA should depend on the nature of the conduct at issue—the federal savings association's conduct can be defended with HOLA preemption, but the national bank's conduct cannot. Here, the court chose the first option, relying on the reasoning in *Metzger v. Wells Fargo Bank, N.A.*, 2014 WL 1689278 (C.D. Cal. Apr. 28, 2014). In a footnote, the court summed up the basis the *Metzger* court's reasoning as: the OTS's "opinion letters, the rationale behind the HOLA preemption regulation, and the fact that [borrowers] agreed that the loan would be governed by HOLA" at loan origination. Applying HOLA field preemption, the court found borrower's UCL claim preempted because it was based in improper escrow allegations, and escrow accounts are specifically named as preempted in the OTS regulations. The court dismissed borrower's action.

FCRA & CCRAA: Borrower Sufficiently Pled "Inference" That Servicer Misreported Credit Information, Damages

Giessen v. Experian Info. Solutions Inc., 2014 WL 4058419 (C.D. Cal. July 2, 2014): The Federal Credit Reporting Act (FCRA) requires that, upon notice from a credit reporting agency (CRA), "furnishers" of credit information (including servicers), "modify, delete, or permanently block the reporting of information the furnisher finds to be 'inaccurate or incomplete.'" California's Consumer Credit Reporting Agencies Act (CCRAA) gets at the same issue: "[a] person shall not furnish information on a specific transaction or experience to any

consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." This case involves somewhat of a twist to the usual fact-pattern: borrowers alleged their servicer claimed it actually complied with the FRCA and CCRAA by notifying CRAs that borrowers were not actually late on their mortgage payments. Servicer claimed the *CRA* improperly continued to report borrower's loan delinquent. Borrowers disagreed, alleging that servicer *must* have miscommunicated with the CRAs, or failed to conduct a "reasonable investigation" into the credit dispute. The court agreed with borrowers: although their complaint was "modest in detail," borrowers created enough of an inference that servicer breached one or more of its statutory duties and continued to report the loan delinquent after borrowers disputed the report. Therefore, the court declined to dismiss borrowers' FCRA and CCRAA claims. The court also rejected servicer's argument that borrowers' alleged emotional distress cannot constitute damages. Damages for mental and emotional distress are recoverable under both the FCRA and CCRAA, and borrowers need not allege they were denied credit or that inaccurate information was sent to third parties to recover those damages. Both statutes also provide for punitive damages, appropriate for the reckless behavior alleged here. The court found borrower's allegations sufficient to state a claim for punitive damages.

Viable Contract Claims for Failure to Provide Foreclosure Notices & Reinstatement Figure

Siqueiros v. Fed. Nat'l Mortg. Ass'n, 2014 WL 3015734 (C.D. Cal. June 27, 2014): To state a breach of contract claim, a borrower must allege: 1) the existence of a contract; 2) borrower's performance or excused nonperformance; 3) servicer's breach; and 4) resulting damages. The breach must be "a substantial factor in causing the damages." Here, borrower alleged her servicer breached her DOT by failing to provide her with an NOD or NTS before the foreclosure sale. Under the DOT, those notices were required to be "delivered to Borrower's notice address" or to "the Property Address," and "deemed to have been given to Borrower when mailed by first class mail."

Servicer mailed the NOD and NTS to an address completely unrelated to the property or to borrower (notices were also faxed to a number unconnected to borrower). As a result, borrower discovered the foreclosure sale after it occurred. The court concluded that the servicer's alleged failure to send the notices to the borrower's address was "a substantial factor" in causing her damages: the loss of her home. The court rejected servicer's argument that borrower's pre-notice default absolved servicer of its obligation to provide foreclosure notices. The court also rebuffed servicer's argument that the DOT only required it to "mail[ ] something somewhere." Borrower also pled a second successful breach claim related to servicer's failure to timely provide her with a reinstatement amount. The DOT required servicer to provide a reinstatement figure "five days before sale of the Property," allowing borrower an opportunity to cure the default and avoid foreclosure. Servicer, however, refused to give her the exact amount until it was too late. The court agreed with borrower that this allegation sufficiently stated a breach of contract claim. Accordingly, the court denied servicer's motion to dismiss borrower's breach of contract claim to the extent it related to servicer's failure to provide foreclosure notices and a reinstatement figure.

The implied covenant of good faith and fair dealing is read into every contract and prevents one party from depriving the other of the benefits imparted by the contract. To distinguish it from a straight breach of contract claim, the good faith claim must allege "something beyond breach of the contractual duty itself." Here, the court found servicer's failure to give borrower a timely reinstatement figure provided the basis for her viable good faith and fair dealing claim. Servicer's failure frustrated borrower's ability to benefit from the DOT by reinstating her loan and avoiding foreclosure. The court disagreed with servicer that, in the absence of a clear reinstatement amount from servicer, borrower should have paid the amount listed in the NOD. That was impossible in this case, where borrower never received an NOD. Accordingly, the court denied the motion to dismiss borrower's good faith and fair dealing claim, but only as it related to the reinstatement figure.

Recent Regulatory Updates

Freddie Mac Single-Family Seller/Servicer Guide Bulletin 2014-14 (July 15, 2014) (effective dates as noted)

Mortgage Modification Settlements (effective December 1, 2014)

New automated settlement process. As of August 25, 2014, servicers may submit required settlement data through the new "Loan Modification Settlement" screen in Workout Prospector for modifications of conventional first lien Freddie Mac-owned or guaranteed mortgages. This submission process will be required as of December 1, 2014.

Mortgage modification signature requirements. A servicer and *any* borrowers may agree to extend, modify, forbear, or make any accommodations with regard to a Fannie Mae/Freddie Mac Uniform Security Instrument or the Note without the co-signer's "signature or consent." This provision only applies, however, if the Security Instrument originally signed by the co-signer included a provision permitting this action.

Transfers of Ownership and Assumptions (effective September 15, 2014)

Chapter 60 of the Single-Family Seller/Servicer Guide has been updated and reorganized. It now contains more detailed requirements relating to transfers of ownership: (1) protected by federal law restricting the exercise of a due-on-transfer clause (the Garn-St. Germain Act); (2) where servicers must ascertain whether a mortgage transferee is creditworthy; and (3) where the transferee seeks to assume the mortgage. These changes respond to the "widows & orphans" problem whereby a borrower's heir or ex-spouse inherits or receives title to the property (through death or divorce) and cannot obtain a loan modification because they are not the "borrower" on the note.

FHA, VA, or RHS Insured Mortgages (effective September 15, 2014)

Updated requirements for filing claims for insurance or guaranty benefits. If the claim filing for a mortgage is subject to a recourse obligation, including indemnification, the servicer must file the claim in its own name so that the claim payment will be paid directly to the servicer. If the claim filing for a mortgage is not subject to a recourse obligation or indemnification, the servicer must submit the claim in Freddie Mac's name so that payment will go directly to Freddie Mac.

Attorney Fees and Costs (effective October 20, 2014)

Freddie Mac has updated it requirements for reimbursing attorney fees and court costs where pre-foreclosure mediation is required by state or local law, as well as mediation manager and/or coordinator fees.

Foreclosure Sale Bidding

Where a first lien mortgage is not covered by mortgage insurance or when state law does not mandate that an appraisal report be used to set the credit bid, servicers must obtain a bid through the Freddie Mac Service Loans application. If Freddie Mac updates or changes the credit bid, it will inform the servicer before the foreclosure sale date. Servicers are required to cooperate with Freddie Mac and ensure that foreclosure counsel receives the updated information so as not to delay, cancel or stop the sale. Where the servicer is unable to give the updated information to foreclosure counsel in a timely manner, or where foreclosure counsel could not use the updated bidding instructions, the servicer must provide documentation of such fact in the file. A foreclosure sale must not be delayed due to a servicer's receipt of an updated credit bid.

APPELLATE DIVISION
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

OPES INVESTMENTS, INC., Plaintiff and Respondent, vs. BORAN YUN and JONATHAN KIM, Defendants and Appellants.	CASE NO. 30-2013-661818 APPEAL from the SUPERIOR COURT NORTH JUSTICE CENTER HON. FREDERICK P. AGUIRRE, JUDGE TRIAL COURT CASE NO. 30-2013-630158

Defendants Boran Yun and Jonathan Kim appeal the trial court's grant of Plaintiff Opes Investments, Inc.'s motion for summary judgment in an unlawful detainer action against them.

We reverse.

Relevant Facts and Proceedings

On February 13, 2013, Plaintiff Opes Investments, Inc. filed an unlawful detainer complaint against Defendant Boran Yun. On February 20, 2013, Defendant Yun filed an answer.

On March 4, 2013, Jonathan Kim, identifying himself as a defendant, demurred to the complaint. On March 13, 2013, the trial court overruled Defendant Kim's demurrer and thereafter, Defendant Kim filed an answer.

On June 6, 2013, Plaintiff Opes filed a summary judgment motion. Defendants Yun and Kim opposed the motion. The trial court granted that motion on June 13, 2013. Judgment was entered in favor of Plaintiff Opes for possession, $12,100 in holdover damages and costs.

Standard of Review

A trial court's ruling on a motion for summary judgment in an unlawful detainer action is reviewed de novo. (*ABCO, LLC v. Eversley* (2013) 213 Cal.App.4th 1092, 1098.)

Discussion

A party is entitled to summary judgment if there is no triable issue of material fact and the party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) Where a plaintiff seeks summary judgment, it must produce admissible evidence on each element of a cause of action entitling it to judgment. (Code Civ. Proc., § 437c, subd. (p)(1).) The party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if it carries its burden of production, it causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. (*Nativi, supra*, 223 Cal.App.4th at p. 288.)

Unlawful detainer actions are authorized and governed by state statute. (*Larson v. City & County of San Francisco* (2011) 192 Cal.App.4th 1263, 1297.) The statutory scheme is intended and designed to provide an expeditious remedy for the recovery of possession of real property. (*Ibid.*)

Historically, a cause of action for unlawful detainer was available only to a landlord against his tenant. (*Bank of New York Mellon v. Preciado* (2013) 224 Cal.App.4th Supp. 1, 9.) The remedy has been expanded by statute to allow one who acquires ownership of real property through foreclosure to also evict by a summary procedure. (*Ibid.*; *see* Code Civ. Proc., § 1161a, subd. (b)(3).)

