California Homeowner Bill of Rights COLLABORATIVE

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

April 2015 Newsletter

In this issue—

The Collaborative has updated its Post-Foreclosure Unlawful Detainer practice guide! The full guide can be found below, and on our website.

Summaries of important cases including *Boyce* and *Alborzian*, published California Court of Appeal opinions.

Representing California Tenants & Former Homeowners in Post-Foreclosure Evictions (Updated through April 1, 2015)

Unlawful detainer (UD) actions are typically associated with landlord-tenant law. Former borrowers, though, often defend eviction after foreclosure.[1] They face different timelines and challenges, but both tenants and former borrowers continue to struggle against unlawful detainer actions as lenders and investors buy up foreclosed properties[2] and attempt to evict residents soon after purchase. Various affirmative defenses arise from improper foreclosure procedures, so these types of UDs are intimately related to foreclosure law. This practice guide reviews state and local measures in California that govern post-foreclosure UD actions and reviews the former federal

[1] A foreclosing entity that purchases the property at the foreclosure sale, or a bona fide purchaser (BFP), must serve the previous homeowner with a 3-day notice to quit. If the former homeowner continues to occupy the property after this notice expires, or "holdover," the foreclosing entity or BFP must bring a judicial unlawful detainer action to evict. CAL. CIV. PROC. CODE § 1161a(b)(3) (2013).
[2] *See*, *e.g.*, Darwin Bond Graham, *The Rise of the New Land Lords*, EAST BAY EXPRESS, Feb. 12, 2014, http://www.eastbayexpress.com/oakland/the-rise-of-the-new-land-lords/Content?oid=3836329 (detailing the recent Oakland-based foreclosure acquisitions of the "global real estate empire called Colony Capital"); Nathaniel Popper, *Behind the Rise in House Prices, Wall Street Buyers*, N.Y. TIMES, June 4, 2013, at A1 (describing the rise or Real Estate Owned (REO) properties in depressed housing markets).

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protections in the recently expired Protecting Tenants at Foreclosure Act. It also provides practice tips for defending UDs on behalf of both tenants and former borrowers.

Overview

Foreclosure purchasers seeking to remove tenants or former borrowers must comply with both UD notice requirements and with statutory foreclosure procedures. Specifically, plaintiffs bear the burden of establishing:[3] 1) proper service of a valid notice to quit; 2) compliance with the foreclosure notice and recording requirements of CC 2924;[4] 3) duly perfected title (which includes the authority to foreclose aspect of CC 2924(a)(6));[5] and 4) that the tenant or former borrower is holding over.[6]

I. UD Notice Requirements and Local Protections

Prior to 2009, and after 2014, tenants renting in states without post-foreclosure protections were (and currently are) at the mercy of their new landlords once foreclosure is complete.[7] From 2009 through 2014, all tenants were protected by federal notice requirements. California had, and continues to maintain, stricter state protections. California "just cause" localities often give the greatest amount of protection.

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[3] *See* CAL. EVID. CODE § 500 (2011) ("[A] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."); Wells Fargo Bank, N.A. v. Detelder-Collins, 2012 WL 4482587, at *7 (Cal. App. Div. Super. Ct. Mar. 28, 2012) (citing § 500 and putting the evidentiary burden on the UD plaintiff). Please refer to Cal. Rule of Ct. 8.1115 before citing unpublished decisions.
[4] See CAL. CIV. CODE § 2924(a)(1)-(5) for the full list of requirements.
[5] *See* CAL. CIV. CODE § 2924(a)(6) (2013).
[6] CAL. CIV. PROC. CODE § 1161a(b)(3) (2013); *see also* Vella v. Hudgins, 20 Cal. 3d 251, 255 (1977) (requiring UD plaintiffs to show that the foreclosure sale was proper and demonstrate duly perfected title); Aurora Loan Servs., LLC v. Brown, 2012 WL 6213737, at *7 (Cal. App. Div. Super. Ct. July 31, 2012) (listing plaintiff's affirmative burdens).
[7] NHLP, *The Protecting Tenants at Foreclosure Act: Three Years Later*, 42 HOUS. L. BULL. 181, 181 (Sept. 2012); NAT'L LOW INCOME HOUS. COAL., *Renters in Foreclosure: A Fresh Look at an Ongoing Problem*, 1 (Sept. 2012), *available at* http://nlihc.org/sites/default/files/Renters_in_Foreclosure_2012.pdf ("[The PTFA] provide[d] the first national protection for renters.").

A. Tenants

1. Former federal protections

To address widespread tenant displacement brought on by the housing crisis, Congress enacted the Protecting Tenants at Foreclosure Act of 2009.[8] The law sunset December 31, 2014,[9] after efforts to make it permanent failed. Bills to re-enact the PTFA and to make it permanent were introduced in March 2015.[10]

Under the PTFA, a successor in interest was required to provide bona fide tenants with a 90-day notice to vacate before beginning the unlawful detainer process.[11] If there was an existing lease, the tenant could remain in possession until the lease expired.[12] This protection did not apply if the purchaser intended to occupy the property as their primary residence.[13] In that case, a bona fide tenant was still entitled to a 90-day notice, but their tenancy could be terminated before the expiration of their fixed-term lease.[14]

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[8] The Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111- 22, div. A, tit. VII, §§ 701-704, 123 Stat. 1632, 1660-62 (enacted May 20, 2009), *as amended by* Pub. L. No. 111-203, tit. XIV, § 1484 (July 21, 2010) [hereinafter PTFA]. For a more thorough treatment of the first three years of the PTFA and related case law, refer to NHLP, *supra* note 7.

[9] PTFA § 704.

[10] S. 730, 113th Cong. (2015); H.R. 1354, 113th Cong. (2015). *See generally* NAT'L LOW INCOME HOUS. COAL., *Bills Introduced to Permanently Protect Tenants at Foreclosure* (Mar. 16, 2015), *available at* http://nlihc.org/article/bills-introduced-permanently-protect-tenants-foreclosure.

[11] PTFA § 702(a)(2)(B); Bank of N.Y. Mellon v. De Meo, 254 P.3d 1138, 1141 (Ariz. Ct. App. 2011) (90-day period must be specified in the notice); Curtis v. US Bank Nat'l Ass'n, 50 A.3d 558, 564-65 (Md. 2012) (90-day period begins the day tenant receives notice, not the day of foreclosure); Wedgewood Cmty. Fund II, LLC v. Sheffield, 2013 WL 6924725, at *2 (Cal. Super. Ct. App. Div. San Bernardino Cnty. Dec. 30, 2013) (three-day notice served on bona fide, periodic tenants was improper as they were entitled to a 90-day notice under the PTFA). *See generally* NHLP, *supra* note 7, at 185.

[12] PTFA § 702(a)(2)(A); Nativi v. Deutsche Bank Nat'l Tr., 223 Cal. App. 4th 261, 284 (2014); Fontaine v. Deutsche Bank Nat'l Tr. Co., 372 S.W.3d 257, 260 (Tex. App. 2012). To benefit from this provision, tenants must have entered into their leases before "notice of foreclosure:" when title transferred to the new landlord at the foreclosure sale. PTFA § 702(a)(2)(A); *see* 28th Tr. No. 119, City Inv. Capital v. Crouch, 2013 WL 3356585, at *2 (Cal. App. Div. Super. Ct. June 27, 2013) (pointing to the PTFA amendment that clarified this definition of "notice of foreclosure"). See NHLP, *supra* note 7, at 184-85, for a more thorough discussion of this definition.

[13] PTFA § 702(a)(2)(A).

[14] *Id. See generally* CEB, California Eviction Defense Manual, § 20.8 (2d ed. 1993, June 2015 update).

A tenant had to be "bona fide" to qualify for PTFA protection: the tenant could not be the former homeowner or the child, spouse or parent of the homeowner, and the lease must have been an "arm's length" transaction for not substantially less than fair market value rent.[15] Lodgers, tenants renting a room from the homeowner rather than an entire house, may still have been considered "bona fide" under the PTFA,[16] as could tenants renting illegal units.[17] Housing Choice Voucher tenants were automatically bona fide tenants under the PTFA.[18]

Tenants unsuccessfully argued in both federal and state courts that the PTFA included an implied private right of action.[19] Only two federal appeals courts considered the issue and both failed to find a federal private right of action.[20] One of those courts, however, and the California Court of Appeal, found that tenants could nevertheless

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[15] PTFA § 702(b). *See generally* NHLP, *supra* note 7, at 182, 185 (reviewing these qualifications in detail). To demonstrate fair market value, a tenant may offer evidence of services performed in exchange for rent. Rent does not require monetary payment. *28th Tr. No. 119*, 2013 WL 3356585, at *1 (finding the trial court erred by failing to consider the fair market value of tenant's services, which tenant performed in exchange for discounted monetary rent). It may be the tenant's burden, however, to demonstrate that services *were* commensurate with fair market rent. *See*, *e.g.*, Customers Bank v. Boxer, 84 A.3d 1256, 1261 (Conn. App. Ct. 2014) (rejecting tenant's PTFA-based eviction defense because tenant offered no evidence that services allegedly performed in exchange for rent were equal to fair market rent).

[16] *See*, *e.g.*, TDR Servicing LLC v. Smith, No. 37-2010-00200020 (Cal. App. Div. Super. Ct. Aug. 29, 2012) ("Sub-tenant" status is not enough to disqualify a tenant from PTFA protection.).

[17] *See* Nativi v. Deutsche Bank Nat'l Tr. Co., 223 Cal. App. 4th 261, 286 (2014) (extending PTFA protection (as a basis for affirmative state law claims) to tenants renting an illegal garage unit); Erlach v. Sierra Asset Servicing, LLC, 226 Cal. App. 4th 1281, 1301-02 (2014) (reaffirming *Nativi* and holding that tenants renting illegal units—here a unit without proper utilities—were protected by the PTFA).

[18] PTFA § 703; Protecting Tenants at Foreclosure: Notice of Responsibility Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property, 74 Fed. Reg. at 30,107-08 (June 24, 2009) ("[T]he Section 8 tenant's lease is, in effect, a bona fide lease."). The new owner took title to the property subject to both the Section 8 lease and the Housing Assistance Payments (HAP) contract with the local public housing agency. PTFA § 703.

[19] *See*, *e.g.*, Nativi v. Deutsche Bank Nat'l Tr. Co., 2010 WL 2179885, at *2-4 (N.D. Cal. May 26, 2010) (finding that it would be inappropriate to create a federal private right of action for a statute that is basically the province of state law). The PTFA did not include an explicit private right of action.

[20] *See* Logan v. U.S. Bank Nat'l Ass'n, 722 F.3d 1163, 1170-73 (9th Cir. 2013); Mik v. Fed. Home Loan Mortg. Corp., 743 F.3d 149, 158-60 (6th Cir. 2014).

assert *state*-law causes of action premised on a successor-in-interest's PTFA violations.[21]

2. California protections

a. Time requirements

As part of the Homeowner Bill of Rights, the California Legislature passed tenant protections that go beyond those included in the PTFA, and continue to protect tenants after the PTFA's expiration.[22] Effective January 1, 2013, all tenants occupying a foreclosed home require a 90-day notice to quit, even tenants who did not qualify as "bona fide" under the PTFA.[23] As was true under the PTFA, tenants with fixed term leases may maintain their tenancy through the lease term, paying rent to their new landlord.[24] Tenants with fixed-term leases must meet criteria identical to the former PTFA's "bona fide" conditions to qualify for protection throughout their lease term.[25] Under state law, the plaintiff in a UD action bears the burden of

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[21] *See Mik*, 743 F.3d 149 at 167-70; Nativi v. Deutsche Bank Nat'l Tr. Co., 223 Cal. App. 4th 261, 285-89, 319 (2014). See Brittany McCormick, *Questions Corner*, 44 HOUS. L. BULL. 85 (Apr./May, 2014) for a full explanation of private right of action litigation related to the PTFA.

[22] The PTFA established a base of protections that state and local jurisdictions could expand upon: "[N]othing under this section shall affect the requirements for termination of any . . . State or local law that provides longer time periods or other additional protections for tenants." PTFA § 702(a)(2)(B). For a more thorough review of California statutory notice requirements for UD actions, refer to CEB, *supra* note 14, § 1.8.

[23] *See* CAL. CIV. PROC. CODE § 1161b (2013). A "tenant" is considered a person who pays rent for housing, or who works or provides services in exchange for housing. *See* Rossetto v. Barross, 90 Cal. App. 4th Supp. 1, 5 (2001) ("Rent may not necessarily be a single specific dollar amount. It consists even of services."). Renters of illegal units may have qualified for PTFA protection. *See* cases cited *supra* note 17. The reasoning in *Nativi* and *Erlach* could form the basis for arguing that tenants of illegal units are afforded the California-specific protections as well. *See* Carter v. Cohen, 188 Cal. App. 4th 1038 (2010) (finding tenant's rental of an illegal unit not a bar to her claim against her landlord for illegal rent increases). Former homeowners, though, are not considered tenants under state or local law, nor were they considered tenants under the PTFA.

