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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

NONA JORDAN, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A. et al., Defendants and Respondents.	B270966 (Los Angeles County Super. Ct. No. LC101325)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rick S. Brown, Judge. Affirmed.

Stephen R. Golden for Plaintiff and Appellant.

Severson & Werson, Kerry W. Franich and Jan T. Chilton for Defendants and Respondents.

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After taking out a loan for a rental property, defaulting on the loan, obtaining a loan modification, and defaulting again, the borrower submitted five further loan modification applications, all of which were rejected by the lender. The borrower then sued the lender and its loan servicer, seeking compensatory, treble, and punitive damages. The trial court granted summary judgment and dismissed the borrower's case. The borrower appeals. We conclude the trial court's ruling was correct and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. The original loan and deed of trust

In November 2006, Nona Jordan (plaintiff) borrowed $604,000 from Sea Breeze Financial Services, Inc. (Sea Breeze). The loan was secured by a deed of trust on one of her rental properties, located at 5547-5551 Hazeltine Avenue in Sherman Oaks, California (the Property). The deed of trust listed Sea Breeze as the lender and the Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary. Paragraph 22 of the deed of trust provided, among other things, that the "Lender shall give notice to Borrower prior to acceleration following Borrower's breach" and that "notice shall," among other things, "inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale." Defendant Wells Fargo Bank, N.A. (Wells Fargo), while doing business as America's Servicing Company, acted as the loan's servicer.

B. Initial default and loan modification

In March 2009, Wells Fargo informed plaintiff that she was $13,959.83 behind in her payments and that her loan was in default. That letter informed plaintiff that "[i]f foreclosure is initiated, you will have the right to bring a court action . . . to assert the non-existence of a default or any other defense you may have to acceleration and sale." A few months later, in June 2009, MERS assigned its beneficial interest in the deed of trust to defendant HSBC Bank USA, N.A. (HSBC).[1] A few months after that, in late 2009, plaintiff entered into a loan modification agreement; the agreement itself was signed by plaintiff and Wells Fargo, which was designated as the "Lender."

C. Subsequent defaults and further loan modification applications

By December 2011, plaintiff was $8,441.47 behind in her payments and again in default. The letter notifying of the default informed her that "[i]f foreclosure is initiated, you have the right to argue that you did keep your promises and agreements under the Mortgage Note and Mortgage, and to present any other defenses that you may have," but did not mention doing so in "a court action."

Plaintiff made a second request to modify her loan. In February 2012, Wells Fargo sent her a letter specifying the documents it needed from her in order to consider her modification application. A few weeks later, Wells Fargo denied her application because it had "not been able to reach [her] to discuss [her] situation."

In May 2012, plaintiff made a third request to modify her loan. Over the phone and in a letter, Wells Fargo informed

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1 MERS recorded an identical assignment in April 2012.

plaintiff of the documents she would need to submit as part of her modification application. In July 2012, Wells Fargo denied this application because she "did not provide . . . all of the information needed within the required time frame."

In October 2012, Wells Fargo informed plaintiff that her loan was still in default and that the amount of arrears had risen to $46,775.09. Like the December 2011 letter, the October 2012 letter informed plaintiff that "[i]f foreclosure is initiated, you have the right to argue that you did keep your promises and agreements under the Mortgage Note and Mortgage, and to present any other defenses that you may have," but did not mention doing so in "a court action."

In December 2012, HSBC substituted Cal-Western Reconveyance Corporation as the deed of trust's new trustee, and Cal-Western filed a notice of default on the Property.

In February 2013, plaintiff made a fourth request to modify her loan. In April 2013, Wells Fargo denied the application because plaintiff did "not meet the requirements" of the loan modification program because Wells Fargo was "unable to create an affordable payment" "[b]ased on [her] documented monthly income."

In the latter part of 2013, plaintiff made a fifth request to modify her loan. In November 2013, Wells Fargo sent her a letter specifying the documents it would need to consider this modification application. From November 2013 through January 2014, Wells Fargo also spoke on the telephone with a person representing plaintiff regarding which documents were needed. Also in November 2013, Cal-Western recorded a notice of trustee's sale. No sale ever occurred. In January 2014, Wells Fargo denied plaintiff's fifth loan modification application

because she "did not provide . . . all the information needed within the required time frame."