As a prerequisite to the filing of an unlawful detainer action, a tenant must be served with either a 3, 30, or 90 days' notice, depending on the individual's status as a tenant. (*Bank of New York Mellon v. Preciado, supra*, 224 Cal.App.4th Supp. at p. 6.) The previous owner of a property that has been sold at a non-judicial foreclosure sale must be given a three-day written notice to quit. (Code Civ. Proc., § 1161a, subd. (b).) A tenant or subtenant in possession of a rental unit under a month-to-month lease or a periodic tenancy at the time the property is sold in

foreclosure must be given a 90-day written notice to quit. (Code Civ. Proc., § 1161b, subd. (a).)

In an unlawful detainer action brought pursuant to Code of Civil Procedure section 1161a(b)(3), the plaintiff must show that it acquired the property at a regularly conducted sale and thereafter duly perfected its title. (*Bank of New York Mellon v. Preciado*, *supra*, 224 Cal.App.4th Supp. at p. 9.) Where the plaintiff in the unlawful detainer action is the purchaser at a trustee's sale, it need only prove a sale in compliance with the statute and deed of trust, followed by purchase at such sale, and the defendant may raise objections only on that phase of the issue of title. (*Ibid.*)

The statute with which a post-foreclosure unlawful detainer plaintiff must prove compliance is Civil Code section 2924. (*Ibid.*) Under a deed of trust, power of sale upon the trustor's default vests in the trustee. (*Id.* at p. 10.) Therefore, in order to prove compliance with Civil Code section 2924, a plaintiff must necessarily prove the sale was conducted by the trustee authorized to conduct the trustee's sale. (*Ibid.*)

Plaintiff Opes failed to meet its initial burden of showing that it acquired the subject property, that the foreclosure sale complied with Civil Code section2924 and that it gave the requisite statutory written notice to Defendant Kim. In addition, there is a triable issue of fact regarding whether Plaintiff Opes gave the requisite statutory written notice to Defendant Yun.

Plaintiff Opes' complaint for unlawful detainer was brought under Code of Civil Procedure section 1161a. The complaint alleged that: (1) on or about February 7, 2013, a property at 5582 Pineridge Drive in La Palma ("Property") was sold by way of a non-judicial foreclosure sale in accordance with Civil Code section 2924 wherein title became vested with Plaintiff Opes; (2) that same day, Plaintiff Opes served Defendant Yun a three-day notice to quit; and (3) Defendant Yun has refused to deliver possession of the Property.

To show that Plaintiff Opes acquired the Property at a non-judicial foreclosure sale, Plaintiff Opes submitted a declaration by Hayden Pak. Mr. Pak stated that Plaintiff Opes is the owner of the Property and that the Property was purchased at a foreclosure sale.

Defendants Yun and Kim objected to the portion of Mr. Pak's declaration which stated that Plaintiff Opes is the owner of the Property on, among other grounds, that it lacked foundation/ personal knowledge. There is no indication in the minutes of the trial court's ruling on the summary judgment motion that it considered and ruled on Defendants Yun and Kim's evidentiary objections. The objection has merit and should have been sustained. Mr. Pak's

declaration did not set forth any facts to show how he knew that Plaintiff Opes was the owner of the Property. Mr. Pak began his declaration by stating that he had "a beneficial interest in the trust" and was "the custodian of, and is personally familiar with, the plaintiff's books and records that relate to the subject premises". Mr. Pak did not explain what trust he was referring to or how the trust related to, or was involved with, Plaintiff Opes. Mr. Pak further stated that "the records of plaintiff show that on 2/07/13, the plaintiff purchased the subject property at a foreclosure sale" and attached a copy of the trust deed as Exhibit A. However, in the same paragraph, Mr. Pak stated that he was the bona fide purchaser for value of the subject property.

The only other piece of evidence submitted by Plaintiff Opes to show it acquired the Property was a copy of the trustee's deed upon sale. The trustee's deed shows that the Property was sold to "Opes Investments". The plaintiff identified in the complaint is "Opes Investments, Inc.", a corporation. While the names are nearly identical, Plaintiff Opes did not provide sufficient evidence to show that it is the "Opes Investments" identified in the trustee's deed upon sale. Mr. Pak's declaration lacked foundation to show that Plaintiff Opes owned the Property and he also stated that he was the bona fide purchaser for value. In sum, Plaintiff Opes failed to meet its initial burden of showing that it acquired the Property at the non-judicial foreclosure sale.

In addition, Plaintiff Opes failed to meet its initial burden of showing that the foreclosure sale of the Property complied with Civil Code section 2924. Plaintiff Opes' separate statement entirely failed to address that issue. It also did not present any evidence to address that issue. The only evidence Plaintiff Opes submitted were declarations by Mr. Pak and Plaintiff Opes' attorney, but neither declaration provide any facts to show that the sale complied with Civil Code section 2924.

Plaintiff Opes also failed to meet its initial burden of showing that it gave the requisite statutory written notice to Defendant Kim. Plaintiff Opes did not submit any evidence to show that it gave written notice to Defendant Kim. Furthermore, in opposition, Defendant Kim submitted evidence that he has resided at the Property since July 1, 2012 pursuant to a rental agreement and that the three-day notice to quit was never served on him, never received by him prior to the initiation of the unlawful detainer action and was never posted at the Property. He also submitted evidence that a 90-day notice was never served on him and he never received one.

Lastly, there is a triable issue of fact regarding whether Plaintiff Opes gave the requisite statutory written notice to Defendant Yun. Plaintiff Opes submitted evidence to show that, on February 7, 2013, its agent served upon "defendants, Boran Yun, a three (3) day notice to quit." Plaintiff Opes provided copies of the two written notices given but only one was legible. The declaration of service shows that a three-day notice to quit was posted at the property on February 7, 2013.

In opposition, Defendant Yun submitted evidence to show that the three-day notice to quit was never served on her, never received by her prior to the initiation of the unlawful detainer action, and was never posted at the Property. Defendant Yun's declaration raised a triable of fact regarding whether the statutory written notice was given by Plaintiff Opes.

In sum, Plaintiff Opes failed to meet its initial burden of showing that it acquired the Property, that the foreclosure sale complied with Civil Code section 2924 and that it gave the requisite statutory written notice to Defendant Kim. In addition, there is a triable issue of fact regarding whether Plaintiff Opes gave the requisite statutory written notice to Defendant Yun. Plaintiff Opes' motion for summary judgment should have been denied. Accordingly, the trial court's order granting the motion for summary judgment is reversed.

Deborah C. Servino

DEBORAH C. SERVINO, Presiding Judge

GLENN R. SALTER, Judge

PETER J. WILSON, Judge

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 07/28/2014 TIME: 09:00:00 AM DEPT: 54

JUDICIAL OFFICER PRESIDING: Raymond Cadei
CLERK: D. Ahee
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: C. Chambers

CASE NO: **34-2013-00152086-CU-OR-GDS** CASE INIT.DATE: 10/11/2013
CASE TITLE: **Pittell vs. Ocwen Loan Servicing LLC**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,11210630

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP
MOVING PARTY: Ocwen Loan Servicing LLC, One West Bank FSB
CAUSAL DOCUMENT/DATE FILED: Demurrer to 1st Amended Complaint, 04/22/2014

APPEARANCES

Nature of Proceeding: Hearing on Demurrer to First Amended Complaint

TENTATIVE RULING

Defendant Ocwen Loan Servicing LLC's ("Ocwen") and OneWest Bank, FSB's ("OneWest") (together, "Defendants'") Demurrer to Plaintiff Doris Pittell's First Amended Complaint ("FAC") is OVERRULED in part and SUSTAINED in part, with leave to amend.

Defendants' Request for Judicial Notice in support of the Demurrer and Request for Judicial Notice in support of the Reply are GRANTED. In taking judicial notice of the recorded land documents, the court accepts the fact of their existence, not the truth of their contents. (*Herrera v. Deutsche Bank Nat'l Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.)

This is a nonjudicial foreclosure case. Plaintiff alleges that her husband became terminally ill and passed away in 2012, which caused her to struggle making her monthly mortgage payments. She alleges that her servicer at the time, OneWest, advised her to fall three months behind on her mortgage payments to permit her to qualify for a loan modification, which she did. Plaintiff thereafter alleges that she submitted a complete loan modification application to OneWest and received notification on April 3, 2013, that she qualified for a trial period payment plan ("TPP"). Plaintiff alleges that she timely made her first two payments under the TTP, but that her second payment was returned for reasons unknown to Plaintiff. Plaintiff further alleges that her efforts to reach OneWest regarding the returned payment were unsuccessful, and on April 23, 2013, OneWest recorded a Notice of Default ("NOD"). Plaintiff then alleges that she received a notice that Ocwen was servicing her loan, and Ocwen instructed her to complete a new loan modification application. Ocwen then caused the recordation of a Notice of Trustee's Sale on September 16, 2013, setting the sale for October 18, 2013. (RJN Ex. E.) Plaintiff alleges she then completed a loan modification application and faxed it to Ocwen on October 2, 2013, but Ocwen refused to cancel the Trustee's Sale. Plaintiff filed the instant suit and moved for a temporary restraining order and preliminary injunction enjoining the sale of the property. The Court granted Plaintiff's request for a TRO on October 16, 2013 and Plaintiff's motion for a preliminary injunction on December 5, 2013.

Plaintiff brings two causes of action in her FAC, alleging that (1) Defendants violated the California Homeowners Bill of Rights ("HBR") when OneWest recorded the NOD and Ocwen scheduled the Trustee's Sale while her loan modifications were under review, and (2) Plaintiff entered into a TPP with OneWest (and Ocwen as successor-in-interest to the servicing rights of the subject loan), which Defendants then breached by not permanently modifying her loan and simultaneously recording a NOD. Defendants demur to both causes of action on the ground that they fail to state facts sufficient to constitute a cause of action.

First Cause of Action - Violation of the Homeowners Bill of Rights

Defendants' demurrer to the first cause of action is OVERRULED. Defendants argue that Plaintiff's first cause of action fails because: (1) the HBR does not require a servicer to rescind a NOD or cancel a pending trustee's sale while a loan modification application is pending, (2) the TPP was offered outside the loan modification process described in section 2923.6 because Plaintiff had been initially denied for a permanent modification and the TPP was thus an "alternate modification program" (Moving Mem. at 3), and (3) Plaintiff's application was submitted after the notice of sale was recorded.