[24] CAL. CIV. PROC. CODE § 1161b (2013); PTFA § 702(c). Also like the PTFA, there is an exception for purchasers who intend to use the property as their primary residence. In that case, tenants still require a 90-day notice. CAL. CIV. PROC. CODE § 1161b(b)(1) (2013).

[25] § 1161b(b)(2)-(4) (The tenant cannot be the child, spouse, or parent of the landlord-mortgagor and the lease must be an arm's length transaction for fair market value).

showing a tenant with a fixed-term lease does not meet these requirements.[26]

b. Cover sheet & method of notice

California law also mandates additional notice requirements than those formerly required by the PTFA. Unless the notice unambiguously provides at least 90 days to vacate, it must be accompanied by a "cover sheet" with exact language dictated by statute, advising tenants to seek legal counsel, to respond to all forthcoming notices, and of the 90-day, fixed-term, and just cause jurisdiction lease protections.[27] At least one court has found that cover sheets are required for all residential tenants, regardless of whether they are *actually* entitled to a 90-day notice.[28]

California law also governs the *method* of service of notices to quit, requiring attempts at personal service first, and then outlining the posting and mailing alternatives.[29] UD plaintiffs must strictly comply with the method of service requirements. Tenants and former homeowners can use flaws in service to successfully defend UDs.[30]

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[26] *See* § 1161b(c).

[27] § 1161c ("[T]he immediate successor in interest . . . *shall* attach a cover sheet, in the form as set forth [below].") (emphasis added). *See* 28th Tr. No. 119, City Inv. Capital v. Crouch, 2013 WL 3356585, at *2 (Cal. App. Div. Super. Ct. June 27, 2013) (reversing the trial court's judgment for plaintiff in part due to plaintiff's failure to notify tenant of her right to remain in possession until the expiration of her lease, violating § 1161c(c) cover sheet requirements).

[28] *See* Canterbury Lots 68, LLC v. Carr, 2014 WL 4922430, at *4 (Cal. App. Div. Super. Ct. Sept. 16, 2014) (reversing an unlawful detainer judgment against a tenant because the notice to quit was not accompanied by the required cover sheet, notwithstanding that tenant resided with the former homeowner and was not entitled to a 90-day notice under California law).

[29] *See* CAL. CIV. PROC. CODE § 1162 (detailing personal delivery and "nail and mail" methods).

[30] *See*, *e.g.*, Liebovich v. Shahrokhkhany, 56 Cal. App. 4th 511, 513 (1997) ("A lessor must allege and prove proper service of the requisite notice. [Citations.] Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained."); Opes Invs., Inc. v. Yun, 2014 WL 4160072, at *1-2 (Cal. App. Div. Super. Ct. July 16, 2014) (reversing trial court's grant of summary judgment to plaintiff who alleged compliance with notice to quit service requirements but submitted no corresponding evidence. Tenant gave evidence he was never personally served a notice to quit, never received notice by mail, and that the notice was never posted at the property. Former homeowner asserted she likewise never received notice to quit, creating a triable issue of fact and rendering summary judgment improper.); *28th Tr. No. 119,* 2013 WL 3356585, at *3 (finding

3. Local protections

The California Homeowner Bill of Rights set a floor of tenant protections that localities can build upon.[31] There are at least fifteen California cities and towns that provide some level of "just cause for eviction" protection, including San Francisco, Los Angeles, Oakland, and San Diego.[32] In these localities, foreclosure is not considered a "just cause" for eviction, and landlords are therefore prevented from evicting tenants simply for leasing a home purchased at foreclosure.[33] Accordingly, tenants may retain possession until there is a "just cause" to evict, regardless of whether they are month-to-month tenants or tenants with a fixed-term lease.[34]

Advocates should note that many of these "just cause" provisions were passed to coincide with local rent control ordinances, and the terms "just-cause" and "rent control" are sometimes used interchangeably to describe local protections for tenants in foreclosure. Advocates should inquire, however, whether the just cause protections for tenants in foreclosure in a particular city apply only to tenants with apartments in rent-controlled structures. At least two California cities, San Francisco and Los Angeles, recently expanded just cause eviction protections to residential buildings *not* covered by rent control ordinances.[35]

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the failure to list a tenant name on the proof of service a fatal defect in plaintiff's UD case).

[31] "Nothing in this section is intended to affect any local just cause eviction ordinance." CAL. CIV. PROC. CODE § 1161b(e) (2013); *see also* Gross v. Superior Court, 171 Cal. App. 3d 265 (1985) (California foreclosure laws do not preempt local eviction protections.).

[32] Refer to Tenants Together, Foreclosure Related Laws, http://www.tenantstogether.org/article.php?id=935, for a complete list and links to municipal websites. NHLP maintains a national list of most state and local protections, available at http://nhlp.org/node/1341.

[33] *See*, *e.g.*, BERKELEY MUN. CODE, Rent Stabilization and Eviction for Good Cause Ordinance § 13.76 (Ord. 5467-NS § 1, 1982: Ord. 5261-NS § 1, 1980).

[34] For more information on this topic, see CEB, *supra* note 14, at § 20.10.C.

[35] *See* S.F. ADMIN. CODE § 37.9D (2014); L.A. MUN. CODE ch IV, art 14.1, § 49.92 (2014). For a quick reference to which ordinances only protect tenants in rent controlled apartments, and those that have been extended to non-rent controlled structures, see NHLP, *supra* note 32.

B. Former Borrowers

In terms of notice, former borrowers enjoy far fewer UD protections than tenants. Absent any federal regulation, once title is transferred to the new owner in a foreclosure sale, the purchaser may give the former borrower a 3-day notice to quit.[36] If the former borrower continues in possession, the new owner must file an unlawful detainer to evict.[37] Self-help, including locking the former borrowers out of the property without going through the UD process, is grounds for forcible entry and detainer, trespass, and wrongful eviction claims.[38] The same service requirements that apply to tenant notices to quit also apply to notices served on former borrowers and may be used as defenses in a UD answer.[39]

II. Compliance with California Foreclosure Law

Without a proper foreclosure sale, the purchaser does not hold valid title to the property and cannot satisfy that UD prerequisite under CCP 1161a.[40] There are two ways to show an improper foreclosure sale, and both tenants and former borrowers can attack the

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36 *See* CAL. CIV. PROC. CODE § 1161a(b)(2).
37 *Id*. *See generally* CEB, *supra* note 14, at § 20.4.
38 *See*, *e.g.*, Makreas v. First Nat'l Bank of N. Cal., 2013 WL 2436589, at *11-12 (N.D. Cal. June 4, 2013) (granting former homeowner-plaintiff's partial summary judgment motion on his trespass and wrongful eviction claims based on defendant-bank's illegal, post-foreclosure lock-out); Karp v. Margolis, 159 Cal. App. 2d 69, 75-76 (1958) (holding that purchasers who entered into the premises without legal process after foreclosure were guilty of forcible entry).
39 *See* CAL. CIV. PROC. CODE § 1162; Bank of N.Y. Mellon v. Preciado, 224 Cal. App. 4th Supp. 1, 8 (2013) (finding service improper because plaintiff used the "nail and mail" method before attempting personal service on tenants and former homeowner in a foreclosed home); US Bank, N.A. v. Cantartzoglou, 2013 WL 443771, at *10-11 (Cal. App. Div. Super. Ct. Feb. 1, 2013) (same); *see also* Opes Invs., Inc. v. Yun, 2014 WL 4160072, at *2 (Cal. App. Div. Super. Ct. Orange Cnty. July 16, 2014) (reversing trial court's grant of summary judgment to plaintiff who alleged compliance with notice to quit service requirements and submitted a declaration of proper service; former homeowner asserted she never received notice to quit, creating a triable issue of fact and rendering summary judgment improper).
40 *See Preciado*, 224 Cal. App. 4th Supp. at 9 (in a CCP 1161a UD, a "plaintiff must show that he acquired the property at a regularly conducted sale and thereafter "duly perfected" his title"); Aurora Loan Servs., LLC v. Brown, 2012 WL 6213737, at *7 (Cal. App. Div. Super. Ct. July 31, 2012) (linking invalid title with plaintiff's lack of standing to sue for possession); US Bank N.A. v. Espero, 2011 WL 9370474, at *4 (Cal. App. Div. Super. Ct. Dec. 27, 2011) (same).

sale to defend a post-foreclosure UD: 1) demonstrate that the foreclosure notice and recording procedures were not followed; or 2) show that the beneficiary or trustee did not have the authority to foreclose.[41] The latter can be much more difficult to prove but, if shown, can void a completed foreclosure sale.

A. Improper Foreclosure Notice & Recording Procedures

Once a trustee's deed upon sale is recorded, there is a presumption that the foreclosing entity complied with the foreclosure notice and recording requirements of CC 2924.[42] Absent evidence to the contrary, this presumption may be difficult for former borrowers and tenants to overcome.[43] The presumption becomes conclusive for bona fide purchasers of the property.[44] Importantly, this presumption does not apply to the authority to foreclose aspect of CC 2924(a)(6).[45]

B. Authority to Foreclose & Duly Perfected Title

Pre-HBOR, former borrowers generally had a limited ability to challenge plaintiff's title in an unlawful detainer action: only

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[41] *See generally* HBOR Collaborative, *Litigating Under the California Homeowner Bill of Rights & Nonjudicial Foreclosure Framework*, part II.A (Mar. 2015), *available at* http://calhbor.org/wp-content/uploads/2015/04/PG-Mar-2015-update-FINAL-4-1-15.pdf (discussing the authority to foreclose and its relation to CC 2924(a)(6)).

[42] *See* CAL. CIV. CODE § 2924(c); Biancalana v. T.D. Serv. Co., 56 Cal. 4th 807, 814 (2013); Moeller v. Lien, 25 Cal. App. 4th 822, 831-32 (1994).

[43] *See*, *e.g.*, Wells Fargo Bank, N.A. v. Detelder-Collins, 2012 WL 4482587, at *6-7 (Cal. App. Div. Super. Ct. Mar. 28, 2012) (accepting the trial court's finding that defendant borrower's allegations that they never received foreclosure notices were not credible and applying the presumption of compliance to § 2924's notice requirements, but not its authority to foreclose element); US Bank N.A. v. Espero, 2011 WL 9370474, at *2 (Cal. App. Div. Super. Ct. Dec. 27, 2011) (same); *cf.* E*Trade Bank v. Mainusch, No. 1-13-AP-001607 (Cal. App. Div. Super. Ct. Feb. 4, 2015) (Former homeowners successfully overturned a UD judgment because plaintiff failed to introduce trustee's deed into evidence and offered no other evidence of compliance with CC 2924). *But see* Opes Invs., Inc. v. Yun, 2014 WL 4160072, at *3 (Cal. App. Div. Super. Ct. July 16, 2014) (reversing a grant of summary judgment to the plaintiff, which pointed to a trustee's deed upon sale that listed the purchaser as "Opes Investments" but identified itself in its complaint as "Opes Investments, Inc.," offering no evidence that these two entities were identical, or any evidence that the sale complied with CC 2924).

[44] CAL CIV CODE § 2924(c); *Biancalana*, 56 Cal. 4th at 814.

[45] *See* Bank of Am., N.A. v. La Jolla Group II, 129 Cal. App. 4th 706 (2005) (statutory presumptions do not apply to purchasers at invalid sales).

noncompliance with foreclosure statutes and the legitimacy of the sale itself could be litigated.[46] However, if a defendant could show defects or serious questions going to the validity of assignments or substitutions of trustees, or if a plaintiff simply failed to provide any evidence showing duly perfected title, courts generally reversed judgments for plaintiffs and prevented evictions.[47] HBOR has since codified this authority to foreclose requirement in CC 2924(a)(6).[48]

Even when the authority to foreclose is not an issue, there may be some defect that would void the foreclosure sale and destroy the plaintiff's claim of "duly perfected title."[49] In *Barroso v. Ocwen Loan*

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[46] Cheney v. Trauzettel, 9 Cal. 2d 158, 160 (1937); Old Nat'l Fin. Servs., Inc. v. Seibert, 194 Cal. App. 3d 460, 465 (1987).

