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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ELIAZER ROBLES et al., Plaintiffs and Appellants, v. ONE WEST BANK, FSB, Defendant and Respondent.	B234196 (Los Angeles County Super. Ct. No. BC435475)

APPEAL from a judgment of the Superior Court of Los Angeles County. Abraham Khan, Judge. Affirmed.

Schimmel & Parks, Alan I. Schimmel, Michael W. Parks for Plaintiffs and Appellants.

Dykema Gossett, J. Kevin Snyder, Brian H. Newman for Defendant and Respondent.

Appellants defaulted on their home loan. They are now suing OneWest Bank, FSB (OneWest) for allegedly misleading them by holding out the prospect of loan modification. Appellants' failure to comply with their contractual loan repayment obligations undermines their claims, rendering the claims nonactionable. Accordingly, we affirm the trial court's judgment in favor of OneWest.

FACTS[1]

In 2002, Eliazer and Josephine Robles (plaintiffs) purchased real property in Santa Clarita for their primary residence. They purchased their home in a conventional fashion, making a 20 percent down payment and financing the remainder through a 30-year fixed loan. In 2006, the loan was modified to a 15-year loan.

Plaintiffs' loan was originally serviced by IndyMac Bank (IndyMac). In July 2008, the Office of Thrift Supervision closed IndyMac and concurrently authorized the creation of IndyMac Federal Bank, FSB (IndyMac Federal). On March 20, 2009, the Federal Deposit Insurance Corporation completed the sale of IndyMac Federal to OneWest. OneWest acquired the servicing rights for IndyMac Federal residential loans, including plaintiffs' loan, thereby taking responsibility for servicing the loan.

In 2008, plaintiffs suffered financial hardships. In December 2008, plaintiffs received a letter from IndyMac Federal threatening plaintiffs with collection proceedings unless they agreed to sign and return an agreement within five days increasing their monthly payments. Plaintiffs signed the agreement but did not make the required payments.

Plaintiffs sought to modify their mortgage in order to reduce the monthly payments. Prior to March 20, 2009, Ms. Robles spoke with unknown representatives of IndyMac or IndyMac Federal who instructed her to provide personal, financial, and tax

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1 The facts are taken from the allegations in the first amended complaint. We must assume the truth of the allegations. (*Gilmer v. Ellington* (2008) 159 Cal.App.4th 190, 194, fn. 1; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) Because only allegations against OneWest are at issue in this appeal, we omit some allegations pertaining solely to other defendants.

documentation as preliminary steps toward loan modification, including a government-related "loan modification program." Plaintiffs provided information and documentation. Meanwhile, beginning in approximately February 2009, plaintiffs discussed their situation with a company purportedly specializing in obtaining loan modifications. They paid the company thousands of dollars to assist them in obtaining a loan modification.

On March 21, 2009, plaintiffs received a "Notice of Default and Election to Sell Under Deed of Trust," which was recorded on March 19, 2009, by a company called NDEx West, L.L.C. (NDEx), as the "agent for beneficiary." The notice of default informed plaintiffs that their home was in foreclosure and that it could be sold "without any court action." Ms. Robles immediately called NDEx and was told that whether the foreclosure went forward was up to "the bank." Ms. Robles then called OneWest and was assured that her loan modification was in process.

On April 13, 2009, Ms. Robles again called OneWest to inquire about the status of her loan modification. A OneWest representative accessed a database with the personal, financial, and tax information plaintiffs had provided. The OneWest representative assured Ms. Robles that her loan modification paperwork was in order and that her loan modification would soon be assigned to a "loan modification officer" for further handling. Ms. Robles called OneWest again on April 23 and was told there was one more form she needed to fill out, which she did. She called again on May 13, more loan modification paperwork was requested, and she once again provided the requested information. Over the next few months, Ms. Robles called OneWest on other occasions, and was told that the loan modification was "in the works." Plaintiffs allege that at no time was Ms. Robles told that, since a notice of default had already been filed, OneWest had no intention, as a matter of preset formulas, policies, and practices, of granting a loan modification.

Plaintiffs learned that their home had been foreclosed on and sold on August 14, 2009. In April 2010, plaintiffs were evicted.

PROCEDURAL HISTORY

Plaintiffs filed suit against OneWest and other defendants in April 2010. The first amended complaint asserts causes of action against OneWest for fraud (Civ. Code, §§ 709, 1710), violations of the Consumer Legal Remedies Act (CLRA) (Civ. Code, §§ 1750 et seq.), and unfair business practices (Bus. & Prof. Code, §§ 17200 et seq.).