Section 2923.6 prohibits a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording a notice of default or notice of sale, or conducting a trustee's sale while a complete loan modification application is pending. (Civ. Code sections 2923.6(c), (h).) The loan servicer may record a notice of default or sale, or conduct a Trustee's Sale after it makes a written determination that the borrower is not eligible for the first lien loan modification, and any appeal period has expired.

The Court finds, consistent with its analysis in its ruling granting Plaintiff's motion for a preliminary injunction, that Plaintiff has sufficiently stated a cause of action under section 2923.6(c). Civ. Code §2923.6(c) prohibits Defendants from conducting a Trustee's Sale while her complete loan modification is pending. Plaintiff alleges that she faxed her completed loan modification application to Ocwen on October 2, 2013, but that Ocwen refused to cancel the Trustee's Sale scheduled for October 18, 2013. (FAC, ¶¶ 15, 17.) Consequently, the timing of the recorded Notice of Sale does not effect Plaintiff's claim as Defendants contend, because Plaintiff alleges that Ocwen nonetheless pursued the sale after receiving Plaintiff's completed loan modification application, in violation of section 2923.6. Plaintiff has therefore stated a viable cause of action for violation of Civil Code section 2923.6(c).

Moreover, Defendants' attempt to distinguish between postponing and cancelling a sale does not effect the analysis. Regardless of whether the language in section 2923.6(c) prohibiting Defendants from "conducting a conducting a trustee's sale" requires postponing the sale or canceling the sale, Plaintiff pleads that Defendants did neither. Plaintiff's FAC alleges that Defendants scheduled the sale for October 18, 2013, and continued to pursue the sale in spite of her pending loan modification application. (FAC ¶ 20.) Indeed, Plaintiff ultimately sought relief from the Court to postpone the sale, filing the instant suit on October 11, 2013 and obtaining a TRO on October 16, just two days before the scheduled sale, and finally obtaining a preliminary injunction, which Defendants opposed, on December 5.

Based on the foregoing, Plaintiff has sufficiently plead a valid a cause of action under 2923.6, and the demurrer to the first cause of action is OVERRULED.

Second Cause of Action - Breach of Contract

Defendants' demurrer to the second cause of action is SUSTAINED with leave to amend. Defendants argue that Plaintiff fails to state a cause of action for breach of the TPP because (1) Plaintiff alleges she submitted her trial payments after the due dates required by the TPP, and (2) the TPP does not guarantee a permanent modification. The Court agrees that the TPP, attached as Exhibit A to Plaintiff's FAC, is not a contract for a permanent modification. (*See Thaler v. Household Finance Corp*. (2000) 80

Cal.App.4th 1093, 1101 (Court may consider facts properly subject to judicial notice on a demurrer and exhibits attached to the complaint.)) Thus, the basis of Plaintiff's breach of contract claim - that Defendants "breached the written contract by not permanently modifying Plaintiff's loan" - is insufficient to state a cause of action for breach of contract. (FAC ¶ 27.)

The TPP states that it is a "trial modification" that is the "first step towards qualifying for a final loan modification." (FAC Ex. A.) It further states: "After all trial payments are timely made and you have submitted all required documents your loan may be permanently modified." (*Id.*)(emphasis added.) The plain language of the TPP makes it clear that if Plaintiff timely makes her three trial payments and submits a completed loan modification application, Plaintiff may receive a permanent loan modification. Plaintiff does not allege that she timely made all three payments. Moreover, even if she did, the TPP does not promise that she will receive a permanent modification. On this basis, the Court finds that the TPP does not constitute a contract or promise for a permanent modification, and Plaintiff's breach of contract cause of action therefore fails.

In reaching this decision, the Court has considered the cases cited in Plaintiff's opposition, *West v. JPMorgan Chase Bank, N.A.* and *Corvello v. Wells Fargo, N.A.* (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, *Corvello v. Wells Fargo, N.A.* (9th Cir. 2013) 728 F.3d 878.) The Court finds these cases distinguishable. In *Corvello* and *West*, the Courts found that banks were required to offer permanent modifications to borrowers who completed their obligations under the TPPs, unless the banks timely notified those borrowers that they did not qualify for a HAMP modification. (*Corvello*, 728 F.3d at 883, citing *West.*) Here, as discussed above, Plaintiff does not allege that she completed her obligations under the TPP by timely submitting all three payments that the TPP required. (*See* FAC Ex. A.) Rather, Plaintiff alleges that she submitted two of the three payments, one of which was returned. (FAC ¶¶ 12, 13.) Consequently, the reasoning of *Corvello* and *West* do not apply.

Moreover, the analysis in *Corvello* is in part premised on the language of the TPP itself, which, in *Corvello*, expressly promised plaintiff a permanent modification if plaintiff complied with the terms of the TPP and if plaintiff's circumstances remained unchanged. (*Corvello*, 728 F.3d at 883.) Here, Plaintiff's TPP makes no such promise. Finally, the *West* court assessed a HAMP TTP, and in doing so looked outside the terms of the TPP itself to the HAMP guidelines in order to reach its holding. (*West*, 214 Cal.App.4th at 798.) Here, Plaintiff does not allege, and the TPP does not state, that it is a HAMP modification. Consequently the Court will look at the terms of the TPP itself - and not outside the TPP at the HAMP guidelines - to assess Plaintiff's stated cause of action. (*See e.g. Lazo v. Bank of Am., N.A*. (N.D. Cal. May 18, 2012) 2012 U.S. Dist. LEXIS 69979, 16-17 ("In some instances, courts have denied motions to dismiss where plaintiffs claimed that a TPP required a defendant to permanently modify their loan, even when the TPP did not set forth the essential terms for the permanent modification. [citations omitted.] These decisions are distinguishable because they all involved TPP's under the Home Affordable Modification Program ("HAMP"), and the applicable HAMP guidelines were critical to the courts' reasoning."))

Based on the foregoing, the demurrer to the second cause of action is SUSTAINED with leave to amend.

The Court notes that in the Reply, Defendants state that a permanent loan modification has been provided to Plaintiff, the NOD has been rescinded, and the trustee's sale has been cancelled. (Reply at 4; RJN Ex. F.) It therefore appears that all of the claims have been resolved, and it is not apparent whether there is an ongoing dispute.

Plaintiff may file and serve a Second Amended Complaint on or before August 7, 2014. Response to be filed and served within 10 days of service of the amended complaint, 15 days if served by mail.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

COURT RULING

There being no request for oral argument, the Court affirmed the tentative ruling.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 07/25/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: C. Chambers, J. Green

CASE NO: **34-2013-00153873-CU-OR-GDS** CASE INIT.DATE: 11/22/2013
CASE TITLE: **Lee vs. Wells Fargo Bank NA**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,11299322

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP
MOVING PARTY: Wells Fargo Bank NA successor by merger with Wells Fargo Bank Southwest NA
CAUSAL DOCUMENT/DATE FILED: Demurrer, 05/08/2014

APPEARANCES

Nature of Proceeding: Hearing on Demurrer

TENTATIVE RULING

Defendant Wells Fargo Bank N.A.'s demurrer to Plaintiffs Lawrence A. Lee and Tricia A. Lee's ("Plaintiffs") Second Amended Complaint ("SAC") is OVERRULED in part, SUSTAINED in part WITH LEAVE to amend, and SUSTAINED in part WITHOUT LEAVE to amend as described below.

Request for Judicial Notice

Defendant filed a Request for Judicial Notice and an Amended Request for Judicial Notice (collectively, "Def.'s RJN"), attaching various documents recorded by the Sacramento County Recorder and court filings and orders from this lawsuit. (Def.'s RJN.) Plaintiffs oppose the RJN on grounds that the documents attached to Defendant's RJN are not relevant and/or that Plaintiffs dispute some of the representations made in those documents. (Pl.'s Obj. to Def.'s RJN at 2-3.)

Defendant's RJN is GRANTED, however, in taking judicial notice of these documents, the Court accepts the fact of their existence, not the truth of their contents. (*See Professional Engineers v. Dep't of Transp.* (1997) 15 Cal.4th 543, 590 (judicial notice of findings of fact does not mean that those findings of fact are true); *Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120-121.) In taking judicial notice of recorded land documents, the court accepts the fact of their existence, not the truth of their contents. (*Herrera v. Deutsche Bank Nat'l Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 ("While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein."); *see also Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265 ("[A] court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in the recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity.").)

Demurrer

A demurrer challenges only the legal sufficiency of a complaint, not the truth or the accuracy of its factual

allegations or the plaintiff's ability to prove those allegations. (*Ball v. GTE Mobilnet of California* (2000) 81 Cal.App.4th 529, 534-35.)

Here, Plaintiffs' SAC alleges causes of action for: (1) wrongful foreclosure based on various alleged violations of California Civil Code §§ 2923 and 2914 et seq.; (2) general negligence; (3) breach of contract; and (4) injunctive relief under Business and Professions Code §§ 17200 et seq. (FAC at 1-21.)

Plaintiffs allege that Defendant misinformed and misled Plaintiffs during the home loan modification process and that Defendant subsequently completed a trustee's sale while falsely citing a lack of documents received from Plaintiffs. Plaintiffs allege that Defendant misinformed and misled Plaintiffs during the home loan modification process and that Defendant subsequently completed a trustee's sale while falsely citing a lack of documents received from Plaintiffs. Plaintiffs allege that on April 3, 2006, Lawrence Lee obtained a Deed of Trust and a 30-year mortgage in the amount of $110,000 from World Savings Bank, which was assumed by Defendant Wells Fargo on or about November 1, 2009. (SAC ¶¶ 31, 34.) Four years later, in May 2010, the loan was modified. (*Id.* ¶ 35.) Shortly after receiving the modification in 2010, Plaintiff Tricia Lee was unexpectedly laid off and Mr. Lee lost his job, and the Plaintiffs began having difficulty making their modified mortgage payments in June of 2011. (*Id.* ¶ 38.) Plaintiffs allege that Defendant never contacted them to discuss pre-foreclosure alternatives during this time. (*Id.* ¶ 39.) Plaintiffs allege that when they contacted Defendant to discuss alternatives, Defendant's representatives told them that they "had to actively be in foreclosure before" Defendant would consider them for foreclosure alternatives. (*Id.*) Defendant's representatives allegedly told Plaintiffs that "they should stop making payments in order to qualify for a modification of their home loan" and to "call back after they were in default." (*Id.*) Plaintiffs allege that Defendant initiated non-judicial foreclosure proceedings on November 15, 2011, that Plaintiffs completed a HAMP application to seek a second loan modification, that Defendant mailed Plaintiffs a packet with an offer for a "Trial Period Plan" under HAMP, but also mailed a second packet that same day stating that Defendant had "not received" necessary paperwork for the HAMP modification. (*Id.* ¶¶ 47-49.) Defendant told Plaintiff to "ignore" the letter offering a Trial Period Plan. (*Id.* ¶ 50.) Plaintiffs allege that thereafter, they repeatedly provided documentation supporting their modification request, but that Defendant repeatedly acknowledged -- then promptly disavowed -- receipt of various documents up until the property was sold at a Trustee's Sale on November 22, 2013. (*Id.* ¶¶ 51-93.)