[47] *See*, *e.g.*, Bank of N.Y. Mellon v. Preciado, 224 Cal. App. 4th Supp. 1, 9-10 (2013) (reversing UD court's judgment for plaintiff because plaintiff had failed to show compliance with CC 2924 – specifically, plaintiff failed to explain why DOT and Trustee's Deed upon Sale listed two different trustees); Aurora Loan Servs., LLC v. Brown, 2012 WL 6213737, at *5-6 (Cal. App. Div. Super. Ct. July 31, 2012) (finding plaintiff's lack of evidence showing valid assignment and substitution of trustee fatal to their UD action, in the face of irregularities in the recording of those documents); Wells Fargo Bank, N.A. v. Detelder-Collins, 2012 WL 4482587, at *7 (Cal. App. Div. Super. Ct. Mar. 28, 2012) (reversing judgment for plaintiff because plaintiff could not show a valid, recorded substitution of trustee that would have given the foreclosing entity authority to foreclose); US Bank N.A. v. Espero, 2011 WL 9370474, at *4 (Cal. App. Div. Super. Ct. Dec. 27, 2011) (reversing trial court's judgment for plaintiff because plaintiff provided no evidence that it was assigned the property from the purchaser after foreclosure). *But see* Aurora Loan Servs. v. Akins, No. BV-029730 (Cal. App. Div. Super. Ct. Apr. 26, 2013) (rejecting former borrower's argument on appeal that plaintiff had to produce evidence of duly perfected title because in an appeal, defendant borrower had to offer some evidence of her own to reverse a trial court's error).

[48] CAL. CIV. CODE § 2924(a)(6) (2013) ("No entity shall record . . . a notice of default . . . or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest.").

[49] "Duly" perfected title encompasses all aspects of purchasing the property, not just recorded title. *See* Bank of N. Y. Mellon v. Preciado, 224 Cal. App. 4th Supp. 1, 9-10 (2013) (finding the trial court erred in accepting the recorded trustee's deed as conclusive evidence of duly perfected title in the face of contradictory evidence that the property was sold to borrower's loan servicer, not the UD plaintiff asserting title); E*Trade Bank v. Mainusch, No. 1-13-AP-001607 (Cal. App. Div. Super. Ct. Feb. 4, 2015) (Former homeowners successfully overturned a UD judgment because plaintiff failed to introduce trustee's deed into evidence and offered no other evidence of compliance with CC 2924.); Opes Invs., Inc. v. Yun, 2014 WL 4160072, at *2-3 (Cal. App. Div. Super. Ct. July 16, 2014) (reversing a grant of summary judgment to the plaintiff, which 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" as evidence of valid purchase. The

Servicing, LLC, for example, borrowers were compliant with their permanent modification when their servicer foreclosed and the purchaser brought an eviction action.[50] The borrowers defended the UD as part of larger litigation initiated by the borrowers against their servicer.[51] The court did not resolve the unlawful detainer, but found that the servicer had breached the permanent modification contract and that borrowers had a valid wrongful foreclosure claim to void the foreclosure.[52]

III. Litigation Issues Unique to Post-Foreclosure Unlawful Detainers

A. Tender

As a general rule, parties seeking to undo a foreclosure sale must "tender" (offer and be able to pay) the amount due on their loan.[53] There are several exceptions to this general rule, including when the sale itself would be void.[54] Accordingly, when a former borrower defends an unlawful detainer by asserting that the plaintiff failed to comply with the duly perfected title/authority to foreclose aspect of CCP 1161a(b), most courts do not require tender.[55] In addition,

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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.); Dang v. Superior Court, No. 30-2013-684596 (Cal. App. Div. Super. Ct. Jan. 31, 2014) (finding the homeowner likely to succeed on appeal because the plaintiff filed the UD before recording the trustee's deed).

[50] Barroso v. Ocwen Loan Servicing, LLC, 208 Cal. App. 4th 1001, 1007 (2012).

[51] *Id*.

[52] *Id*. at 1017. *But see* Zavieh v. Superior Court, 2015 WL 1524546 (Cal. Ct. App. Apr. 2, 2015) (holding that while breach of loan modification agreement would render the trustee sale void, such a claim is not a challenge to the statutory UD proceeding and therefore the UD judgment was not res judicata to a subsequent wrongful foreclosure case).

[53] *See* Lona v. Citibank, N.A., 202 Cal. App. 4th 89 (2011) (stating the general tender rule).

[54] *See*, *e.g.*, Dimock v. Emerald Props., 81 Cal. App. 4th 868, 877-78 (2000). A full discussion of the tender rule and its exceptions in a foreclosure context is in HBOR Collaborative, *supra* note 41, part III.C.

[55] *See*, *e.g.*, Wells Fargo Bank, N.A. v. Detelder-Collins, 2012 WL 4482587 (Cal. App. Super. Ct. Mar. 28, 2012) (excusing tender when the sale was found void due to an invalid trustee substitution); Seastone v. Perez, 2012 WL 6858725 (Cal. Super. Ct. Dec. 13, 2012) (finding tender excused because defendant (former borrower) brought a statutory defense to plaintiff's perfection of title under CC 2924); *cf*. MCA, Inc. v.

because they are not parties to the loan, courts have not imposed the tender requirement on tenants who challenge the plaintiff's compliance with foreclosure notice and recording requirements of CC 2924.[56]

B. The Res Judicata Problem for Former Borrowers

If a foreclosing bank proved "duly perfected" title in an unlawful detainer action, a subsequent affirmative wrongful foreclosure claim brought by the former borrower against the bank is often barred by res judicata, if the basis for the borrower's affirmative claim is also validity of title. This is true even if the borrower did not allege improper title as part of her general denial of the UD plaintiff's case, but could have.[57]

This is a tricky problem to address because many former borrowers litigate UD actions without legal representation not anticipating that, by not addressing title, they are destroying any chance they have of attacking the foreclosure in the future.[58] Even if former borrowers *are*

Universal Diversified Enters., 27 Cal. App. 3d 170 (1972) (requiring tender when the defendant combined statutory defenses with claims for affirmative relief to invalidate the sale).

[56] JP Morgan Chase Bank v. Callandra, No. 1371026 (Cal. Super. Ct. Santa Barbara Cnty. Oct. 21, 2010) (allowing tenant to challenge the foreclosure without tender because the foreclosing entity had failed to post a notice of trustee sale).

[57] *See, e.g.,* Hopkins v. Wells Fargo Bank, N.A., 2013 WL 2253837, at *4-5 (E.D. Cal. May 22, 2013) (barring former borrower's wrongful foreclosure claim because defendant bank had already established duly perfected title in a previous UD action and the borrower *could have* litigated their § 2923.5 issue there); Castle v. Mortg. Elect. Registration Sys., Inc., 2011 WL 3626560, at *4-9 (C.D. Cal. Aug. 16, 2011) (dismissing plaintiff borrower's wrongful foreclosure claims because title was "litigated" in the previous UD action, even though there was a default judgment in that action); Lai v. Quality Loan Serv. Corp., 2010 WL 3419179, at *4 (C.D. Cal. Aug. 26, 2010) (finding borrower's requests for declaratory relief and to set aside the foreclosure sale issues already litigated in a previous UD action); Malkoskie v. Option One Mortg. Corp., 188 Cal. App. 4th 968, 973 (2010) (applying the same reasoning described in *Hopkins*).

[58] Challenging a bank's "authority to foreclose" can be extremely difficult in an affirmative, wrongful foreclosure or quiet title case because, while a foreclosing entity must actually *be* one the of the parties listed in CC 2924(a)(6) to possess that authority, nothing in the statute actually requires them to *prove* they are who they say they are. Conversely, in a UD, the burden is on the plaintiff to prove they possessed the authority to foreclose and complied with all aspects of CC 2924. The UD court then, should require the UD plaintiff to prove they are the beneficiary, trustee, or designated agent capable of foreclosing. *See, e.g.*, US Bank, N.A. v. Cantartzoglou, 2013 WL 443771, at *6-11 (Cal. App. Div. Super. Ct. Feb. 1, 2013) ("In her verified answer, [former homeowner] denied the allegation that [bank] had purchased and perfected title in the property at the trustee's sale. That denial put

represented, advocates defending UD actions are unlikely to also represent former borrowers in affirmative wrongful foreclosure cases.

This is an unsettled area of law, but if a former borrower or their counsel is fortunate enough to realize the impending res judicata problem as they defend an eviction (or even before the UD is filed), they should file an affirmative suit against their servicer (which is, or will be, the UD plaintiff) as soon as possible. This allows for a couple of different options moving forward: 1) move to stay the UD until the wrongful foreclosure suit is resolved; or 2) move to consolidate the UD with the wrongful foreclosure suit.[59] Either option allows for the litigation of title outside the context of an unlawful detainer, which some UD courts insist is meant to decide possession only, even in a post-foreclosure context.[60]

Very few cases have considered whether HBOR claims brought post-sale constitute "title" issues that would be barred by res judicata after an unsuccessful unlawful detainer defense. Advocates facing this possibility should argue that HBOR claims fall outside the scope of "title" and may therefore be litigated after a UD.[61]

C. Rights of Unnamed Occupants

A new landlord who wishes to evict existing, holdover tenants must serve a summons and complaint to begin the UD process.[62] For the eviction judgment to bind unnamed tenants, the landlord must also

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[bank's] ownership of the property at issue, thereby obligating [bank] to prove its ownership at trial as an element of its case.").

[59] *See* Martin-Bragg v. Moore, 219 Cal. App. 4th 367, 385 (2013) (finding that the UD defendant and former borrower was prejudiced by the trial court's refusal to consolidate the UD with the former borrower's affirmative wrongful foreclosure suit).

[60] Advocates should also argue that in the *post-foreclosure* UD context, as opposed to the standard UD, title *should* be at issue because it is part of the UD plaintiff's prima facie case. Even if a UD judge agrees that title is appropriately litigated in a post-foreclosure UD, however, advocates should be warned that the UD timeline is much shorter than in normal litigation. *See generally* CEB, *supra* note 14 at § 11.5. It may be difficult to conduct discovery related to a complicated title analysis in a shortened timeframe.

[61] *See* Bolton v. Carrington Mortg. Servs., LLC, No. 34-2013-00144451- CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. July 24, 2014) (HBOR violations outside scope of unlawful detainer actions and not barred by res judicata).

[62] The standard procedure, at least for corporate purchasers of foreclosed homes, is to name only the former borrower on a UD summons and complaint, but to also list "Does 1-10" and "all occupants," thereby covering any tenants that may or may not reside on the property.

include a blank prejudgment right to possession form.[63] Before HBOR, any unnamed tenants residing on a foreclosed property needed to complete this form and file it with the court within 10 days of being served notice.[64] If they did not, these tenants lost all rights to assert possession by defending the UD,[65] or to object to the enforcement of a judgment for possession.[66] Because of HBOR, however, unnamed tenants in post-foreclosure UD actions can now file a claim of right to possession or object to a judgment at *any* time before a lockout.[67]

D. Masking Rule

Finding rental housing with an eviction on your rental record can be difficult and often puts another strain on already stressed tenants and former borrowers. Usually, court documents related to unlawful detainer cases are "masked," or not available to the public, for only 60 days after the complaint is filed.[68] After this 60-day "curtain," the case file becomes public unless the defendant prevailed in the UD.[69] Since 2010, tenants and borrowers defending post-foreclosure evictions have been afforded more protection: UD documents are masked for 60 days following the filing of the complaint, and then permanently masked *unless* the plaintiff prevails within those 60 days, against all defendants, after a trial.[70]

E. Security Deposits

A tenant's previous landlord, and that landlord's successor-in-interest, are jointly and severally liable for a tenant's security

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[63] *See* CAL. CIV. PROC. CODE § 415.46 (2012). Including this form complied with pre-HBOR post-foreclosure eviction law but did not give tenants a fair opportunity to assert the right to possession they were entitled to under PTFA or local just cause statutes.
[64] *See* CAL. CIV. PROC. CODE § 1174.25(a) (2007).
[65] *Id.*
[66] *See* § 1174.3 (2007). For more on this subject, see CEB, *supra* note 14, at § 24.2.
[67] *See* CAL. CIV. PROC. CODE § 415.46(e)(2) (2012); Manis v. Superior Court, No. 1-13-AP-001491 (Cal. App. Div. Super. Ct. Apr. 26, 2013) (claim of right to possession must be granted when the claimant has a valid claim to possession); *see also* CEB, *supra* note 14, at § 24.6.
[68] *See* CAL. CIV. PROC. CODE § 1161.2(a)(5) (2013).
[69] § 1161.2(a)(6)
[70] *Id.* Documents are still available to parties listed as exceptions in § 1161.2(a)(1)-(4).

deposit.[71] If the original landlord did not return the tenant's security deposit before the foreclosure sale, the new landlord must return the deposit, and the tenant should name both landlords in any small claims suit to recover the deposit. One case also held that a tenant in possession post-foreclosure has standing to bring a rent-skimming claim to recover the security deposit as damages.[72]

IV. Evictions of Tenants for Nonpayment of Rent and Breach of Lease

Because California law now clarifies that the landlord-tenant relationship continues after foreclosure,[73] a tenant may also face evictions due to non-payment of rent or breach of a lease term.[74] Because these evictions are based on CCP 1161, the 90-day notice protection in CCP 1161b and the cover sheet requirement of CCP 1161c do not apply.