In May 2014, plaintiff made a sixth request to modify her loan. In a June 2014 letter, Wells Fargo informed her which documents it would need to evaluate her application. In September 2014, Wells Fargo denied this application because it had "not yet received a complete application."

As of October 27, 2015, plaintiff was $196,174.12 in arrears on the loan and owed a total of $646,247.93. No foreclosure has occurred.

II. Procedural Background

In the operative third amended complaint, plaintiff has sued HSBC and Wells Fargo (collectively, defendants) for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) negligence in considering her loan applications.[2]

Defendants moved for summary judgment. Plaintiff opposed the motion. The trial court granted the motion. However, there is no written order, and a transcript of the hearing on the summary judgment motion was not prepared.

After the trial court entered judgment, plaintiff filed this timely appeal.

DISCUSSION

Plaintiff argues that the trial court erred in granting summary judgment on each of her claims.

Summary judgment is appropriate when a party can "show that there is no triable issue as to any material fact and that [it] is entitled to a judgment as a matter of law." (Code Civ. Proc.,

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2 Plaintiff also sued for quiet title, but subsequently withdrew that cause of action.

§ 437c, subd. (c).) The party moving for summary judgment must show either that the opposing party cannot establish "[o]ne or more of the elements of [her] cause of action" or by showing a valid affirmative defense. (*Id.*, subds. (o) & (p)(2).) If the moving party (usually the defendant) makes this initial showing, the burden shifts to the other party (usually the plaintiff) to present evidence showing that a triable issue of material fact exists. (*Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1032.) "A triable issue of material fact exists if, and only if, the evidence reasonably permits the trier of fact to find the contested fact in favor of the plaintiff in accordance with the applicable standard of proof." (*Rondon v. Hennessy Industries, Inc.* (2016) 247 Cal.App.4th 1367, 1374.) W review a trial court's grant of summary judgment de novo. (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 415.)

I. Breach of Contract Claim

To prove a breach of contract, a plaintiff must show (1) the existence of a contract, (2) her own performance under the contract or an excuse for her nonperformance, (3) breach of that contract by the defendant, and (4) resulting damages. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

Plaintiff's breach of contract claim is premised on the argument that defendants did not comply with the requirement set forth in Paragraph 22 of the deed of trust because (1) the two letters Wells Fargo sent to her in December 2011, and October 2012, told her she could contest whether she was in default and could raise other defenses, but did not mention she could do so in "a court action"; and (2) plaintiff does "not recall" ever receiving

the March 2009 letter that *did* tell her she could contest her default and assert other defenses in "a court action."[3]

The undisputed evidence indicates that plaintiff cannot establish two elements of her breach of contract claim.

She cannot establish a breach of Paragraph 22 because Wells Fargo informed her, in the March 2009 letter, that she could contest her default and press other defenses in "a court action." This discharged defendants' obligation under Paragraph 22, which entitled plaintiff to "notice" upon her default—not notice every time she subsequently defaulted. The effect of this notice is not negated by plaintiff's assertion that she does "not recall" receiving the March 2009 letter. The presumption that letters dropped in the mail reach their destination applies in a summary judgment motion (Evid. Code, § 641; *Colleen M. v. Fertility & Surgical Associates of Thousand Oaks* (2005) 132 Cal.App.4th 1466, 1479-1480), and plaintiff's lack of recollection "is insufficient to create a triable issue of fact" (*Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 160).

Plaintiff also cannot establish that defendants' failure to inform her of her right to challenge the default in "a court action"

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3 In her opening brief on appeal, plaintiff alleges a second breach—namely, that she was not really in default on her loan. We need not consider this argument because she did not plead it as part of her breach of contract claim. (*Nativi v. Deustche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 290 (*Nativi*) ["'summary judgment cannot be *denied* on a ground not raised by the pleadings'"].) What is more, this argument is inconsistent with plaintiff's own deposition testimony in which she freely admits that her last loan payment was three or four years prior to her February 2015 deposition.

caused her any damage for the simple reason that she nevertheless sued them in "a court action." Plaintiff states without explanation that she has spent $30,000 "so far to protect my property from foreclosure," but those damages spring from her efforts to halt foreclosure—not the venue in which those efforts took place. The requisite causal link between the breach and her damages is missing. (Accord, *Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1103 [the "'test for causation in a breach of contract . . . action is whether the breach was a substantial factor in causing the damages"'].)