First Cause of Action (Wrongful Foreclosure)

Defendant argues that Plaintiffs' first cause of action fails as a matter of law because it is premised upon the Homeowner Bill of Rights ("HOBR"), which was enacted on January 1, 2013, *after* Defendant's alleged improper recordation of the Notice of Default ("NOD") in November 2011 such that HOBR cannot form the basis of Defendant's liability because it does not apply retroactively. (Def.'s Ps & As at 2 (citing cases).) However, as Plaintiffs note, some of the conduct the SAC ascribes to Defendant occurred *after* HOBR's enactment, such as the recordation of a Notice of Trustee Sale on October 31, 2013. In their Opposition, Plaintiffs argue that Defendant violated HOBR by *not correcting* the alleged defects in the previously-filed NOD prior to recording the Notice of Trustee Sale. In Reply, Defendant again cites to cases broadly holding that HOBR cannot be applied retroactively, but does not squarely address Plaintiffs' arguments regarding alleged conduct post-dating HOBR's enactment. Solely for purposes of the pleading stage, Defendant has not shown that the alleged facts cannot as a matter of law support a violation of HOBR, especially given that some of the alleged events transpired after HOBR's enactment.

Defendant also argues that Plaintiffs' allegations reveal a prior loan modification in Plaintiffs' favor, such that Defendant was not "obligated to re-review the loan pursuant to Civil Code § 2923.6(g)." (Def.'s Ps & As at 3.) However, the SAC alleges that Plaintiffs were requesting a second modification totally separate and apart from the modification they had previously been granted. Accordingly, Defendant's argument is not well taken.

Defendant also argues that the SAC admits Plaintiffs failed to provide documents supporting their requested modification, revealing that any damages to Plaintiffs were caused by Plaintiffs themselves. (Def.'s Ps & As at 3-5.) The argument is not well-taken, as the SAC repeatedly alleges that Plaintiffs provided all required and requested documents, but that Defendant continually represented that documents were missing.

Defendant argues that "the SAC is devoid of evidence demonstrating any material change in plaintiffs' financial circumstances after the enactment of HOBR." (Def.'s Ps & As at 3 n.1.) The argument is not well-taken because the SAC need not contain or identify "evidence" to withstand demurrer. Moreover, the SAC alleges that Plaintiffs' financial circumstances changed as of July 30, 2013, on which date the married Plaintiffs allegedly sent Defendant a fax informing Defendant they had separated and that their "home and financial situation had changed." (SAC ¶ 82.) Defendant has not shown that this alleged fax, allegedly sent after HOBR's enactment, fails to suffice as an allegation of material change in circumstances post-dating HOBR.

The Court is not persuaded by Defendant's argument that judicially noticeable documents indicate that Plaintiff Lawrence Lee was "unable to submit bank documents" in support of his requested modification. Defendant has not shown that individuals without bank accounts cannot as a matter of law assert causes of action for wrongful foreclosure. Defendant has not shown that individuals without bank accounts cannot obtain loan modifications from Defendant; this is a factual argument requiring extrinsic evidence and is inappropriate at the pleading stage. (Def.'s Ps & As at 4 (arguing that Plaintiff's allegation that Defendant did not need bank documents from Lawrence Lee is "false" because Defendant did *in fact* need such documents to proceed, such that Plaintiffs' modification application was *in fact* "incomplete").)

Defendant argues that "Plaintiffs' Civil Code § 2923.5 claim fails for lack of particularity." (Def.'s Ps & As at 5.) This argument is not well-taken, because Defendant does not explain what allegations are insufficiently general or what additional details are required to be alleged. Defendant argues that Plaintiffs fail to plead facts sufficient to "overcom[e] Wells Fargo's 'prima facie evidence' of compliance with the foreclosure statutes." (Def.'s Ps & As at 5 (citing Exh. G to Def.'s RJN).) Plaintiffs allege that Defendant recorded an "untrue declaration" with its NOD falsely representing that Defendant indeed "contacted" Plaintiffs in compliance with Civil Code § 2923.5(a)(d) (SAC ¶ 95), and Plaintiffs allege that Defendant never actually "contacted Plaintiffs with any mention of any type of foreclosure alternative options as required by California Civil Code 2923.5." (SAC ¶ 95.) At this procedural posture, the Court declines to accept the *truth* of a representation in the judicially-noticeable recorded NOD, especially when Plaintiffs' pleading (and Opposition) expressly challenge the truth of that representation. Further, the SAC's assertions in this regard are not conclusory; the SAC alleges the *fact* that Defendant never affirmatively contacted Plaintiffs to explore options to avoid foreclosure. The Court takes factual allegations as true at this procedural posture. Defendant has not shown such allegation to be deficient for purposes of the pleading stage.

Defendant broadly argues that federal law, the Home Owner's Loan Act ("HOLA") 12 U.S.C. §§ 1461 et seq., preempts all of "Plaintiff's allegations under the HOBR" (Def.'s Ps & As at 6-10.) HOLA preempts state laws that purport to impose upon a federal savings bank requirements regarding "the terms of credit . . . loan-related fees . . . disclosure and advertising . . . [and] processing, origination, servicing." (12 C.F.R. §560.2(b).) However, Defendant has not persuaded the Court in this regard. In the context of its preemption argument, Defendant fails to meaningfully discuss the SAC's allegations particular to this case; from the allegations in the SAC, it is not beyond dispute that Defendant allegedly acted at all relevant times as a loan processor, originator, or servicer, i.e., in a capacity that would trigger application of HOLA. Further, Defendant's cited authorities are exclusively from federal courts, such that Defendant fails to discuss a single California authority sustaining a demurrer on grounds of HOLA preemption. (*See, e.g.*, *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 228-231 (nonjudicial *foreclosure* laws,

which HOLA does not preempt, are outside the preempted category of *loan-servicing* laws).) Even assuming *arguendo* that there are discrete allegations in the SAC that HOLA does preempt, the Court cannot strike them on demurrer.

Defendant argues that the first cause of action should be dismissed to the extent it is premised upon "statutory violations," because the Court can take judicial notice of the recordation of the NOD in November 2011 (Exh. G to RJN) and recordation of substitution of trustee in February 2012 (SAC ¶ 96). Defendant contends this is a legally permissible sequence of events pursuant to Civil Code § 2934a(b), such that it cannot be a premise for a wrongful foreclosure cause of action. (Def.'s Ps & As at 10-11.) Plaintiffs argue that while Civil Code § 2934a(b) might permit the recording of a NOD after a substitution of trustee is executed but not yet recorded, no substitution of trustee was timely executed here, and that in such situations an "affidavit" of notice is required (*id.*) and that none was given in this case. (Oppo. at 7-8.) Regardless, the Court finds that Plaintiffs' first cause of action is premised upon more than the sequence of recordation of the NOD and the Substitution of Trustee. The SAC alleges wrongful foreclosure on grounds of Defendant's alleged failure to affirmatively contact Plaintiffs to explore alternatives to foreclosure. (SAC ¶¶ 94-95.) The SAC also alleges that Defendant failed to ensure a "single point of contact" for Plaintiffs' loan modification process, repeatedly lost Plaintiffs' application documents and stalled, made misrepresentations regarding the loan application status, etc. (SAC ¶¶ 97-100.) Defendant has not shown that *these* allegations are insufficient to support the first cause of action for purposes of the pleading stage. Thus, even if Defendant's argument regarding the alleged sequence of recording the NOD and thereafter the Substitution of Trustee has merit, Defendant has not shown that Plaintiffs' first cause of action should be dismissed in its entirety under Code of Civil Procedure § 430.10(e).

Accordingly, Defendant's demurrer to the First Cause of Action is OVERRULED.

Second Cause of Action (General Negligence)

Defendant argues that the second cause of action for negligence fails as a matter of law because the allegations underlying it are "implausible." (Def.'s Ps & As at 11 (citing *Morrison v. Wachovia Mortgage*, 2012 U.S. Dist. LEXIS 39273, at *14-15 (C.D. Cal. March 12, 2012) ("Insofar as plaintiff alleges that she would have timely paid her mortgage but-for Wachovia's 'advice' to fall behind on her payments in order to secure a loan modification, her claims are implausible as a matter of law.") (citing *Ashcroft v. Iqbal* (2009) 556 U.S. 662).) The argument is not well-taken. Defendant has not cited any California cases indicating that state trial courts may examine the "plausibility" of allegations on a demurrer pursuant to Code of Civil Procedure § 430.10 in the same way that federal courts may examine the "plausibility" of allegations on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and *Iqbal*.

Defendant argues that "no legal duty exists in connection with plaintiffs' alleged attempts for a modification review." (Def.'s Ps & As at 11 (citing *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 67).) However, as noted in the Court's Order of April 10, 2014, "The *Lueras* court, however, concluded that a lender *does* owe a duty to a borrower to not make material misrepresentations about the status of an application for a loan modification or about the date, time, or status of a foreclosure sale. The law imposes a duty not to make negligent misrepresentations of fact." (Order dated April 10, 2014 (citing *Lueras*, 221 Cal.App.4th at 68).) Defendant's moving papers failed to address this component of *Lueras*, or the adequacy of SAC's allegations to support negligence in connection with Defendant's alleged material misrepresentations about the status of Plaintiffs' application for a loan modification. Accordingly, Defendant has not shown that *Lueras* requires dismissal of the second cause of action as a matter of law. Defendant's demurrer to the second cause of action is OVERRULED.

Third Cause of Action (Breach of Contract)

Defendant argues that the Deed of Trust is not an "enforceable contract" between Plaintiffs and Defendant, that there was no "contract" to modify Plaintiffs' loan, and that even assuming a valid contract, an alleged violation of HOBR is not a "breach" of such contracts. (Def.'s Ps & As at 12.) However, aside from citing broadly to the elements of a cause of action for breach of contract, Defendant does not cite to authorities holding that a Deed of Trust is not an "enforceable contract." Defendant does not cite to authorities holding that a violation of HOBR cannot as a matter of law *also* be a breach of a contract.