Finally, successors-in-interest (new landlords) must provide notice to existing tenants of the change in ownership within 15 days of assuming ownership.[75] A new landlord must comply with the notice requirement before the landlord can evict for non-payment of rent.[76] Landlords may, however, request back-rent for any time a tenant was not paying rent, and bring an action in small claims court to do so.[77]

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[71] CAL. CIV. CODE § 1950.5(j).

[72] Ferguson v. Tr. Holding Serv. Co., 2014 WL 810852, at *4-7 (Cal. Ct. App. Mar. 3, 2014). Rent skimming refers to a landlord's application of rental payments, during the landlord's first year of property ownership, on things other than the landlord's mortgage, without first applying the rent to the mortgage. *See* CAL. CIV. CODE § 890(a)(1).

[73] *See* CAL. CIV. PROC. CODE § 1161b (2013) ("[A]ll rights and obligations under the lease shall survive foreclosure."). Several courts have also found that the landlord-tenant relationship continued post-foreclosure under the PTFA. *See* Mik v. Fed. Home Loan Mortg. Corp., 743 F.3d 149 (6th Cir. 2014); Nativi v. Deutsche Bank Nat'l Tr. Co., 223 Cal. App. 4th 261, 277-84 (2014); Erlach v. Sierra Asset Servicing, LLC, 226 Cal. App. 4th 1281, 1295 (2014) (finding the purchaser at foreclosure sale becomes the new landlord of the existing tenant and is obligated to remedy habitability issues).

[74] *But see* Solid Rock Homes, LP v. Woods, No. 37-2012-00200205-CL-UD-CTL (Cal. App. Div. Super. Ct. Nov. 20, 2013) (finding tenants need not pay rent to benefit from the post-foreclosure notice requirements in former CCP 1161b or the PTFA).

[75] CAL. CIV. CODE § 1962(c) (2013).

[76] *Id.*

[77] "Nothing in this subdivision shall relieve the tenant of any liability for unpaid rent." *Id.*

Conclusion

Defending tenants and former borrowers in post-foreclosure unlawful detainer actions requires advocates to become versed in California foreclosure law. These types of cases also open up UD defenses uncommon in standard landlord-tenant cases: improper foreclosure notice and recording procedures and imperfect title.

Summaries of Recent Cases

Published State Cases

Wrongful Foreclosure Claim Barred by Res Judicata with Bankruptcy and UD Actions

Boyce v. TD Serv. Co., 235 Cal. App. 4th 429 (2015): Res judicata is the overarching doctrine that prevents the same parties from litigating the same issue twice. Claim preclusion is the first of a three-part analysis used to determine *if* res judicata bars a particular suit. California courts determine whether: 1) the same parties litigated the same alleged harm in the first suit; and 2) the first suit resulted in a final judgment on the merits; and 3) if the parties in the two suits are not exactly the same, does privity between the parties exist? California courts employ the "primary rights theory" to answer the first inquiry, which involves a claim preclusion analysis. If the claims in the second suit were—or *could* have been—asserted in the first suit, claim preclusion exists and the first element of res judicata is fulfilled. Here, borrower brought wrongful foreclosure and related claims against his original lender, the eventual investor, his servicer, the trustee, and the bona fide purchaser of his property. Generally, borrower asserted that the assignment of his loan to a trust was void because it occurred after the trust closed. Previously, borrower had filed chapter 11 bankruptcy to stay the foreclosure. The bankruptcy court granted servicer relief from the automatic stay and denied borrower's motion to disallow servicer's proof of claim. In reaching its decision, the bankruptcy court analyzed and confirmed a proper chain of title. Borrower appealed, but a federal district court affirmed the bankruptcy court's decision. Free from the automatic stay, servicer proceeded with foreclosure and eventually sued to evict borrower. As part of his unlawful detainer (UD) defense, borrower repeated his *Glaski*-like claim and argued servicer had not demonstrated duly perfected title. The UD court disagreed and granted summary judgment to servicer; the Appellate Division affirmed. In the current litigation, the trial court found borrower's claims barred by res judicata and granted servicer's demurrer. The Court of Appeal agreed. Borrower had multiple opportunities to argue his wrongful foreclosure theories, in bankruptcy court, federal district court, UD court, and in the Appellate Division. In each instance, the court considered borrower's allegations related to title and foreclosure procedures. Even though the specific claims varied, they all emanated from the same "primary right." Finally, the parties involved in the bankruptcy and the UD are in privity with the parties in the current suit, as all have a "substantial interest in the foreclosure." The Court of Appeal therefore affirmed the trial court's sustaining of servicer's demurrer based on res judicata with the bankruptcy and UD decisions.

(Former) CCP 580b Basis for Viable FDCPA Claim

Alborzian v. JP Morgan Chase Bank, N.A., 235 Cal. App. 4th 29 (2015): California has several "anti-deficiency" statutes that prevent creditors from seeking deficiency judgments in particular situations. Under (former) CCP 580b, the foreclosure on a senior lien of a purchase-money loan securing real property prevented a junior lien holder from seeking a judgment against borrowers personally, even if the foreclosure purchase price was insufficient to pay the junior lien holder the outstanding debt.[78] Here, borrowers tried to use former CCP 580b to argue that their junior lien holder's post-foreclosure debt collection attempts violated the federal Fair Debt Collections Practices Act (FDPCA) and therefore also California's Rosenthal Act and the UCL. Specifically, the junior lien holder sent borrower letters urging them to "settle" their "debt" by paying a percentage of the amount "owed." The letters referred to borrower's foreclosed mortgage as "debt" and "the amount owed," while simultaneously "disavow[ing] being 'an attempt to collect a debt or to impose personal liability . . . to the extent [the] obligation was discharged.'" Borrowers argued "that [§] 580b extinguished [the junior lien holder's] right to enforce its loan

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[78] CCP 580b was amended in 2013 by Senate Bill No. 426. The current version of the law (effective Jan. 1, 2014) specifies: "No deficiency *shall be owed or collected*, and no deficiency judgment shall lie, on a loan, refinance, or other credit transaction . . . that is used to refinance a purchase money loan . . ." (emphasis added to highlight the additional language).

against them personally, such that [its] letters and calls were misleading for implying that the debt was still owed." The court found that borrowers had sufficiently stated an FDCPA claim, which prohibits debt collectors from "false[ly] represent[ing] . . . the character, amount or legal status of any debt." Further, a debt collector's deceptive attempts to collect debt—whether enforceable or unenforceable debt—violates the FDCPA. Here, the "unspoken but unmistakable premise" of the letters borrowers received was that they still owed an enforceable debt. Indeed, under the "least sophisticated debtor" standard, the borrowers would not understand what "original obligation was discharged" meant "unless [they] happened to be familiar with [§] 580b." The court reversed the trial court's grant of the lien holder's demurrer to borrowers' FDCPA claim and their attendant Rosenthal and UCL claims. Interestingly, borrowers' claim that the lien holder improperly reported the unenforceable debt to credit reporting agencies provided standing for borrowers' UCL claim.[79]

Unpublished State Cases[80]

Statutory Right of Redemption Unavailable if No Deficiency Sought

Vega v. Goradia, 2015 WL 847128 (Cal. Ct. App. Feb. 26, 2015): "If a deficiency judgment is not waived or prohibited, the real property . . . therein shall be sold subject to the right of redemption." CCP § 726(e). Additionally, "if the decree of foreclosure . . . on real property pursuant to CCP 726 determines that a deficiency judgment may be ordered against the defendant, the real property . . . shall be sold subject to the right of redemption." CCP § 729.010(a). If, in other words, the

[79] Other borrowers have used the former CCP 580b as a basis for straight Fair Credit Reporting Act claims. *See, e.g.*, Murphy v. Ocwen Loan Servicing, LLC, 2014 WL 2875635 (E.D. Cal. June 24, 2014) (finding that while former CCP 580b did not wipe out borrower's deficiency, borrowers could nevertheless sue servicer for misleading credit reporting agencies by failing to explain that an outstanding debt is not subject to a deficiency judgment in court); Johnson v. Wells Fargo Home Mortg., Inc., 2013 WL 7211905 (C.D. Cal. Sept. 13, 2013) (same).

[80] 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.

foreclosing entity does *not* seek a deficiency judgment against the foreclosed upon borrowers, then the borrowers are not entitled to a right of redemption. Here, borrower alleged her home was improperly foreclosed upon without allowing her a right of redemption. In a previous bankruptcy filed by borrower's husband, the court ordered borrowers to make both monthly mortgage payments and protection payments to servicer. Ultimately, borrowers paid servicer more than $100,000 this way, "post-judgment, [and] for which [borrower] received no offset or credit." Borrower alleged these payments "created a deficiency" and consequently provided her with a right of redemption, which servicer denied her. The court disagreed. Servicer never sought a deficiency from borrower—it "looked only to the property to satisfy [borrower's] obligations." This does not give rise to a statutory right of redemption as borrower argued. Nor was there an equitable set-off. Unlike the borrowers in *Birman v. Loeb*, 64 Cal. App. 4th 502 (1998), which borrower cited, this borrower had not won a judgment (including attorney's fees and costs) against servicer before foreclosure. Having won the judgment, borrowers in *Birman* were "both a creditor and a debtor of [servicer]." Here, by contrast, "the issue of an equitable setoff simply does not arise." The Court of Appeal affirmed the trial court's grant of a demurrer to borrower's redemption-based cause of action.

Servicer's Summary Judgment Motion Denied on Breach of Contract Claim

Morris v. Bank of Am., No. 34-2014-00163806-CU-OR-GDS (Cal. Super. Ct. Sacramento Cnty. Mar. 13, 2015): Breach of contract claims require borrowers to show, *inter alia*, the existence of an enforceable contract and damages. Relevant to the contract element, a novation is a "complete substitution of agreements that entirely extinguishes the first [contract,]" and any breach claim based on the first contract. By comparison, a modification changes or extinguishes "only portions" of the original agreement. Damages are measured by the "detriment proximately caused [by the breach], or which, in the ordinary course of things, would be likely to result [from the breach]." Here, borrower alleged she obtained a permanent modification from her servicer. She could not notarize the final documents, however, because servicer had misspelled her last name. Over the next three years, servicer accepted modified payments and promised to correct the clerical error, but never did. Eventually, servicer began rejecting payments and cancelled the modification due to borrower's failure to notarize the final documents. Borrower sued servicer for breach of the modification and, as part of the resulting settlement agreement, servicer provided borrower with a new permanent modification—four years after her first agreement. In the current suit, borrower continues to allege breach of the first modification agreement, claiming damages of accrued arrearages and fees, attorney's fees, "costs of saving the property," and ruined credit. Servicer moved for summary judgment, alleging: 1) that the new modification agreement constituted a novation of the first modification, forestalling borrower's attempt to base her breach claim on the first modification; and 2) that because the terms of the new modification are more advantageous than the terms of the first modification, borrower can not claim damages stemming from a breach of the first modification. The court rejected both arguments. First, the court looked to the plain language of the new modification agreement, which identified itself repeatedly as a "modification," not a novation of any pre-existing agreement. Further, that borrower may have received additional consideration for this new modification does not automatically render the agreement a novation, and servicer cites no supporting authority for this argument. Second, to show borrower could not possibly claim damages resulting from servicer's breach of the original modification, servicer had to demonstrate that the breach did not "deprive [her] of *any* savings or other benefits more valuable than the [amount] servicer contends inhere in the [new] modification." Since it is possible borrower could have avoided the accrued arrearages and costs associated with a four-year delay in obtaining a modification, *and* benefited from more beneficial loan terms by refinancing or obtaining an additional modification after the first modification, servicer has not met its burden. Additionally, borrower alleges other damages besides accrued arrearages and costs (which may, as servicer alleges, be offset by a more favorable new modification). She also alleges costs of saving her home and damaged credit. The court therefore denied servicer's summary judgment motion.