II. Breach of the Implied Covenant of Good Faith and Fair Dealing Claim

Implied in every contract is a supplemental covenant of good faith and fair dealing that "requires each party to do everything the contract presupposes the party will do to accomplish the agreement's purposes." (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244; see generally *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 690.)

On appeal, plaintiff argues that defendants breached the implied covenant in three ways. First, she asserts that they did not inform her of her right to bring "a court action." This argument fails for the reasons explained above.

Second, plaintiff contends that the acceleration letter the defendants issued in December 2011, was issued "a mere 16 days" after she first missed a payment. We need not consider this argument because she did not allege it as a basis for relief in the operative complaint. (*Nativi*, *supra*, 223 Cal.App.4th at p. 290.)

Lastly, plaintiff argues that Wells Fargo "misrepresented" its status in the 2009 loan modification agreement. That agreement labels Wells Fargo as the "Lender," plaintiff points out, when in fact Wells Fargo was merely the true lender's (that is, HSBC's) loan servicer. However, it is undisputed that Wells Fargo was HSBC's servicing agent at all pertinent times. By law, "mortgage servicers" are tasked with "enforcing the [promissory] note and security agreement." (Civ. Code, § 2920.5.) Indeed, this is partially why the beneficiary of a deed of trust may initiate a nonjudicial foreclosure through the acts of its "authorized agents." (Civ. Code, § 2924, subd. (a)(1).) Accordingly, there was nothing untoward about listing Wells Fargo as the "Lender" in the 2009 loan modification agreement. Even if there were, plaintiff has established no damages. Plaintiff argues that, had she known the "true" lender, she could have approached HSBC and obtained a better loan modification deal. Plaintiff has submitted no evidence on this point, and her argument is accordingly speculative. More to the point, Wells Fargo's status as HSBC's agent affirms that Wells Fargo was acting with HSBC's blessing, and that HSBC's response to plaintiff's entreaties would have been no different than Wells Fargo's.

III. Negligence Claim

Although a lender does not ordinarily owe its borrowers a duty of care when it acts solely as a lender (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1095-1096), a handful of courts have recognized that a lender may owe some duties to borrowers when considering their loan modification applications. (*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 945-952 (*Alvarez*); *Daniels v. Select*

Portfolio Servicing, Inc. (2016) 246 Cal.App.4th 1150, 1180-1183 (*Daniels*).)

Plaintiff contends that defendants breached this duty of care when reviewing her five rejected loan modification applications because they engaged in a practice of "demand[ing] more and more documents" and only "actually completed" the review of one of her applications (presumably, the fourth). We have no reason to consider defendants' invitation to part ways with *Alvarez* and *Daniels* because, even if we assume there is such a duty of care, the undisputed facts indicate it was not breached in this case. To begin, defendants not only considered—but granted—plaintiff one loan modification. More importantly, the undisputed facts indicate that defendants' denial of (1) one of plaintiff's five post-modification requests for further modification was based on her financial ineligibility for a modification, and (2) the remaining requests were based on plaintiff's failure to provide the documents defendants specifically requested. Plaintiff says she "could not keep up with all of the[] demands" for documents. Critically, however, she does not provide any evidence that she ever gave defendants the documents they requested. Moreover, the documents defendants requested consisted of bank statements, proof of rental income from the property, rental agreements and other documents that appear to be reasonably pertinent to an evaluation of a loan modification on a rental property. Plaintiff says defendants only "actually completed" one of the five post-modification applications, suggesting that the four applications defendants denied due to her failure to provide documents do not count as completed applications. We reject plaintiff's attempt to manufacture a disputed issue of fact from the use of different terminology.

Plaintiff lastly asserts that defendants never considered a seventh loan modification application she filed in February 2015. Not only was this breach not pled in the operative complaint, but it is also unsupported by the evidence presented. Plaintiff sent Wells Fargo a bank statement five months after her sixth loan modification application was denied; this was not a request for a loan modification, and imposed upon defendants no duty to treat it as such.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J. *
GILBERT

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* Presiding Justice of the Court of Appeal, Second Appellate District, Division Six, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.