Defendant also argues that Plaintiffs' breach of contract cause of action fails as a matter of law because Plaintiffs *admit* that they could not perform their own contractual obligations. (SAC ¶ 38 ("Plaintiffs began to fall behind in their mortgage payments" after losing their jobs).) A plaintiff must plead the fact of his or her *own performance of a contract, or excuse for nonperformance*, as an element of a cause of action for breach of contract. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) Here, the contract that the SAC alleges Defendant breached was "the mortgage" (SAC ¶¶ 110-116) which the SAC admits Plaintiffs *themselves* failed to perform when they fell behind on their mortgage payments. Accordingly, Plaintiffs have not alleged their own performance with the contract they allege was breached. All of Defendant's alleged misconduct in connection with Plaintiffs' request for a modification occurred *after* Plaintiffs' admitted failure to perform their own contractual obligations. From the alleged facts in the SAC, then, any breach of "the mortgage" contract by Defendant came after Plaintiffs' own breach.

Accordingly, the demurrer to Plaintiffs' third cause of action for breach of contract is SUSTAINED WITHOUT LEAVE TO AMEND.

While this is the first time the Court has substantively addressed the adequacy of Plaintiffs' third cause of action, from the
alleged facts and the arguments in Plaintiffs' Opposition (Oppo. at 14-15), it appears that leave to amend this cause of action would be futile. The allegations in Plaintiffs' SAC admit that Plaintiffs' own nonperformance of the alleged "mortgage" contract preceded Defendant's alleged breaches thereof in connection with Defendant's conduct during foreclosure and during the modification application process. (SAC ¶¶ 38, 110-116.)

Fourth Cause of Action (Business & Professions Code § 17200)

Defendant argues that the SAC fails to allege that Defendants' conduct caused Plaintiffs any "actual loss" such that Plaintiffs lack standing to assert an Unfair Competition Law ("UCL") claim under Business & Professions Code § 17200. (Def.'s Ps & As at 13-14.) A plaintiff alleging unfair business practices under §17200 must state with reasonable particularity the facts supporting the statutory elements of the violation. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 609.
Defendant argues that "plaintiffs did not suffer an actual loss" from any conduct they ascribe to Defendant, "as [plaintiff] Lawrence A. Lee borrowed money in 2006 and has not repaid the loan," such that the foreclosure was caused by Lee's conduct, not Defendant's. (*Id.*) Based on the allegations in the SAC, Defendant's "actual injury" argument is well-taken. However, in their Opposition, Plaintiffs describe various "actual injuries" -- loss of equity and loss of income/business -- that they allege were caused by Defendant's alleged misconduct during the loan modification application process: "Plaintiffs did default on their loan but due to the defendant's unlawful and unfair actions during pre-foreclosure, foreclosure and the subsequent Trustee's Sale, [P]laintiffs lost their home, approximately $67,000 in equity, and lost their only source of income; two disabled boarders and Mr. Lee's home based marine repair business. Plaintiffs also had moving expenses . . . ." (Oppo. at 15-16.) In their Opposition, Plaintiffs appear to distinguish between loss of their real property due to Plaintiffs' failure to make mortgage payments as opposed to other losses somehow caused by Defendant's alleged conduct during the loan modification

process. It is unclear how Plaintiffs might amend their pleading to parse out which "actual injuries" they allege resulted from Defendant's conduct (versus injuries that resulted from their own admitted failures to make mortgage payments); however, the Court will permit Plaintiffs one more opportunity to amend their pleading in efforts to do so.

The Court agrees with Defendant that it is not clear from the SAC that Plaintiffs have alleged actual injury *resulting from the alleged conduct of Defendant* in this case. (*See Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322-26 (standing to bring UCL claim requires injury "as a result of" the alleged unfair or unlawful conduct).) Accordingly, the demurrer is SUSTAINED as to the fourth cause of action, but Plaintiffs shall have LEAVE TO AMEND it. Plaintiffs' amended pleading should clearly allege the nature of the damages Plaintiffs believe resulted from the event(s) underlying the UCL claim.

As to Defendant's arguments that the SAC lacks allegations of an unfair, unlawful, or fraudulent predicate act (Def.'s Ps & As at 13-14), the argument is not well-taken. Plaintiffs have alleged that Defendant repeatedly made false representations regarding the status of Plaintiffs' loan modification application, and none of Defendant's cited cases hold that such representations cannot be the basis of a UCL claim as a matter of law. However, while Plaintiffs' fourth cause of action (SAC ¶¶ 118-123) incorporates all preceding allegations, it is not clear whether Plaintiffs intend to premise their fourth cause of action upon representations Defendant allegedly made regarding Plaintiffs' loan modification application. Instead, the fourth cause of action appears primarily premised upon Defendant's failing to contact Plaintiffs to discuss foreclosure alternatives prior to commencing foreclosure, and then filing untrue documents indicating Defendant did attempt to contact Plaintiff in that manner. The Court finds that Plaintiffs' fourth cause of action is confusing and lacks the requisite factual specificity with respect to the allegations underlying the cause of action. (*See Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474 (upholding trial court's grant of demurrer to UCL cause of action for lack of specificity in allegations of fraud underlying it).) Accordingly, Plaintiffs shall amend the paragraphs underlying their fourth cause of action so as to itemize each alleged event upon which Plaintiffs intend to premise that cause of action, the date(s) of the alleged event(s), the names of individual(s) involved in the event(s) and the (mis)representations allegedly made to Plaintiffs.

In sum, Defendant's demurrer to the SAC is OVERRULED as to the first and second causes of action, SUSTAINED WITHOUT LEAVE to amend as to the third cause of action, and SUSTAINED WITH LEAVE to amend as to the fourth cause of action.

Plaintiffs shall file the above-described Third Amended Complaint ("TAC") by no later than **August 8, 2014**. Response to be filed and served within 10 days thereafter, 15 days if the TAC is served by mail. (Although not required by any statute or rule of court, Plaintiff is requested to attach a copy of the instant minute order to the TAC to facilitate the filing of the pleading.)
The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

COURT RULING

There being no request for oral argument, the Court affirmed the tentative ruling.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 07/24/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: C. Chambers, J. Green

CASE NO: **34-2013-00144451-CU-OR-GDS** CASE INIT.DATE: 05/31/2013
CASE TITLE: **Bolton vs. Carrington Mortgage Services, LLC**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,11246554

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP
MOVING PARTY: EuroPacific Mortgage, LLC
CAUSAL DOCUMENT/DATE FILED: Demurrer, 04/29/2014

APPEARANCES

Nature of Proceeding: Hearing on Demurrer

TENTATIVE RULING

Defendant Euro Pacific Mortgage, LLC's demurrer to Plaintiff Ruthie Bolton's second amended complaint ("SAC") is overruled.

Defendant's request for judicial notice is granted.

Plaintiff alleges causes of action for Violation of the Homeowner's Bill of Rights ("HOBR") and for Violation of Business & Professions Code § 17200 et seq. Plaintiff alleges that various defendants, among other things, violated Civil Code § 2923.6(c) by filing a notice of sale in April 2013 while her loan modification application was pending.

Defendant demurs to the SAC on the basis that the causes of action are barred based on the fact that it is the third party purchased of the subject property at the May 20, 2013, foreclosure sale and that it obtained a judgment in an unlawful detainer action against Plaintiff on June 11, 2013. Defendant reasons that Plaintiff is precluded from challenging the Trustee Sale as a result of the Judgment entered in favor of Defendant in the unlawful detainer action. (*Malkoskie v. Option One Mortgage Corp*. (2010) 188 Cal.App.4th 968, 976.) *Malkoskie* held that an unlawful detainer judgment has preclusive effect in an action challenging the validity of a defendant's title. The Court previously issued a tentative ruling sustaining Defendant's demurrer without leave to amend on this ground. The Court also found that the complaint was uncertain. While Plaintiff did not oppose the demurrer, her counsel appeared at the hearing and the Court allowed Plaintiff leave to amend.

The SAC differs little from the FAC, other than the fact that Plaintiff attempted to clarify the uncertainty identified by the Court in the FAC by alleging that Defendant is the "agent, subsidiary, employee, or related entity of each of the other defendants." (SAC ¶ 7.) Plaintiff has also now alleged each wrongful act alleged against the other defendants in carrying out the foreclosure was performed or ratified by Defendant. (SAC ¶ 9.)

While the SAC differs little from the FAC in terms of substantive allegations, having now had the opportunity to consider a substantive opposition to a demurrer based on the same arguments asserted in connection with the demurrer to the FAC, the Court now concludes that the SAC is not precluded as a result of the UD judgment that Defendant obtained against Plaintiff.

Importantly, the instant lawsuit is based, at least in part, upon claims that Defendant violated the HOBR by recording a notice of sale while Plaintiff was under a loan modification review in violation of Civil Code § 2923.6, failing to provide written notice of her appeal rights from any denial of a loan modification application in violation of Civil Code § 2923.6(f), failing to provide written notice of a denial of her loan modification application and failing to identify specific reasons for the denial in violation of Civil Code § 2923.6(f), and failing to provide a single point of contact in violation of Civil Code § 2923.7. (SAC ¶¶ 36-40.) The second cause of action for violation of Business and Professions Code § 17200 is also based in part on the alleged violations of Civil Code § 2923.6. (SAC ¶ 50.) The Court is aware that the causes of action also involve allegations that Defendant filed false declarations in connection with the underlying foreclosure and an insufficient notice of default and that in her prayer for relief, in addition to damages, she seeks "in the alternative for possession of the home." Nevertheless, the complaint seeks damages based on violations of the HOBR, damages which are expressly authorized in situations where, as here, as trustee's deed upon sale has been recorded. (Civ. Code § 2924.19(b).)

The situation presented in *Malkoskie* is markedly different from the instant action in which Plaintiff seeks damages as a result of HOBR violations. Indeed, the HOBR issues raised in the instant action do not involve the manner in which Defendant obtained title to the subject property but instead involve allegations with respect to failures to comply with the statutes governing review of loan modification applications during the foreclosure process. Thus, in this respect, the SAC is not challenging the validity of the foreclosure sale, even though other allegations which the Court identified above (e.g., insufficient notice of default, false documents) may be construed as attacking the validity of the sale.