Federal Cases

Potential TPP Claims Accrued Before *Wigod*, *West*, *Corvello*

***In re* Goldstein**, 526 B.R. 13 (B.A.P. 9th Cir. 2015): All the assets of the debtor, including legal claims existing at the time of the petition, belong to the bankruptcy estate. Thus, if the debtor fails to schedule an asset such as a potential cause of action, that asset continues to belong to the bankruptcy estate and does not revert to the debtor after discharge. "[G]enerally, a cause of action accrues . . . when the wrongful act is done and the obligation or the liability arises, but it does not accrue until the party owning it is entitled to begin and prosecute an action thereon." Here, debtors entered into a TPP agreement with their servicer and complied with the TPP terms. After borrower's first three payments, servicer did nothing: it neither granted a permanent modification, nor did it deny a modification. After continuing their TPP payments for several months, debtors finally filed a chapter 7 bankruptcy to prevent the looming foreclosure. Debtors did not list any potential causes of action against their servicer in their bankruptcy schedule. Two years after their bankruptcy discharge, debtors sued their servicer for TPP-related fraud and contract claims. The bankruptcy court granted the bankruptcy trustee's motion to approve the settlement agreement with servicer related to debtors' TPP claims. In so deciding, the bankruptcy court found that debtors' TPP claims accrued pre-petition. As such, the money from the settlement would become part of the bankruptcy estate rather than be paid to debtors individually. The Bankruptcy Appellate Panel (BAP) of the Ninth Circuit agreed with the bankruptcy court. First, the court rejected debtors' argument that their claims did not accrue until servicer's official denial of a permanent modification, which occurred after the bankruptcy was filed. Rather, it was servicer's failure to comply with the TPP language *by not offering a permanent modification* that triggered debtors' TPP-based claims. Second, debtors argued they lacked a colorable claim until California courts recognized TPP-related causes of action—which occurred after their bankruptcy filing. Up until that point, courts had been rejecting TPP related contract and fraud claims; only *West v. JP Morgan Chase Bank*, 214

Cal. App. 4th 780 (2013) and *Corvello v. Wells Fargo, N.A.*, 728 F.3d 878 (9th Cir. 2013) made TPP-based claims realistically possible. The court rejected this argument as well. Those cases relied on existing state law to conclude that servicers must offer permanent modifications upon a borrower's successful completion of a HAMP TPP. While the cases certainly made it more *likely* debtors would prevail on any TPP-related claims, they "did not create new legal rights" that made TPP claims *possible*. The court therefore affirmed the bankruptcy court's approval of the settlement agreement.

"Complete" Application; Borrower's Request for Loan Modification Triggers Servicer's Obligation to Provide SPOC; Representatives' Inability to Perform SPOC Duties Gives Rise to Claim; Post-Foreclosure HBOR Claim for Injunctive Relief Construed as Wrongful Foreclosure Claim; Tender Evidence

Munguia v. Wells Fargo Bank, N.A., 2015 WL 1475996 (C.D. Cal. Mar. 30, 2015): HBOR's dual tracking protections only apply to a borrower's "complete" first lien loan modification application. Here, borrower alleged she submitted a modification application to servicer, and timely complied with every request for further documentation. Servicer representatives told borrower her application was under review, but then foreclosed. In defending borrower's dual tracking claim, servicer argued she never submitted a "complete" application, as evidenced by her continual need to update her application. The court disagreed, finding: 1) borrower pled she complied with every additional document request in the time specified by servicer; 2) servicer acknowledged that her application was under review several times; and 3) borrower pled she submitted her application and additional documents before the foreclosure sale date. "Taken together, these allegations suggest that [borrower] submitted a timely and complete loan modification application." Borrower's dual tracking claim survived the MTD.

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). Here, borrower alleged she requested a foreclosure prevention alternative and that none of the assigned representatives could perform their SPOC duties. Servicer argued that because borrower failed to *affirmatively request a SPOC*, not just a foreclosure prevention alternative, servicer was under no duty to appoint a SPOC, according to a strict reading of the statute. The court disagreed, siding with the majority of courts that have found that a borrower is entitled to a SPOC as soon as he or she requests a foreclosure prevention alternative. The court declined to grant servicer's MTD borrower's SPOC claim on this basis.

SPOCs may be a "team" of people, or an individual, and must facilitate the loan modification process and document collection, possess current information on the borrower's loan and application, and have the authority to take action, like stopping a sale. Here, borrower alleged that at least five different representatives handled her case, in addition to the repeated transfers to other representatives within different servicer departments. She was also told multiple times that her application was lost, misplaced, or was being handled by a different representative. The court found "these allegations . . . consistent with a failure to assign [borrower] a SPOC with the 'ability and authority to stop foreclosure proceedings when necessary'" and denied servicer's MTD.

Pre-sale, HBOR provides borrowers a private right of action to enjoin a servicer from foreclosing. Post-sale, borrowers may recover actual economic damages "resulting from" material violations of specific HBOR provisions. CC § 2924.12(b). Here, the sale has already occurred, but borrower asserted dual tracking and SPOC violations—both of which survived the MTD—seeking declaratory relief to "enjoin [servicer] from 'taking possession of the property,'" rather than for damages. The court construed these causes of action as one for wrongful foreclosure "to the extent that [borrower] seeks to set aside the completed sale of the property."

Borrowers bringing wrongful foreclosure claims must tender the amount due on their loan. Here, borrower called a servicer representative on the day of the scheduled foreclosure sale to inform him that her brother was "on standby" at one of servicer's branch offices, ready to payoff borrower's arrearage to stop the sale. She confirmed the amount required to cure the arrearage with the representative. Borrower was then transferred to a servicer attorney who hung up on her. She was never given enough information to allow her brother to make the arrearage payment and her home was sold. Servicer argued that the amount due at the time of the foreclosure was well above what servicer quoted borrower. Her contention that her brother was on standby to tender the amount specified by the servicer representative "is entirely consistent with the tender requirement." The court denied servicer's MTD borrower's wrongful foreclosure claim (as it was construed by the court, see above).

Permanent Modification Did Not Reflect Terms Contemplated in TPP: Viable Fraud, Promissory Estoppel, and Good Faith & Fair Dealing Claims

Fernandez v. Bank of Am., 2015 WL 1456748 (C.D. Cal. Mar. 30, 2015): Fraud claims require borrowers to show: 1) defendant's misrepresentation; 2) defendant's awareness of the false nature of the misrepresentation; 3) defendant's intent to induce borrower's reliance; 4) borrower's reliance; and 5) damages. Here, borrower's TPP agreement stated that successful completion of the TPP would result in "a permanent reduction of your principal balance . . . and of your interest rate to 2.15%." It also noted that exact terms may change based on the borrower's activity "during the TPP." The permanent modification offered by servicer, however, differed "vastly" from the terms outlined in the TPP. After five years, for example, the interest rate skyrocketed past 2.15%, rendering payments unaffordable. Borrower alleged in her fraud claim that servicer misrepresented that the terms of the permanent modification would "not substantially differ" from the TPP. The court rejected servicer's argument that no misrepresentation was made because the terms of the permanent modification terms *could* change, as agreed to in the TPP. Rather, the court inferred "that the interest rate would be 2.15%, *or lower*" if borrower complied with the TPP terms. And even if the permanent terms could change, the TPP does not contemplate that they would change so much as to make payments unaffordable. The court also found sufficient detrimental reliance, as borrower would have rejected the TPP offer had she known it would lead to an unsupportable modification. The TPP payments themselves, and the time and effort it took to participate in the TPP, properly allege damages. Borrower's fraud claim survived the MTD. Borrower's promissory estoppel claim, based on the same fact pattern and nearly the same claim elements, also survived the MTD.

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. Here, borrower alleged that servicer's failure to offer a permanent modification with terms similar to the TPP agreement deprived her of the opportunity to benefit of both the TPP and the permanent modification. The court agreed: borrower sufficiently pled compliance with the TPP, and that the TPP explicitly stated the principal balance and interest rate would both decrease. This language, taken together with the purpose of a loan modification —to make a mortgage more affordable—led the court to find a viable good faith and fair dealing claim. The court denied servicer's MTD.

Viable CC 2924.10 Claim; Pleading Standards for CC 2924.17 Claim

Gardner v. Nationstar Mortg., 2015 WL 1405539 (E.D. Cal. Mar. 26, 2015): HBOR requires servicers to acknowledge a borrower's modification application within five business days of receipt, to describe the loan modification process, and to request any missing documents. CC § 2924.10. Here, borrower alleged he submitted two applications over two years, neither of which his servicer acknowledged. The court found a viable CC 2924.10 claim and denied servicer's MTD.

Recorded, foreclosure-related documents must be "accurate and complete and supported by competent and reliable evidence." CC 2924.17. Here, borrower alleged two flaws of a recorded NTS. First, a company not registered with the California Secretary of State recorded the NTS. Second, the NTS was executed more than a year and half before it was recorded. Borrower claimed these defects demonstrated that the NTS "is not reliable." While it did not elaborate, the court found that borrower had not alleged enough facts to support a CC 2924.17 claim and granted the MTD.

Contractually Unable to Modify Loan, Servicer Encouraged Five-Year, Unsuccessful Application Process: Viable Fraud, Negligent Misrepresentation, IIED Claims

Pulley v. Wells Fargo Bank, 2015 WL 1393417 (N.D. Cal. Mar. 26, 2015): To bring a fraudulent misrepresentation claim, borrowers must allege: 1) a misrepresentation; 2) knowledge of falsity; (3) intent to defraud; 4) justifiable reliance; and 5) resulting damage. An allegation of fraud must specifically state the time, place, and content of alleged fraudulent representations, as well as the identities of the parties. Here, borrower identified multiple calls from named servicer representatives, all encouraging him to extend his default to qualify for a permanent loan modification. Five years later, after 14 failed applications, servicer finally notified borrower it never possessed contractual authority to modify his loan, rendering borrower's applications, countless hours and resources spent compiling those applications, resulting credit damage, and severe emotional stress all for naught. The court found a viable fraud claim. Borrower did not plead, as servicer contended, that servicer fraudulently promised a loan modification and never delivered. Rather, borrower pled servicer's promise was fraudulent because it *could not possibly* provide a modification, and it knew about the contractual limitations when it made the promise. Further, borrower relied on servicer's representations to his detriment, continuing to apply for modifications for five years. Borrower suffered damages in continuing late fees and interest, attorneys' fees, "loss of reputation and goodwill, destruction of credit, severe emotional distress, loss of appetite, frustration, fear, anger, helplessness, nervousness, anxiety, sleeplessness, sadness, and depression." The court therefore denied servicer's motion to dismiss borrower's fraud claim.

Some courts require borrowers to show their servicer owed them a duty of care to bring a negligent misrepresentation claim. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. Here, borrower asserted his servicer repeatedly encouraged him to submit modification applications, and to frequently supplement his existing applications. As it has recently held in previous cases, this court found that once the servicer processed borrower's application(s), "even encourag[ing] him to reapply, and requested additional information from him on numerous occasions over the course of five years," servicer owed borrower a duty of care. Specifically, servicer should have timely informed borrower that it was contractually prevented from granting him a loan modification. Having established a duty, the court pointed to borrower's successful fraud claim (above, requiring largely the same elements as a negligent misrepresentation claim), and denied servicer's motion to dismiss borrower's negligent misrepresentation claim.

Intentional infliction of emotional distress (IIED) claims require borrowers to demonstrate: 1) servicer's outrageous conduct; 2) intended to cause emotional distress (or was conducted with reckless disregard); 3) leading to borrower's severe emotional suffering; 4) actually and proximately caused by servicer's conduct. Here, borrower alleged that, beyond referring his home to foreclosure, servicer dragged out an ultimately unsuccessful modification process for five years, repeatedly denying borrower and then encouraging him to re-apply, all while knowing it lacked contractual authority to modify borrower's loan. Borrower consequently suffered "confusion, frustration, fear, anguish, nervousness, helplessness, anxiety, shock, humiliation, and shame." The court found these allegations stated a viable IIED claim and that servicer's conduct could be construed as "outrageous," going beyond the usual foreclosure process. It therefore denied servicer's motion to dismiss borrower's IIED claim.

Servicer Fails to Follow Local "Meet and Confer" Rule

Aguilar v. Ocwen Fin. Corp., 2015 WL 1345279 (C.D. Cal. Mar. 24, 2015): Courts have discretion to refuse to consider a party's motion if the motion does not comply with local court rules. Local Rule 7-3 in the federal Central District of California requires parties to "meet and confer." These conferences "shall take place at least seven days prior to the filing of [a] motion," "preferably in person." Here, servicer claimed it attempted to "meet and confer" only two days prior to filing a motion to dismiss borrowers' complaint. Further, the "attempt" was only an email notifying borrowers' counsel that servicer intended to file the motion. The court found servicer to have clearly violated Local Rule 7-3, both in its timing of the pre-filing conference, and in failing to comply with the "intent" of the rule—"promoting the resolution of disputes without requiring the intervention of the Court." The court denied servicer's MTD.

Pleading Requirements for Damages Element of Fraud Claim

Johnson v. Bank of Am., 2015 WL 1387478 (N.D. Cal. Mar. 24, 2015): A fraudulent misrepresentation claim requires: 1) a misrepresentation; 2) servicer's knowledge of falsity; (3) intent to defraud; 4) borrower's justifiable reliance; and 5) resulting damage. Over four years, borrower submitted multiple modification applications, responded to servicer's duplicative document requests, and repeatedly received contradictory information from multiple SPOCs regarding the status of her applications. Servicer representatives misstated to her on multiple occasions that her applications were "complete," and after each instance, she was later told her application did not exist, or was denied a modification based on failure to provide requested documents. The court had previously found that these allegations state a viable fraud claim, and that borrower had adequately pled damages of initiated foreclosure, accrued fees and overcharges, attorney's fees, and a growing arrearage that could have been prevented had borrower pursued other foreclosure alternatives besides a modification. The court granted borrower leave to add damage allegations related to this last assertion—specifically, that borrower could have pursued reinstatement, refinancing, or short sale options, but did not, relying on servicer's assurances that her "complete" applications were being evaluated. The court found borrower's additional damage allegations sufficient and again denied servicer's MTD her fraud claim.

Extending *Corvello* & *Chavez*: Servicer Equitably Estopped from Using Statute of Frauds to Defend Implied Contract Claim; "Debt Collector" under FDCPA; "Consumer Debt" under Rosenthal Act Includes Residential Mortgage Loans

Tirabassi v. Chase Home Fin. LLC, 2015 WL 1402016 (C.D. Cal. Mar. 24, 2015): Implied contract claims require borrowers to plead the same elements as a contract claim (contract, borrower's performance, servicer's breach, damages), but the contract in question is formed by the parties' actions, rather than verbally or in writing. Servicers may defend against implied contract claims by asserting the statute of frauds, which requires agreements dealing with real property to be memorialized in writing, signed by the contracting parties. Borrowers may in turn invoke the doctrine of equitable estoppel to prevent a servicer from successfully arguing a statute of frauds defense. For equitable estoppel to apply, the borrower must show: 1) the servicer (the party to be estopped from using the statute of frauds) must be "apprised of the facts"; 2) servicer must have intended that its conduct be acted upon; 3) borrower must have been "ignorant of the true state of facts"; and 4) borrower must have detrimentally relied upon servicer's conduct. Here, borrower entered into a TPP agreement with his servicer. (It is unclear from the opinion whether this was a HAMP TPP or a proprietary agreement.) The TPP stated that if borrower successfully complied with its terms and made three TPP payments, servicer "will send" borrower a permanent modification. Borrower completed the three payments and servicer did not respond. Borrower continued making TPP payments for over a year, all of which servicer accepted. Before transferring the servicing rights to borrower's loan, however, servicer began rejecting the TPP payments. Borrower alleged that in accepting additional TPP payments after the original TPP period had expired, servicer created an implied contract to permanently modify his loan. Servicer asserted the statute of frauds defense, arguing that an agreement to permanently modify a loan must be made in writing, and this implied contract was not. The court found, however, that borrower had successfully asserted the doctrine of equitable estoppel to prevent servicer's statute of frauds defense. In doing so, the court relied on *Chavez v. IndyMac Mortgage Services*, 219 Cal. App. 4th 1052 (2013), where borrowers entered into a TPP and continued making modified payments after servicer sent permanent modification documents and borrower signed and mailed them to servicer. Servicer accepted modified payments for a time, before rejecting them and initiating foreclosure. The *Chavez* court found that mailing the permanent modification agreement to borrowers, and accepting their payments afterwards "suggested that [servicer] 'intended to stand by the agreement.'" Here, by comparison, servicer never mailed borrowers a permanent modification offer. Acknowledging that his point seemingly distinguishes *Chavez* from the present case, the court continued: "[b]ut in light of . . . *Corvello v. Wells Fargo Bank*, 728 F.3d 878 (9th Cir. 2013), the Court finds *Chavez* persuasive." Specifically, *Corvello* made clear that if a servicer offers a borrower a TPP agreement similar to the one at issue here, promising to permanently modify the loan if borrower complies with the TPP, and if borrower successfully completes the TPP, then the servicer must either offer a permanent modification or notify the borrower that he or she is ineligible. Here, servicer breached its affirmative obligation, established by the TPP and *Corvello*, to offer a modification. Servicer was clearly aware of the TPP agreement and of its own acceptance of continued TPP payments, and borrower detrimentally relied on servicer's continued acceptance of payments by continuing to tender the payments. The court therefore denied servicer's MTD borrower's implied contract claim, finding servicer was equitably estopped from invoking the statute of frauds defense.

Under the federal Fair Debt Collections Practices Act (FDCPA), a "debt collector" is "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts." Generally, creditors collecting their own debts, including mortgage servicers, do not qualify as "debt collectors." If an assignee of a mortgage loan purchases the loan when it is in default, however, that assignee entity is considered a "debt collector" because it knew it would be attempting to collect borrower's debt, so collecting the debt is the entity's acknowledged "principal purpose." Courts have also found that entities that *treat* a loan as if it were in default, regardless of the loan's actual status, may also be considered "debt collectors." Here, borrower entered into a TPP agreement with his servicer. The TPP stated that if borrower successfully complied with its terms and made three TPP payments, servicer "will send" borrower a permanent modification. Borrower completed the three payments and servicer did not respond. Borrower continued making TPP payments for over a year, all of which servicer accepted. Before transferring the servicing rights to borrower's loan, however, servicer began rejecting the TPP payments. The new servicer similarly rejected borrower's TPP payments and refused to modify the loan. Borrower alleged that both the transferor and transferee servicers were "debt collectors" under the FDCPA because they both treated the loan as if it were in default by rejecting TPP payments. The court agreed, denying both servicers' MTD borrower's FDCPA claims.

California's Rosenthal Act prevents unfair debt collection practices related to "consumer debt:" "money, property or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction." Here, borrower alleged that servicer's failure to permanently modify his loan in compliance with his TPP agreement, rendered the TPP—and his payments—an unfair debt collection practice. California courts are split on whether mortgage loans qualify as "consumer debts" under the Rosenthal Act. All the courts that have found a loan does *not* constitute "consumer debt" have based their reasoning on other decisions finding that *foreclosure activities* do not constitute "debt collection." After citing "a difference between a foreclosure sale and a [servicer's] pre-foreclosure communications regarding a residential loan that has come into default," this court found that mortgage loans are "not categorically excluded from the Rosenthal Act." And since this borrower's claim relates to servicer's treatment of his TPP agreement—the servicing of the loan, not foreclosure—the claim survived servicer's MTD.

Federal Question Jurisdiction

Park v. Bank of Am., __ F. Supp. 3d __, 2015 WL 1323330 (S.D. Cal. Mar. 24, 2015): Federal courts exercise original jurisdiction over "all civil actions arising under [federal] law." The "mere mention" of a federal law does not, however, automatically bestow federal subject matter jurisdiction. "A claim arises under federal law 'only if it involves a determination respecting the validity, construction, or effect of such a law and the result of the action depends on that determination.'" Here, borrowers brought state common law claims and HBOR claims against their servicer, some of which were based on servicer's failure to permanently modify their loan after they successfully completed a HAMP TPP. Servicer removed the case to federal court, asserting that borrowers' claims arose "from various federal statutes and programs," including the Troubled Asset Relief Program (TARP), which created the HAMP program. Servicer also alleged that borrower's allegations regarding unlawful credit reporting and debt collection implicitly invoked the federal Fair Credit Reporting Act and Fair Debt Collection Practices Act. The court disagreed, finding that state law "traditionally controls [borrowers'] causes of action." Additionally, because there is no federal private right of action under HAMP, servicers cannot claim that HAMP-related state causes of action give rise to federal jurisdiction. Accordingly, the court found removal improper and remanded the case.

Dual Tracking: "Fair Opportunity to be Evaluated"; Distinguishing Forbearance Agreement from TPP in *Corvello*; Fraud Claim Based on SPOC's Sale Date Misrepresentation

Johnson v. Aurora Bank, FSB, 2015 WL 1306466 (N.D. Cal. Mar. 23, 2015): Servicers may not move forward with foreclosure while a borrower's complete, first lien loan modification is pending. Servicers are under no obligation, however, to review a subsequent application if a previous application was already evaluated, or "afforded a fair opportunity to be evaluated." CC § 2923.6(g). Here, borrower began applying for a modification with her original servicer. Before making a determination on borrower's application, the original servicer transferred servicing. Transferee servicer recorded an NTS but continued to work with borrower on her modification application. In early 2013 (after HBOR became effective), transferee servicer denied borrower's application for failure to submit all the requested documents. Borrower alerted servicer she had in fact submitted everything servicer had requested, and servicer acknowledged its mistake, agreeing to continue its evaluation of her application. After acknowledging her application as "complete," but not making a determination on it, transferee servicer foreclosed on borrower's home. Servicer argued borrower's dual tracking claim failed because she already had a "fair opportunity" to be evaluated for a modification with her original servicer and with itself, the transferee, which denied her application. Borrower argued that servicer's denial did not signify that borrower was afforded a "fair opportunity" to be evaluated. The denial was based on servicer's admittedly erroneous finding that borrower had not submitted all documents (potentially unfair), and the denial was not based on the merits of her application (not a real opportunity for evaluation).[81] The court therefore denied servicer's MTD borrower's dual tracking claim.

Breach of contract claims require borrowers to demonstrate: a contract, borrower's performance, servicer's breach, and damages. Here, borrower alleged servicer entered into a "Foreclosure Alternative Agreement" (FAA), essentially a forbearance agreement, where servicer agreed not to pursue foreclosure while the borrower made timely FAA payments. The FAA explicitly provided that at the expiration of the agreement, borrower must cure the arrearage by either paying it, or by entering a "Cure Method" (*i.e.*, a loan modification). Borrower's failure to cure or to enter a Cure Method would allow servicer to pursue foreclosure. Borrower made all required

[81] The same borrower has another pending case before the court, *Johnson v. Bank of Am.*, 2015 WL 351210 (N.D. Cal. Jan. 23, 2015). There, the court arrived at the same conclusion based on a different servicer's conduct. See our Case Compendium for a summary of this case.

payments under the FAA. At the agreement's expiration, servicer instructed borrower to continue making FAA payments and servicer would in turn continue to review borrower's pending modification application. Borrower continued making payments until months later, when servicer refused to accept them. Servicer then transferred servicing rights to another servicer, but remained the beneficiary. On the original servicer's (and beneficiary's) instruction, the transferee servicer recorded an NTS. Borrower alleged that this NTS breached the FAA and subsequent, verbal, Cure Method agreement. Servicer argued that this subsequent agreement to continue reviewing borrower for a modification in exchange for further FAA payments was not a "Cure Method," and that under the FAA's plain terms, it could continue pursing foreclosure after the FAA's expiration. The court agreed, distinguishing the FAA from the Trial Period Plan (TPP) at issue in *Corvello v. Wells Fargo Bank*, 728 F.3d 878 (9th Cir. 2013). In *Corvello*, the TPP agreement clearly stated that a borrower's compliance triggered the servicer's contractual duty to provide the borrower with a permanent modification. This court interpreted *Corvello* as the Ninth Circuit giving clear "instruction that only a very clear promise to provide a loan modification in a forbearance agreement will give rise to breach of contract." Since this FAA did not contain similar language to the TPP in *Corvello*, the court rejected borrower's contract claim, even though borrower did not allege servicer breached the FAA by *failing to offer a modification*, as borrowers did in *Corvello*. Instead, this borrower alleged it was servicer's *recording of the NTS* that breached the FAA and the subsequent agreement to continue the FAA. The court did not address this distinction. The court also rejected borrower's assertion that the subsequent verbal agreement to continue the FAA constituted a contract: the FAA contained an integration clause specifically prohibiting verbal amendments to the contract. The court granted servicer's MTD borrower's contract claim.

To assert intentional misrepresentation, a type of fraud claim, a borrower must show, *inter alia*, 1) a false representation; 2) on which borrower justifiably relied; and 3) damages. Additionally, borrowers must plead fraud claims with specificity. In the foreclosure context (involving mostly corporate defendants) specificity has come to include: "the names of the persons who made the [misrepresentations], their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." Here, borrower alleged her SPOC, which she referred to by name, assured her on two occasions, including the day of the foreclosure sale, that the sale would not occur because her modification application was still under review. Relying on this misrepresentation, borrower did not pursue a deed-in-lieu, refinancing, selling the property herself, or reinstating her loan. After the property sold, her SPOC wrote to borrower that his misrepresentations regarding the sale were "an oversight." The court found that these allegations sufficiently stated an intentional misrepresentation claim with the required level of specificity. It met the "who, what, where, and when" standard, and the misrepresentation was "material" because it "directly impacted" borrower's decision not to take measures to stop the sale. And not only did the SPOC's assurance that the sale would not occur lead borrower to rely on that promise and not pursue alternatives, but the fact that he assured her that her modification application was still under review also reassured her there was not a need to pursue those alternatives. The court denied servicer's MTD borrower's intentional (and negligent) misrepresentation claims.

A SPOC "Team" Must Still Perform Statutory Duties; Novel Good Faith & Fair Dealing Claim Requires Further Briefing

Hernandez v. Specialized Loan Servicing LLC, 2015 WL 1401784 (C.D. Cal. Mar. 23, 2015): 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 to comply with the statute. Here, borrower was "bounced" between SPOC team members, frequently receiving conflicting information and requests for duplicative information and documents she had previously submitted to other team members. She also had trouble contacting team members who were familiar with her file. The court found this alleged a viable SPOC claim and dismissed servicer's MTD.

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. Here, borrower alleged servicer breached the covenant as applied to her deed of trust (DOT), which specified: "All rights and obligations contained in this [DOT] are subject to any requirement and limitations of Applicable Law." Specifically, borrower alleged servicer breached that provision by violating HBOR's SPOC statute, the "applicable law." Addressing this (apparently) novel argument, the court asked the parties for further briefing on the question: does a "generic 'follow applicable law' provision . . . support an implied covenant claim in this scenario"?