It is true that courts have held that subsequent fraud or quiet title suits founded upon allegations of irregularity in a trustee's sale are barred by a prior unlawful detainer judgment. (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 256.) Applying *Vella*, the court in *Malkoskie* concluded that a demurrer was properly sustained because a stipulated judgment in an unlawful detainer action barred a subsequent action attacking the validity of the foreclosure sale. (*Malkoskie*, *supra*, 188 Cal.App.4th at 973.) The Court reasoned that *Vella* applied because the plaintiffs' claims were based on the alleged invalidity of the foreclosure sale. (*Id*. at 974.) Because the sole basis upon which [the purchased] asserted its right to possession of the property was its "duly perfected" legal title obtained in the nonjudicial foreclosure sale, the validity of [the purchaser's] title had to be resolved in the unlawful detainer action. Under section 1161a , Code of Civil Procedure, a purchaser who has acquired title at such trustee's sale must prove that the property was sold in accordance with section 2924 of the Civil Code under a power of sale and that title under the sale has been duly perfected. Under such unlawful detainer statutes title to the extent required by section 1161a not only may but must be tried in the unlawful detainer action. (*Id*.)

However, as set forth above, the entire SAC is not premised on the invalidity of Defendant's title, but rather is premised, at least in part, on violations of the HOBR, which are not within the scope of the unlawful detainer action. Indeed, nothing in Code of Civil Procedure § 1161a requires that an unlawful detainer plaintiff show that it complied with the HOBR as part of proving its right to possession. Rather CCP § 1161a simply requires that an unlawful detainer action may be filed "[w]here the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust...and the title under the sale has been duly perfected." Thus, unlike the situation in *Malkoskie* where the UD action barred a subsequent civil action premised solely on the invalidity of the foreclosure sale because the question of title had to be tried in the unlawful detainer action, the instant civil action is premised on HOBR violations which do not necessarily challenge the validity of the foreclosure sale and any such HOBR violations were not required to be tried in the UD action.

A finding that the SAC is not barred by the UD judgment because it is premised on HOBR violations is consistent with the statements from the Supreme Court. Indeed, the Supreme Court observed in *Vella*, that an unlawful detainer action is "summary in character" with the issues ordinarily limited to the "right of immediate possession." (*Id*. at 255.) Thus "a judgment in unlawful detainer usually has very limited res judicata effect and will not prevent one who is dispossessed from bringing a subsequent action to resolve questions of title, or to adjudicate other legal and equitable claims between the parties." (*Id*.) Here, any issues with respect to compliance with the HOBR were not a predicate to Defendant obtaining judgment against Plaintiff in the UD action and thus were not necessarily decided in that action and Plaintiff is not therefore precluded from asserting them here.

As the Court mentioned above, it is aware that the SAC also contains allegations which could be construed as attacking the validity of the foreclosure which allegations could be precluded by the UD judgment. However, both the first cause of action for violations of the HOBR and the second cause of action for violation of Bus. & Prof. Code § 17200 (premised at least in part on HOBR violations) are sufficient in the absence of those allegations and a demurrer does not lie to only a portion of a cause of action. As a result, the demurrer to the first and second cause of action on the basis that they are barred by the UD judgment is overruled.

In addition the demurrer on the basis that the SAC is fatally uncertain is overruled. Demurrers for uncertainty are disfavored and only sustained where the complaint is so muddled that the defendant cannot reasonably respond. The favored approach is to clarify theories in the complaint through discovery. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) While Defendant claims that no specific conduct is attributed to it and all defendants are lumped together, Plaintiff has amended the complaint to allege that each Defendant "shares an identity of interest with the other Defendant such that each wrongful act of the other Defendants in carrying out the foreclosure whether acting as lender, trustee, servicer, or beneficiary, was performed or ratified by" Defendant. (SAC ¶ 9.) Plaintiff has also alleged that "all Defendants are alleged to have done each alleged act....wherever the word Defendants is used, simply substitute the name of each Defendant named in the caption." (Id.) The instant complaint is not so muddled that Defendant cannot reasonably respond. It is clear that Plaintiff is alleging that this Defendant specifically engaged in the conduct set forth in the First Cause of Action for HOBR violations and the Second Cause of Action for Bus. & Prof. Code § 17200 violations. To the extent there is any uncertainty in the SAC, Defendant can clarify the theories through discovery.

Finally, the Court notes that Defendant also indicates in its notice of demurrer that the "combined prayer for relief seeks possession of the subject property without any cause of action to support such requested relief." This is not a basis for demurrer. (CCP § 430.10(a)-(h).)

The demurrer is overruled.

Defendant shall file and serve its answer no later than August 4, 2014.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or other notice is required.

COURT RULING

There being no request for oral argument, the Court affirmed the tentative ruling.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 07/22/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: C. Chambers, J. Green

CASE NO: **34-2013-00155929-CU-BC-GDS** CASE INIT.DATE: 12/11/2013
CASE TITLE: **Lucille Miller Barnett individually and as Trustee vs. Ocwen Loan Servicing LLC**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP

APPEARANCES

Nature of Proceeding: Hearing on Demurrer (Ocwen Loan Servicing LLC)

TENTATIVE RULING

Defendant Ocwen Loan Servicing, LLC's demurrer to Plaintiff Lucille Miller Barnett's complaint was continued from April 24, 2014, to today's date. The Court now issues the following ruling.

The demurrer was continued at Plaintiff's request as she indicated in her original opposition that she was in the process of resolving loan modification issues with Ocwen and hoped to have the matter resolved within 90 days and if the modification was completed, she would dismiss the case. The Court indicated that new opposition and reply papers could be submitted based on the continued hearing date. Plaintiff has yet to dismiss the case. Plaintiff did, as allowed by the Court, file a new opposition.

This is a foreclosure lawsuit in which Plaintiff alleges, among other things, that defendants have not complied with a loan modification agreement Plaintiff alleges causes of action for specific performance, breach of contract, breach of the covenant of good faith and fair dealing, violations of the Homeowner's Bill of Rights ("HOBR") and for injunctive relief.

First and Third Causes of Action (Specific Performance and Breach of Contract)

Ocwen's demurrer to the first and third causes of action on the basis that there is no contract between the parties is overruled.

Plaintiff alleges that Ocwen sent her a letter stating that "[a]fter all trial period payments are timely made and you have submitted all the required documents, your mortgage will be permanently modified. (Comp. ¶ 16.) Ocwen thereafter sent a letter re-stating the terms of the offer and including a Modification Agreement setting forth the terms on which her loan would be modified. (Id. ¶ 17.) Plaintiff further alleges that she fully performed all obligations set forth in Ocwen's offer, including executing the Modification Agreement, submitting every document required and making all trial payments in a timely manner, thereby accepting Ocwen's offer. (Id. ¶¶ 17, 18.) Plaintiff alleges that Ocwen breached the Modification Agreement when it later stated she was not eligible for a loan modification because there

was "an issue with your mortgage title." (Id. ¶ 19.)

Ocwen argues that the contract causes of action fail because there was no contract. Ocwen maintains that any modification was contingent on Plaintiff satisfying all conditions in the Modification Agreement because it was conditioned on her having clear title to the property. It reasons that her allegations show that the modification was denied because of a title issue and therefore there no contract could have been formed because all conditions precedent to formation were not satisfied. Ocwen's argument is a factual one that is not appropriately resolved on demurrer. A hearing on a demurrer cannot be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. (*Unruh-Haxton v. Regents of Univ. of Cal*. (2008) 162 Cal.App.4th 343, 365.) Indeed, as set forth above, Plaintiff alleged that she performed all obligations contained in Ocwen's offer that were required to obtain the Modification Agreement. That she alleged that Ocwen indicated that she did not qualify because there was a title issue does not show that there was no contract. It merely shows that Ocwen asserted that Plaintiff had not complied with the requisite conditions for a modification. Plaintiff, however, *has alleged that she did*. (Comp. ¶¶ 18, 19.) Allegations that she fully performed all conditions necessary to enter a Modification Agreement with Ocwen must be accepted as true for purposes of the instant demurrer. "Many federal courts have concluded a trial loan modification under HAMP constitutes a valid, enforceable contract under state law, at least at the pleading stage of litigation...if the borrower has complied with all the terms of the TPP--including making all required payments and providing all required documentation--and if the borrower's representations on which modification is based remain true and correct the lender must offer the borrower a goof faith permanent loan modification, because the borrower has qualified under HAMP and has complied with the TPP." (*West v. JPMorgan Chase Bank, N.A*. (2013) 214 Cal.App.4th 780, 796 [citations omitted].)

As a result, the demurrer to the first and third causes of action on the basis that there was no contract because Plaintiff did not satisfy all conditions precedent is overruled.

Second Cause of Action (HOBR)

As of January 1, 2013, "The California Homeowner Bill of Rights went into effect and it offers homeowners greater protection during the foreclosure process. Cal.
Civ. Code § 2923.6(b) (2013). Section 2923.6(b) states "it is the intent of the
legislature that the mortgage servicer offer the borrower a loan modification or work out a plan if such a modification or plan is consistent with its contractual or
other authority." The statute further provides that "if a borrower submits a complete application for a first lien loan modification . . . the mortgage servicer . . . shall
not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending." Cal. Civ. Code §
2923.6(c) (2013).

Ocwen's demurrer to the second cause of action on the basis that the HOBR does not apply is overruled.

Ocwen argues that the HOBR does not apply because it did not go into effect until 2013 and Plaintiff failed to identify any conduct that took place after the HOBR was enacted. The Court disagrees. The Complaint is clear that Plaintiff did not apply for a loan modification until January 2013 and all of the conduct alleged to violate the HOBR took place *after the loan application*. (Compl. ¶¶ 16-24, 30-35.)

Ocwen also argues that relief under the HOBR is limited to injunctive relief where no foreclosure has yet to take place and here Plaintiff has failed to show the need for such relief. The Court rejects this argument. The HOBR itself clearly establishes that injunctive relief is available as a remedy for

violations of its various provisions. (Civ. Code § 2924.12(a)(1).) Given that Plaintiff has alleged violations of the HOBR, she has necessarily shown that injunctive relief is appropriate.