Alleging the Existence of a Contract; Dual Tracking: "Material Change in Financial Circumstances," "Complete" Application; Viable Good Faith & Fair Dealing Claim based on DOT

Dias v. JP Morgan Chase NA, 2015 WL 1263558 (N.D. Cal. Mar. 19, 2015): Breach of contract claims require borrowers to show, *inter alia*, the existence of an enforceable contract. Borrowers can either attach the contract to their complaint or plead pertinent aspects of the contract "verbatim." Here, borrowers alleged they entered into a permanent modification with servicer. When borrowers tried to make their first payment, however, servicer rejected the payment and instructed borrowers to reapply for a modification. Rather than plead a breach of contract claim based on the alleged permanent modification, borrowers pointed to their deed of trust (DOT), which provided: "Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current." Borrowers alleged that servicer's rejection of their first modified payment breached this clause in the DOT, since that payment would have brought their loan current under the modification. And even though borrowers did not attach the DOT to the complaint, they quoted the contract language verbatim (as evidenced by a comparison to the DOT provided by servicer). The court denied servicer's MTD borrowers' breach of contract claim based on a failure to allege the existence of a contract.

Under HBOR, a servicer is not obligated to consider a borrower's modification application if it considered a previous application. If a borrower can show she "documented" and "submitted" a "material change in financial circumstances" to servicer, however, dual tracking protections can reignite and protect the borrower while that subsequent application is pending. CC § 2923.6(g). Here, borrowers alleged servicer rejected their first payment under a permanent modification, instructing them to reapply. Borrowers did so, also noting a $2,000 per month decrease in income. With this new modification pending, servicer recorded an NTS. The court concluded that borrowers sufficiently alleged a material change in financial circumstances, but also found servicer's *solicitation* of another application critical. It signified that borrowers were likely not reapplying for the purpose of delay, "which [§] 2923(g) is designed to protect against." The court denied servicer's MTD borrower's dual tracking claim.

Only "complete" applications receive dual tracking protections, and servicers determine what constitutes "completeness." CC § 2923.6(h). Here, servicer alleged its denial of borrower's modification application for lack of documents necessarily means that borrowers did not submit a "complete" application, and their dual tracking claim therefore fails. The court strongly disagreed. "Given this argument, [servicer's] interpretation of the statute appears to be that [it] does not apply if, in hindsight, [servicer] consider[s] a [borrower's] application to be incomplete. This is a misguided interpretation as it puts [the servicer] in control of when the statute applies." Additionally, servicer was in possession of borrower's application when it recorded the NTS—it should have evaluated whether it required further documentation *before* recoding the NTS, and it did not. It would be unfair to allow servicer to declare, months after recording the NTS, that the application is incomplete and the dual tracking statute does not apply. Because borrowers believed their application complete when servicer recorded the NTS, they have stated a viable dual tracking claim. The court denied servicer's MTD.

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. Here, borrowers alleged they were current on their mortgage when they requested a modification from their servicer. A servicer representative instructed them to become delinquent on their mortgage; that was the only way they could obtain a modification. Additionally, the representative told borrowers that servicer would not foreclose, even if borrowers missed payments, while a modification application was pending. Servicer, then, prohibited borrowers from the benefits in their deed of trust. The court found that borrowers had sufficiently alleged servicer had gone beyond merely informing borrowers about modifications. Servicer actually encouraged and/or instructed borrowers to become delinquent. The court therefore denied servicer's MTD borrower's good faith and fair dealing claim.

Federal Jurisdiction: Amount in Controversy

Vergara v. Wells Fargo Bank, 2015 WL 1240421 (C.D. Cal. Mar. 17, 2015): 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 states. If the amount in controversy is unclear in the plaintiff's complaint, the defendant bears the burden of proving, by a preponderance of the evidence (more likely than not), that the amount exceeds $75,000 and that removal is proper. Here, borrower's complaint—alleging HBOR, good faith and fair dealing, negligent misrepresentation, and UCL claims, and seeking injunctive relief to halt the foreclosure—did not specify an amount in controversy. Servicer made two arguments as to why the amount exceeds $75,000, both of which failed. First, servicer argued that if borrower prevailed, he would take title to his home "without any encumbrances," gaining at least the amount of the original loan, which far exceeded $75,000. The court disagreed that borrower sought unencumbered title to his home or "invalidation" of the loan. Instead, borrower seeks damages for the mishandling of his loan modification efforts. Second, servicer argued that seeking an injunction puts the entire value of the home at issue. The court followed precedent and found that where a borrower seeks to temporarily enjoin a foreclosure sale "pending a loan modification," the loan amount is not considered the amount in controversy. Because servicer failed to show that $75,000 was at issue, the court granted borrower's motion to remand.

Diversity Jurisdiction: Amount in Controversy

Olmos v. Residential Credit Solutions, __ F. Supp. 3d __, 2015 WL 1240347 (C.D. Cal. Mar. 17, 2015): 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 states. Defendants bear the burden of showing that these requirements are met, and that removal is therefore proper. If the amount in controversy is not specified in the complaint, the defendant must show by a preponderance of the evidence (more likely than not) that the amount exceeds $75,000. Here, borrower brought state HBOR claims against his servicer and trustee, seeking injunctive relief and unspecified damages. In defending borrower's motion to remand, servicer and trustee did not allege that borrower's damages exceed $75,000; rather, they argued that in seeking injunctive relief, borrower put the entire value of the home at issue, exceeding $75,000. The court disagreed. In seeking an injunction to halt foreclosure until his loan modification application can be processed, borrower has not put the value of the home at issue. At most, he has put the amount it would cost servicer to evaluate his application and any lost interest on the loan during the evaluation. The servicer and trustee did not meet its burden and the court granted borrower's motion to remand.

Force-Placed Insurance (FPI): Viable Breach of Contract, Good Faith & Fair Dealing Claims; Viable UCL "Unfair" Prong Claim Based on *Unsuccessful* RESPA Claim

Gomez v. Nationstar Mortg., LLC, 2015 WL 966224 (E.D. Cal. Mar. 4, 2015): Breach of contract claims require borrowers to demonstrate: a contract, borrower's performance or excused non-performance, servicer's breach, and damages. Here, borrowers alleged servicer breached their deed of trust (DOT) by improperly force-placing homeowner's insurance while borrowers maintained a current homeowner's insurance policy. Servicer later admitted it had force-placed the insurance in error and attempted to reimburse borrowers. Due to the shortfall in the reimbursement, servicer's continued accounting errors, and continued failure to fully correct the FPI issue, borrowers eventually ceased making mortgage payments, believing the payments were being improperly applied and/or held in an escrow account. Servicer argued borrower's contract claim therefore failed because borrowers themselves breached the DOT by failing to make payments. The court disagreed: by its own admission, servicer breached the DOT by force-placing insurance when borrowers had an existing policy. Borrower's *subsequent* breach of the DOT, "while relevant to the issue of damages, does not excuse [servicer's] original breach." The court denied servicer's MTD borrowers' breach of contract claim. Relatedly, the court also denied servicer's MTD borrowers' promissory estoppel claim based on the same DOT language; even though borrowers' contract and promissory estoppel claims are mutually exclusive, borrowers may plead inconsistent claims under the federal rules of civil procedure.

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. Here, borrowers alleged servicer deprived them of the benefits under their deed of trust (DOT) by improperly force-placing homeowner's insurance while borrowers maintained a current insurance policy. The DOT explicitly prohibits this practice. Additionally, borrowers alerted servicer of their current insurance policy multiple times. Servicer refused to accept their proof of insurance however, continuing to force-place insurance for two years until finally admitting its mistake. "This refusal plainly frustrates [borrowers'] right to benefit from the [DOT]." The court denied servicer's MTD.

There are three possible prongs within a UCL claim: unlawful, unfair, and fraudulent. California courts have devised three tests to evaluate allegedly “unfair” conduct. Some courts evaluate the conduct using a balancing test, weighing the borrower’s harm against “the utility of the [servicer’s] conduct” and considering the overall immorality or unethical nature of the conduct. Other courts require borrowers to allege the conduct was “tethered to some legislatively declared policy.” The final test subjects a servicer’s conduct to a three-factor analysis: 1) was the borrower’s injury substantial; 2) do benefits to consumers or competition outweigh the injury; and 3) would the injury have been avoided by other reasonable borrowers? This court followed the Ninth Circuit’s endorsement of the first and second tests, and subjected borrower’s claim to both. First, the court determined that even though borrowers’ Real Estate Settlement and Procedures Act (RESPA) claim was dismissed because the FPI provisions servicer had violated were not effective during the violation, borrowers could still “tether” their UCL claim to the “non-retroactive provisions of RESPA.” Borrowers need only demonstrate “that the effects of [servicer’s] conduct is ‘comparable to or the same as a violation of an established law,’ not that [borrowers] meet all of the procedural requirements of that law.” The court also pointed out that other courts have found viable UCL claims even where the underlying cause of action may have been time barred. The court found borrowers to have alleged a violation of the “spirit” of RESPA’s FPI statute, even if the statute was not in effect at the time of the violation. Second, the court found borrowers had also stated an unfair prong claim under the balancing test. As with the backdated FPI line of cases,[82] servicer’s conduct here unfairly impacted borrowers by forcing them to pay for insurance twice, resulting in servicer’s own financial gain. Not only is this conduct morally blameworthy and unethical, but the harm to consumers outweighs any potential benefit. The court denied servicer’s MTD borrowers’ unfair UCL claim.

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[82] *See, e.g.*, Ellsworth v. U.S. Bank, N.A., 2014 WL 2734953 (N.D. Cal. June 13, 2014) (summarized in the Case Compendium).

Dual Tracking: "Reinstatement" Plan is Not Modification Offer; SPOC "Team" Members Must Perform SPOC Duties; UCL Standing

Gardenswartz v. SunTrust Mortg., Inc., 2015 WL 900638 (C.D. Cal. Mar. 3, 2015): HBOR prohibits a servicer from moving forward with foreclosure if a borrower has submitted a complete loan modification application. Borrowers have 14 days within which to accept a modification offer from servicer. If they do not accept it, a servicer may proceed with foreclosure after the expiration of the 14 days. CC § 2923.6(c)(2). If a borrower brings a successful dual tracking claim pre-sale, the borrower may obtain an injunction to stop the impending sale. Damages are available only after a trustee's deed upon sale has been recorded. Here, borrowers submitted a complete modification application but their servicer recorded an NOD before making a determination. Servicer argued, however, that it *did* offer borrowers a "reinstatement plan," a form of "modification" offer, and only recorded the NOD after borrowers' rejected the offer, complying with HBOR's dual tracking statute. The court rejected servicer's unsupported assertion that the reinstatement plan constitutes a modification offer. Further, borrowers pointed out that by definition, a reinstatement plan cannot be a modification because it is meant to pay the loan on the same terms as the original loan—nothing is modified. The court therefore denied servicer's MTD borrower's dual tracking claim seeking an injunction. Because the property has not yet been sold, the court did dismiss borrower's damages claim.

HBOR requires large servicers to promptly establish a single point of contact (SPOC) to borrowers requesting foreclosure prevention alternatives. SPOCs may be individuals, or a "team" of people, and have several responsibilities, including making sure borrowers are considered for all possible foreclosure prevention alternatives and notifying borrowers of any missing documents in the loan modification process. Here, borrowers alleged their servicer changed their SPOC four times over two years. This SPOC shuffling led to repeated requests that borrowers re-submit duplicative documentation, an erroneous denial, and the mislabeling of a reinstatement plan as a loan modification. The court found that while SPOCs may be a "team," each team member must perform the statutory duties of a SPOC. Borrowers successfully alleged that none of their assigned SPOCs—regardless of their "team" membership—could perform their SPOC duties. The court denied servicer's MTD.

To bring a UCL claim, borrowers must assert injury in fact (loss of property or money) directly caused by servicer's unfair, unlawful, or fraudulent conduct. Here, borrowers alleged servicer's dual tracking and SPOC misconduct (outlined above) intentionally delayed the modification process, leading to accrued penalties and interest and significantly increasing borrower's loan balance. The court agreed that borrowers sufficiently alleged economic loss caused by servicer's unlawful conduct and denied servicer's motion to dismiss borrowers' UCL claim.