Fourth Cause of Action (Breach of Implied Covenant of Good Faith and Fair Dealing)

"There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract." *Harm v. Frasher*, (1960)181 Cal. App. 2d 405. Ocwen's demurrer to the fourth cause of action is overruled. Ocwen argues that Plaintiff failed to allege what contract she entered into with it and what specific contractual provision was frustrated. "To establish a breach of an implied covenant of good faith and fair dealing, a plaintiff must establish the existence of a contractual obligation, along with conduct that frustrates the other party's rights o benefit from that contract." (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 798.) Here Plaintiff alleged that she entered into a Modification Agreement and that Ocwen failed to exercise good faith/fair dealing in honoring the Modification, refusing to respond to her counsel's communications regarding the Modification. Thus, she identified the specific contract (which the Court found above was adequately pled) and alleged that conduct that frustrated her rights to receive the benefit from the contract. The Court again notes that under well recognized law, for the purpose of testing the demurrer all material and issuable facts properly pleaded must be regarded as true (*Flores v. Arroyo* (1961) 56 Cal.2d 492, 497; *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 487.)

Fifth Cause of Action (Injunctive Relief)

Ocwen's demurrer is overruled. While Ocwen points out that an injunction is a remedy and not a separate cause of action, its main attack is that "no injunction may issue to the extent the Complaint fails to state a cause of action. Here, the Complaint is devoid of facts establishing a claim for relief." (Dem. 4:14-15.) As seen above, the Court disagrees as Plaintiff has adequately alleged causes of action for specific performance, breach of contract, breach of the implied covenant of good faith and fair dealing and violation of the HOBR.

The demurrer is overruled.

Ocwen shall file and serve its answer no later than August 1, 2014.

The notice of demurrer does not provide notice of the Court's tentative ruling system as required by Local Rule 1.06(D). Defendant's counsel is ordered to notify Plaintiff's counsel immediately of the tentative ruling system and to be available at the hearing, in person or by telephone, in the event Plaintiff's counsel appears without following the procedures set forth in Local Rule 1.06(B).

This minute order is effective immediately. No formal order pursuant to CRC rule 3.1312 or other notice is required.

COURT RULING

There being no request for oral argument, the Court affirmed the tentative ruling.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 07/07/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: C. Chambers, J. Green

CASE NO: **34-2013-00150939-CU-OR-GDS** CASE INIT.DATE: 09/16/2013
CASE TITLE: **Pugh vs. Wells Fargo Home Mortgage**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Preliminary Injunction

APPEARANCES

Nature of Proceeding: Motion for Preliminary Injunction

TENTATIVE RULING

Plaintiff's Motion for Preliminary Injunction is granted.

The Court issued a TRO/OSC on September 17, 2013 enjoining the foreclosure sale that had been scheduled for September 23, 2013. The foreclosure sale was being held pursuant to a Notice of Trustee Sale that was executed June 28, 2013, and recorded on July 1, 2013. Plaintiffs presented admissible evidence in their moving papers that defendant Wells Fargo was engaged in impermissible dual-tracking of conducting a loan modification procedure at the same time as recording a notice of trustee sale.

Civil Code section 2923.6(f) provides that once a borrower submits an application for a foreclosure prevention alternative offered by, or through, the borrower's mortgage servicer, the servicer shall not record a notice of default or notice of sale, or conduct a Trustee's sale, while the application is pending, an until any of the following occurs: a. The mortgage servicer makes a written determination that the borrower is not eligible for a foreclosure prevention alternative and any appeal period has expired; b. The borrower does not accept an offered foreclosure prevention alternative within fourteen days of the offer; OR c. The borrower accepts a written foreclosure prevention alternative, but defaults on the loan modification or otherwise breaches his/her obligations under the foreclosure prevention alternative.

In deciding whether to enter a preliminary injunction, the Court must evaluate two interrelated factors: (1) the likelihood that the applicant will prevail on the merits at trial, and (2) the interim harm that the applicant will likely suffer if preliminary relief is not granted, as compared to the likely harm that the opposing party will suffer if the preliminary injunction issues. (See, e.g., *Langford v. Superior Court (Gates)* (1987) 43 Cal.3d 21, 28.) One of these two factors may be accorded greater weight than the other depending on the applicant's showing. (See *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 447.) A preliminary injunction may not be granted, regardless of the balance of interim harm, unless it is reasonably probable that the moving party will prevail on the merits. *San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal. App. 3d 438, 442. A ruling on a preliminary injunction is not a final ruling on the merits. Civil Code section 527(a). It would appear beyond dispute

that a ruling on a preliminary injunction is provisional.

"[T]he party seeking the injunction must present sufficient evidentiary facts to establish a likelihood that it will prevail." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1478.)

Plaintiffs have presented evidence in their declarations that they had applied for a loan modification in January/February of 2013 and had provided all required documentation. Wells Fargo denied the request for mortgage assistance on June 19, 2013 but did not provide any reasons for the denial, nor was an appeal provided. (Declarations of plaintiffs, paragraphs 13-29) Based on the evidence submitted by plaintiff's they have established that the recording of the notice of sale was a violation of Civil Code section 2923.6. In an analogous situation under the foreclosure statutes, a filing of a notice of default before complying with Civil Code 2923.5 renders the notice void. See, e.g. *Mabry v. Superior Court* (2010) 185 Cal. App. 4th 208, 232. Defendant has not presented evidence that it has rescinded the defective notice of sale nor recorded a second Notice of Sale.
The plaintiffs have presented sufficient evidence that they will prevail on their claim.

After the TRO was preliminarily granted, the parties stipulated to continue the hearing on preliminary injunction for several months to allow the parties to pursue loan modification. Defendant has now filed an opposition stating that they have now complied with all requirements of 2923.6, including providing an appeal of the loan modification denial. However, there is no admissible *evidence* supporting any of defendant's opposition arguments. The declaration of counsel is not based on personal knowledge and all documents attached thereto are hearsay. Under Evid. Code, § 350, only relevant evidence is admissible. Except as otherwise provided by statute, all relevant evidence is admissible. Evid. Code §351.The Court may not rely on inadmissible evidence. Hearsay evidence is inadmissible, absent an exception. In general, an out-of-court statement offered for its truth is inadmissible hearsay. Evid Code sec. § 1200. The court is vested with broad discretion in determining the admissibility of evidence. Even if those letters were admissible, they do not establish that the defendant complied with the statutory requirement. Wells Fargo has not presented evidence that they have complied with 2923.6. Thus, it appears that plaintiffs are likely to prevail on their claim that this code section was not complied with.

In weighing the harm to plaintiff against the harm to defendant in delaying the sale, the Court finds that the prejudice to plaintiff would far outweigh any prejudice to defendant.

Plaintiff's Reply requests that no bond be ordered. However, plaintiff's counsel wrote and told Wells Fargo that plaintiff's gross monthly income is $5,880. Plaintiffs are not indigent and have established no reason why they should not have to pay a monthly fair market rental value payment to Wells Fargo.

Plaintiff is ordered to post a bond in the amount of $15,000, and in addition, to make monthly payments of $1,600 to the defendant pending the trial of this action.

The prevailing party shall prepare a formal order for the Court's signature pursuant to C.R.C. 3.1312. The court will sign a proposed formal order on the preliminary injunction (to be served pursuant to CRC 3. 1312, only upon proof that the undertaking has been paid.

COURT RULING

There being no request for oral argument, the Court affirmed the tentative ruling.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 07/01/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: C. Chambers, J. Green

CASE NO: **34-2013-00142131-CU-OR-GDS** CASE INIT.DATE: 03/22/2013
CASE TITLE: **Doster vs. Bank of America NA**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,11381585

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP
MOVING PARTY: Bank of America, National Association, Wells Fargo Bank, National Association as trustee
CAUSAL DOCUMENT/DATE FILED: Demurrer, 05/28/2014

APPEARANCES

Nature of Proceeding: Hearing on Demurrer to Second Amended Complaint

TENTATIVE RULING

Defendants Bank of America, N.A., Reconstruct Company, N.A. and Wells Fargo Bank, N.A.s' demurrer to Plaintiff Travis Doster's second amended complaint ("SAC") is ruled upon as follows.

Defendants' Request for Judicial Notice is granted. (*See Poseidon Devel., Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-18; see also *Startford Irrig. Dist. v. Empire Water Co.* (1941) 44 Cal.App.2d 61, 68 [recorded land documents, not contracts, are the subject of judicial notice on demurrer].) The court, however, does not accept the truth of any facts within the judicially noticed documents except to the extent such facts are beyond reasonable dispute. (*See Poseidon Devel*., 152 Cal.App.4th at 1117-18.) *see also Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265 ("[A] court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in the recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity.")

In this foreclosure action, Plaintiff alleges causes of action for violation of the Homeowners Bill of Rights (one count of robosigning and one count of failure to validate mortgage), cancellation of instruments, fraud, breach or oral contract, and for money had and received.

Tender

The demurrer to all causes of action in the complaint on the basis that Plaintiff was required to "make a valid tender of the indebtedness is overruled. The Court previously overruled the demurrer to the entire complaint on this basis in its ruling on the demurrer to the FAC. There is no basis to revisit the ruling.

First Cause of Action (Violation of HOBR)

Count One-Robosigning

The Court previously sustained Defendants' demurrer to this count on the basis that Plaintiff's allegations were conclusory. Plaintiff alleges that in violation of Civil Code § 2924.17, Defendants knowingly recorded false documents (NOD, NOTS, etc.) which contained information that was not verified and not true in that the Deed of Trust was forged, BANA had already transferred its beneficial interest to BAC SEC and neither Reconstruct nor Wells Fargo were rightfully entitled to enforce the Deed of Trust.

Civil Code § 2924.17(b) requires mortgage servicers to review competent and reliable evidence to substantiate the borrower's default and the right to foreclose prior to recording or filing any documents in connection with a foreclosure.

Defendants argue, among other things, that the robosigning count is barred because it is based upon documents which were recorded prior to the date the HOBR was enacted. This argument is rejected for the same reasons that it was rejected in the ruling on the first demurrer. Indeed, the robosigning count, is based on documents recorded/filed both before and after the HOBR's enactment. (SAC ¶ 14.) Thus, Defendants' failed to show as a matter of law that the "robosigning" count fails as a matter of law because it predates HOBR's enactment.