Out of State Cases

TILA: When Servicers Must Credit Electronically Transferred Payments

Fridman v. NYCB Mortg. Co., __ F.3d __, 2015 WL 1046296 (7th Cir. Mar. 11, 2015): Servicers must credit mortgage payments "as of the date of receipt" of payment. 15 U.S.C. § 1639f(a). The Consumer Financial Protection Bureau (CFPB) defines the phrase "date of receipt" in its Official Interpretations of this TILA rule: "the date that the payment instrument or other means of payment reaches the mortgage servicer. . . . [P]ayment is received when the mortgage servicer receives the third-party payor's check or other transfer medium, such as an electronic funds transfer." Here, borrower alleged she submitted an electronic payment through her servicer's website at least one day before the payment was due. Due to servicer's internal processing systems, the payment was not credited to borrower's account until two business days later, three actual days after her payment due date. Consequently, servicer charged borrower a late fee. Borrower alleged servicer's failure to credit her payment the day she authorized it violated TILA. The district court disagreed and granted servicer's motion for summary judgment. Here, the Seventh Circuit first considered how much weight to grant the CFPB's interpretation of the TILA rule. This particular interpretation was adopted "wholesale" from the CFPB's predecessor, the Federal Reserve Board (FSB), and its Staff Commentary. Previously, courts gave FSB Staff Commentary deference on TILA interpretations "unless the opinion was 'demonstrably irrational.'" Here, the court found the CFPB's Official Interpretation of 15 U.S.C. § 1639f(a) *not* demonstrably irrational and accepted that "the relevant date of receipt is the day when the payment mechanism reaches the mortgage servicer, not any later potentially relevant time." Second, the court considered what constitutes the "payment instrument" referred to in the CFPB interpretation. Borrower contended her online authorization, allowing servicer to extract funds from her bank account, *is* the payment instrument servicer should have to credit the day of authorization. Servicer conversely argued that the authorization is only the initiation of payment, which actually happens only when servicer contacts the bank for the funds. The court looked to the language of the interpretation, which was broad: "the date that the payment instrument *or other means of payment* reaches the mortgage servicer." Electronic mortgage payments "easily fit" within this definition. Further, payment instruments are defined elsewhere in Dodd-Frank as including "electronic instruments." Third, the court found no material difference between a servicer's acceptance and credit of paper checks the day they are received, actually processing them later (a common and acknowledged servicer practice that complies with TILA) and doing the same with electronic transfers—servicers should be able to timely credit either form of payment, regardless of how long it takes to actually process the payments. Fourth, the court found that its acceptance of the CFPB's interpretations complies with the intention behind the TILA provision, "to require mortgage servicers to credit electronic authorizations when they are received protects consumers from . . . unwarranted—and possibly limit-less delay." Finally, the court found that because electronic payments are "payment instruments," servicer should have credited borrower's account the day borrower authorized the electronic payment. The Seventh Circuit reversed the grant of summary judgment to the creditor.

Recent Regulatory Updates

HAMP Supplemental Directive 15-02 (Issued Mar. 12, 2015)

This supplemental directive provides administrative clarifications on the following issues:

- Right Party Contact
- Non-Approval Notices
- Suspension of a Referral to Foreclosure
- Post-Modification Credit Reporting
- Servicer Incentive for Completed Modifications
- Borrower Incentives for Non-GSE Mortgages
- Consideration of Borrowers for HAFA
- Treasury FHA-HAMP and RD-HAMP Reporting
- Handbook Mapping Clean-Up and Clarifications

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

MINUTE ORDER

DATE: 03/13/2015 TIME: 09:00:00 AM DEPT: 54

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

CASE NO: **34-2014-00163806-CU-OR-GDS** CASE INIT.DATE: 05/19/2014
CASE TITLE: **Morris vs. Bank Of America N A**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Summary Judgment and/or Adjudication - Civil Law and Motion - MSA/MSJ/SLAPP

APPEARANCES
Michael D Maloney, counsel, present for Plaintiff(s).
David E Pinch, counsel, present for Defendant(s) telephonically.

Nature of Proceeding: Motion for Summary Judgment

TENTATIVE RULING

This matter was continued to this date for oral argument only.

Defendant Bank of America, N.A.'s ("BANA") motion for summary judgment is DENIED.

<u>Overview</u>

This case follows efforts by Plaintiff Mary Morris ("Morris") and her now-deceased husband (sometimes collectively "Borrowers") to obtain a residential loan modification from their lender, BANA. In the operative first amended complaint ("FAC"), Morris alleges that in 2009 BANA offered a loan modification, which proceeded in a two-step process. First the Borrowers were required to sign and return a Terms and Conditions Agreement ("Terms Agreement") and make modified payments. Subsequently, BANA informed the Borrowers that the modification had been approved, but the Borrowers were required to execute, notarize and return further documentation "in order for the modification to be valid." (See FAC, Exh. C.) However, according to Morris, the final documents ("Final Documents") contained errors, including a misspelling of Morris' last name and a reference to a retired loan number. Morris alleges that the misspelling prevented her and her husband from having the Final Documents notarized. Nonetheless, the Borrowers continued to make modified payments under the Terms Agreement.

Between 2009 and 2011, BANA allegedly made promises to reissue Final Documents without errors, but it failed to do so. In addition, BANA allegedly cancelled the Terms Agreement and began rejecting the Borrowers' payments thereunder due to the Borrowers' failure to notarize the Final Documents.

The Borrowers filed suit in Sacramento County Superior Court Case No. 2011-111212 (the "first action"). The complaint in the first action contained many allegations in the instant FAC, including allegations that BANA breached the Terms Agreement and failed to cure errors in the Final Documents. (See RJN and

BANA Exh. 15.)

Shortly before trial in the first action, BANA and the Borrowers settled. (See RJN and BANA Exh. 7.) Although the settlement did not include Morris' express release of any claims, it contained BANA's offer to provide a new loan modification (the "2013 Modification"). Morris acknowledges in the current FAC that she entered into the 2013 Modification. However, she alleges that she had "no choice" but to accept the 2013 Modification "in order to keep her home." (See FAC, ¶ 26.) She further alleges that the passage of time between formation of the Terms Agreement and entry into 2013 Modification wrongfully caused arrearages, fees and costs to accrue. (*Id.*) She has pleaded a breach of contract cause of action based on most of the same allegations that supported her contract claims in the first action.

The FAC in the instant case originally contained three causes of action, including the breach of contract cause of action that is the subject of theis motion. On October 9, 2014, however, the court sustained BANA's demurrer to Morris' non-contract causes of action and granted leave to amend. Because Morris did not amend the FAC, only her breach of contract cause of action remains in effect.

BANA now moves for summary judgment. BANA's Separate Statement contains a single set of 23 material facts. Morris does not dispute any facts in BANA's separate Statement. Nonetheless, BANA has not met its initial burden of demonstrating the nonexistence of any triable issue of material fact. The court thus denies the motion.

<u>Discussion</u>

BANA argues that the 2013 Modification was a novation that bars Morris' first cause of action. Specifically, BANA argues that the 2013 Modification was intended to extinguish the original loan agreement as well as any provisions in the Terms Agreement.

Whether a subsequent agreement constitutes a novation, i.e., a complete substitution of agreements that entirely extinguishes the first one, or a modification, which extinguishes only portions the underlying agreement, depends on the parties' intent. (See *Meadows v. Lee* (1985) 175 Cal.App.3d 475, 483; compare also CC § 1531-1532 with *id.* § 1697.) When ascertaining contractual intent, the court begins with the language of the contract. (See CC §§ 1638-1639.)

A review of the 2013 Modification discloses that the terms "modification" and "modification agreement" appear throughout the text to describe the document's character. (See BANA Exh. 8.) By way of example, the middle of the second page of the document contains an all-caps heading which reads, "IMPORTANT TERMS OF PROPOSED MODIFICATION." The first sentence beneath that heading then reads:

Upon the modification agreement becoming binding and effective, the mortgage *will be modified* to reflect the following terms. Please read this section carefully to understand the impact of *this modification* on your current mortgage.

(*Id.* [emphasis added].) BANA has not confronted the evident significance of this language, i.e., that the 2013 Modification is just that, a modification. Instead, BANA argues as follows:

Morris entered into a new agreement. Her intent was to enter into this agreement in place of the original note and in place of the 2009 modification. She received consideration as (1) her trial was cancelled; (2) she received lower interest rates and payments. She accepted the offer by signing it. Morris cannot have the November 2009 Loan Modification and the June 2013 Loan Modification as the terms are in direct conflict with each other.

(See Moving Memo. at 9:15-20.) BANA does not cite any cases to support its reasoning. Although new consideration is not required to support a written modification of a written contract, (CC § 1697), the court is not aware of any authority holding that the presence of new consideration automatically transforms such a modification into a novation. Morris' receipt of new consideration in the 2013 Modification does not appear to be inconsistent with an intent merely to modify her loan. Nor is there any inconsistency between a loan modification, on the one hand, and the existence of terms in the underlying loan that conflict with terms in the modification, on the other. Even if a modification can impose solely new terms that are consistent with the original contract, many modifications, including loan modifications designed to reduce homeowners' monthly payments, alter existing terms.

In short, BANA's novation argument is unpersuasive and does not entitle BANA to summary judgment.

Next, BANA argues that it is entitled to summary judgment because Morris cannot establish the element of damage. To support this argument, BANA has performed calculations meant to demonstrate that, when the payments under the Terms Agreement are totaled and compared with those under the 2013 Modification, Morris will achieve savings of approximately $414,000. Although BANA has not included in its Separate Statement the fact that Morris will save $414,000 under the 2013 Modification, BANA asserts that its arrival at that number was "simple mathematics." The court disagrees.

BANA's calculation involves a diminishing principal amount and an increasing interest rate. A witness with sufficient expertise in accounting or mathematics was required to tender the accuracy of the calculation, and the court does not accept counsel's assurance of such accuracy. As a result, BANA's unsubstantiated assertion that Morris will save approximately $414,000 by entering into the 2013 Modification does not demonstrate that Morris has not been damaged.

Even if the court were to assume that BANA's $414,000 savings figure is accurate, it would still reject BANA's no-damages argument. BANA highlights the comparatively favorable interest rates in the 2013 Modification. BANA reasons that, even if Morris correctly alleges that loan arrearages, fees and costs accrued as a result of BANA's failure to facilitate notarization of the Final Documents, the 2013 Modification more than offsets such losses.

In addition, BANA argues that the only damages Morris may pursue with her breach of contract cause of action are "out of pocket" losses. (See Moving Memo. at 10:21-23.) BANA thus suggests that, to the extent Morris seeks damages in the form of lost savings or other lost benefits that would have materialized had the Final Documents been notarized, such damages may not be awarded.

The only authority BANA cites to support its argument that Morris is restricted to her out of pocket losses is *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240. That case, however, involved damages for fraud and is inapposite.

CC § 3300 defines the measure of damages in contract cases:

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved *for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom*. (Emphasis added.)

Hence, in order to demonstrate the nonexistence of any triable issue of material fact on the element of damages, BANA was required to produce evidence that any breach of the Terms Agreement and Final Documents was not likely to deprive the Borrowers of any savings or other benefits more valuable than the approximately $414,000 BANA contends inhere in the 2013 Modification. The question thus arises, What is the likelihood that Morris would have saved more than $414,000 if she and her husband had been allowed to proceed under the Terms Agreement and Final Documents in 2009? Could Morris have averted the arrearages and other losses she alleges in the FAC and also have benefited from more favorable interest rates subsequently by refinancing or entering into additional modifications? Perhaps the likelihood is small, but at this juncture it was BANA's burden to produce evidence demonstrating as much. Because BANA's no-damages argument relies exclusively on a comparison of the total payments under the Terms Agreement/Final Documents, on the one hand, and the 2013 Modification, on the other, it has not carried its burden, and summary judgment is denied.

In rejecting BANA's no-damages argument, the court is mindful that the pleadings set the outer limit of materiality for purposes of summary judgment. Hence, if Morris had alleged that the only damages she suffered as a result of BANA's breaches of contract were the arrearages, fees and costs incurred between 2009 and 2013, then evidence of greater savings under the 2013 Modification might entitle BANA to summary judgment. Morris' alleged damages, though, are not so limited:

Plaintiff is entitled to actual damages including, *but not limited to*, loss of money and property. Such losses include, *but are not limited to*, overcharges of fees, unlawful loan terms, incurred attorneys' fees, *costs of saving the Property, and destruction of credit*, as according to proof at trial and within the Court's jurisdiction.

(FAC, ¶ 40 [emphasis added].) BANA has not identified or otherwise confronted the magnitude of damages Morris allegedly suffered as "costs of saving the Property" or "destruction of credit." Nor has BANA produced evidence precluding categories of damages beyond those expressly alleged. Hence, BANA has not shown that Morris cannot establish damages greater than the $414,000 in savings BANA contends the 2013 Modification will provide. As a result, even if there were sufficient evidence that BANA's $414,000 figure is accurate, summary judgment would still be unwarranted.

Because the court denies the motion for reasons stated above, it need not address and does not address BANA's further argument that Morris did not enter into the 2013 Modification under duress.

<u>Judicial Notice</u>

BANA's request for judicial notice is GRANTED.

<u>Conclusion</u>

The motion is denied.

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

COURT RULING

The matter was argued and submitted. The Court affirmed the tentative ruling.