While Defendants argue that the allegations remain conclsuory, the Court disagrees. Plaintiff has alleged, for example, that the Notice of Default recorded on February 13, 2013, was false because it stated that he was in default despite the fact that he was not in default given he had fully paid under his forbearance agreement, because the NOD contained a statement that he was contacted in accordance with Civil Code § 2923.5. (SAC ¶ 14(v).) Plaintiff alleges that had the NOD not been robosigned and someone verified the information, the true facts would have come to light. These allegations are sufficient to state a violation of § 2921.17(b) as they set forth a specific factual basis as to how Defendants failed to review information to substantiate Plaintiff's default prior to recording the NOD, regardless of the sufficiency of any other allegations. The Court need not consider Defendants' argument regarding Plaintiff's ability to challenge any assignment as the Court found that the robosigning count is sufficiently pled with respect to the NOD. The demurrer to the robosigning count is overruled.

Count Two-Failure to Validate

Defendants demur to this count on the basis that the judicially noticeable documents demonstrate that the foreclosure was properly conducted.

Plaintiff alleges that in February 2013, he sent a letter demanding that Defendants BANA and Reconstruct verify their right to foreclose and that he received a response that was intentionally misleading as to the owner of the note. (SAC ¶ 27.) He alleges that BANA stated it was the servicer but could not identify the party on whose behalf it was servicing the note, sometimes referring to BAC SEC and sometimes referring to WELLS. Plaintiff's second count is essentially based on the same factual predicate as the first count and thus is sufficient for the same reasons stated above.

Finally, Defendants argue that Plaintiff failed to allege prejudice in connection with the foreclosure process. This argument is rejected as Plaintiff clearly alleged, for example, that had the recorded documents been verified/validated, the true information would have come to light, specifically that he was not in default as stated in the NOD. (SAC ¶ 14(v).)

The Court is puzzled by Defendants arguments that there was no stated violation of the HOBR because Plaintiff was previously denied a loan modification and failed to provide a material change to them regarding his circumstances as required by Civil Code § 2923.6. Plaintiff's HOBR cause of action is not

premised upon any alleged violation with respect to Civil Code § 2923.6.

Second Cause of Action (Cancellation of Instruments)

Defendants demur to this cause of action on the basis that it is time barred because Plaintiff seeks to cancel certain loan documents which were executed in 2006 yet he failed to allege facts showing when/how he discovered that the loan/foreclosure documents were forged or why he could not have discovered that information earlier despite the exercise of reasonable diligence. The Court previously sustained the demurrer to this cause of action in the FAC on this basis.

The Court finds that Plaintiff has cured the defects in that he has alleged that discovered that the documents were forged/falsified in February 2013 when he sought relief under the HOBR. He alleges that he had no reason to know of any impropriety with any of the underlying documents until he became aware that BANA was attempting to foreclose on he sent his mortgage validation letter and received the documentation he alleges is false. Prior to that time, he alleges that he had only been provided a copy set of the closing documents from title. (SAC ¶ 41.) These allegations were absent from the FAC. The Court finds, that for pleading purposes only, Plaintiff has alleged facts showing "(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." (Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal.4th 797, 808.) The instant complaint was filed in March 2013 and thus for pleading purposes, the second cause of action is not barred by the statute of limitations. In addition, Plaintiff seeks to cancel documents that were not executed until 2013, e.g., the NOD recorded in February 2013. Thus even if Defendants were correct on the statute of limitations argument with respect to loan documents executed in 2006, such argument would not show that the entire cause of action was untimely.

Defendants also argue that cancellation is only appropriate when there is a reasonable apprehension that if left outstanding the instrument may cause serious injury to a person against whom it is void or voidable. (Civ. Code § 3412.) Plaintiff has alleged such facts, for example, as he has alleged that a falsified notice of default has been recorded falsely indicating that he is in default. Thus he has alleged both an "apparent validity" and "actual invalidity" of the NOD. (Civ. Code § 3413.) Further, while Defendants may be correct that a sale is not currently scheduled, the outstanding NOD, pursuant to which Defendants could proceed with a sale may cause serious injury to Plaintiff if left outstanding.

The demurrer to the second cause of action is overruled.

Third Cause of Action (Fraud)

Defendants demur on the basis that the cause of action is time barred. The demurrer on this basis is overruled. The Court already found in its ruling on the demurrer to the FAC that the fraud cause of action was not barred by the statute of limitations as pled and there is no reason to revisit that ruling.

Defendants' demur on the basis that the fraud cause of action is not pled with the requisite specificity is overruled. The Court previously sustained the demurrer on this basis finding that Plaintiff failed to allege the "names of the persons who made the misrepresentations," their authority to speak for the corporation, specifically "what they said or wrote," or precisely "when it was said or written." (*Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434.) Plaintiff has now alleged specific names of the individuals alleged to have made the misrepresentations, their authority to speak, specific dates, and specific statements. (SAC ¶¶ 65- 77.) The demurrer on the basis that the fraud claim is not specifically pled is overruled.

Defendants' demur on the basis that Plaintiff failed to allege intent to induce reliance, actual reliance or damages is overruled. Plaintiff alleged that BANA falsely represented that it would execute a

forbearance agreement, would negotiate a modification, and ultimately would receive a modification. (SAC ¶¶ 65-77.) Plaintiff alleged that BANA made these promise with no intent to perform in order to collect payments from him. (Id. ¶ 78.) He alleged that he justifiably relied upon the promises to send BAN over $33,000 believing that a written forbearance agreement or modification agreement was forthcoming, despite the fact that BANA was not the true servicer of the loan. (Id. ¶¶ 79-80.) He alleges that had he known BANA would not honor its promises, he would have elected to grant BANA a deed in lieu or allowed them to foreclose on the security. (Id. ¶ 80.) He alleges that he was damaged because BANA wrongfully received $33,000 from him because it had no intention of modifying the mortgage. (Id. ¶ 82.) These allegations are sufficient to show intent to induce reliance, actual reliance and damages.

Finally, Defendants cite to case law finding that forbearance agreements that alter foreclosure rights fall within the statute of frauds and must be in writing, apparently to argue that a fraud cause of action cannot be based on a promise to execute a forbearance agreement. (*Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544.) However, that case stands for the proposition that an unsigned written forbearance agreement was unenforceable because it was not in writing as required by the statute of frauds. (*Id*. at 553.) It did not hold that a fraud cause of action for damages could not be based upon a promise to execute a forbearance agreement. Indeed, the instant cause of action does not seek to enforce an agreement, it merely seeks damages for making a false promise.

The demurrer to the third cause of action is overruled.

Fourth Cause of Action (Breach of Oral Contract)

The Court previously sustained the demurrer to this cause of action on the basis that Plaintiff alleged an oral promise to modify his loan which fell within the statute of frauds and he had not adequately alleged a promissory estoppel claim to avoid the statute of frauds. Defendants again demur on the basis that Plaintiff failed to adequately allege a claim for promissory estoppel.

Generally, an oral agreement to modify a mortgage loan comes within the statute of frauds and if not in writing, it is unenforceable. (*Secrest*, *supra*, at 552-553.) Case law recognizes that a plaintiff may allege promissory estoppel to avoid the statute of frauds. (*Aceves v. U.S.Bank, N.A.* (2011) 192 Cal.App.4th 218, 230-231.) "The elements of a promissory estoppel claim are: "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Aceves, supra,* 192 Cal.App.4th at 225-226 (citation omitted).) In *Aceves*, the plaintiff had alleged that "U.S. Bank agreed to 'work with [her] on a mortgage reinstatement and loan modification' if she no longer pursued relief in the bankruptcy court," and the court held that this was a sufficiently "clear and unambiguous promise" for the promissory estoppel claim to withstand the pleading phase. (*Id.*) The court held that such alleged promise "indicates that U.S. Bank would not foreclose on [the plaintiff's] home without first engaging in negotiations with her to reinstate and modify the loan on mutually agreeable terms." (*Id.*) Concluding that the alleged "promise was sufficiently concrete to be enforceable," the court held that the plaintiff's pleading adequately alleged a claim for promissory estoppel. (*Id.* at 222.) The court clarified that the alleged promise was *not* a promise to modify a loan, it was a "promise *to negotiate"* with the plaintiff. (*Id.* at 226 (emphasis in *Aceves*).)

The Court previously found that Plaintiff had only alleged a promise to offer a forbearance/modification and the unambiguous and concrete terms of those promises were not alleged. In the SAC, Plaintiff now alleges both that BANA promised to negotiate with him regarding a modification and that BANA promised to offer him a forbearance/modification. The promise to negotiate is within the scope of Aceves, which Plaintiff had not previously alleged in the FAC. Plaintiff has sufficiently allege that BANA promised to negotiate with him regarding a modification. (SAC ¶¶ 68, 69, 90, 91.) Thus, regardless of

Plaintiff's other allegations regarding a promise to offer a forbearance/modification, as opposed to a promise to negotiate, Plaintiff's cause of action now falls within *Aceves* which found that an allegation of a promise to negotiate a modification was sufficiently definite to support a promissory estoppel claim. The Court rejects Defendants' argument that his allegations of a promise to negotiate are somehow impermissibly contradictory to a promise to offer a forbearance/modification agreement. Indeed, as pointed out by Plaintiff, it simply reflects the varying positions BANA took with him. The allegations in the FAC did not preclude Plaintiff from also alleging that BANA promised to negotiate with him. Further, he has now sufficiently alleged the terms of the promised forbearance/modification agreement as he has also alleged that BANA promised to offer a forbearance agreement/modification whereby the past due balance would be re-amortized into the principal, which would take Plaintiff out of default, and a modification at a "step rate of 3% for the first year, 4% for the next year, and 5% for the third year." (Id. ¶ 91.)

Further, Plaintiff has alleged detrimental reliance and damage as a result of the alleged promise to negotiate, promise to forbear. Indeed, Plaintiff alleged that he made numerous payments rather than simply cutting his losses and allowing BANA to foreclose on the home. (Id. ¶¶ 96-98.) Indeed, California authority has cited approvingly authority indicating that detrimental reliance may exist where a borrower foregoes other opportunities, including "defaulting." (*West v. JPMorgan Chase Bank, N.A*. (2013) 214 Cal.App.4th 780, 805 [citing *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 566 for the proposition that detrimental reliance was sufficiently alleged when a plaintiff alleged that she gave up other "opportunities to save her home and by devoting resources to making the lower monthly payments under the TPP rather than attempting to sell her home or defaulting"].) Plaintiff's allegations are sufficient for pleading purposes.

The demurrer to the fourth cause of action is overruled.

The demurrer is overruled.

Defendants shall file and serve their answers no later than July 11, 2014.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or other notice is required.

COURT RULING

There being no request for oral argument, the Court affirmed the tentative ruling.