OneWest answered the first amended complaint and thereafter filed a motion for judgment on the pleadings. The motion was granted without leave to amend and OneWest was ordered dismissed. An order of dismissal was subsequently filed, and plaintiffs appealed. Judgment was thereafter entered.

DISCUSSION

A motion for judgment on the pleadings serves the function of a demurrer, challenging only defects on the face of the complaint. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999.) On review, we render our independent judgment as to whether the complaint states a cause of action. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.)

The trial court's refusal to grant plaintiffs leave to amend the pleading is reviewed for an abuse of discretion. Plaintiffs have the burden of establishing a reasonable possibility that an amendment to the pleading would cure any defects; they may make that showing for the first time on appeal. (*Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027; *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711.)

I. Fraud cause of action

Plaintiffs first argue that they properly stated a cause of action for fraud against OneWest. Fraud may involve the "suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." (Civ. Code, § 1710.) The elements of fraud are (1) a material misrepresentation (including false representation, concealment, or nondisclosure); (2) knowledge of its falsity; (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damages. (*Robinson Helicopter Co., Inc. v. Dana Corp.*

(2004) 34 Cal.4th 979, 990.) Each element of a fraud claim must be pleaded with particularity. (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1059-1060.)

Plaintiffs contend that OneWest led them along with representations that their loan modification would be processed, all the while never intending to grant any type of modification. Plaintiffs argue that OneWest should have disclosed that, as a matter of preset formulas, policies, and practices, it would not agree to modify plaintiffs' loan. The first amended complaint states that, as a result of OneWest's fraud, plaintiffs incurred "actual damages and loss of money and property, including the loss of their [home]." Other than the loss of their home, the complaint does not detail with any particularity the sort of damages plaintiffs suffered. Now, on appeal, plaintiffs contend that they incurred damages because they would not have spent thousands of dollars on "loan modification consultants" and the costs of gathering and transmitting documents to OneWest had they known that OneWest would never modify the loan.

Plaintiffs' fraud cause of action clearly does not meet the heightened standard required for pleading fraud—"the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.) In addition to inadequately pleading compensable damages, the first amended complaint contains no identification of OneWest representatives who spoke to Ms. Robles, and the content of OneWest's communications is described only in generalities. In their appellate papers, plaintiffs argue that if given the opportunity to amend, they can bolster their allegations with further details, including the name of a OneWest representative who signed a letter that plaintiffs characterize as fraudulent.[2]

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[2] One West submitted this letter in a request for judicial notice accompanying its motion for judgment on the pleadings. Because this letter is unnecessary to our decision, we do not decide whether it is a proper subject for judicial notice.

We find no need to analyze whether such proposed amendments would be sufficient, however, because the amendments would not fix the primary problem with the fraud cause of action: the representations identified by plaintiffs do not support a fraud claim. As a general rule, a financial institution owes no duty of care to a borrower in the context of a loan transaction. (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096; see also *Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 466 [absent special circumstances, no fiduciary relationship between lender and borrower]; *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 476 (*Price*) [no general fiduciary relationship between a bank and its loan customers].) Negotiations and communications relating to the possible modification of a loan are generally nonactionable. "The terms of a restructuring agreement obviously may vary as widely as the terms of the original agreement. Unless an agreement to restructure a loan embodies definite terms, capable of enforcement, it is not a legally valid contract. 'Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement.' [Citation.] [Plaintiffs'] understanding that the notes would be 'redone' thus raises no triable issue as to a legally enforceable understanding inconsistent with the written terms of the notes." (*Id.* at p. 483.)

Plaintiffs' communications with OneWest did not progress past the preliminary negotiation stage. According to plaintiffs' first amended complaint, OneWest represented that the proposed loan modification was "in process," that it would be transferred for "further handling," and that it was "in the works." But a bank's statements of a willingness to consider loan applications do not establish a fraudulent promise to make a loan. (*Conrad v. Bank of Amer.* (1996) 45 Cal.App.4th 133, 156.) To be enforceable, a promise must be definite enough to determine the scope of duty and the limits of performance. (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1045.) No promise was made here.

Furthermore, it is clear that OneWest's representations did not relieve plaintiffs of their own obligations. Plaintiffs do not allege that they paid any consideration to secure OneWest's agreement to alter the terms of the loan contract. They could not justifiably

rely on an oral representation about a future attempt to negotiate a loan workout to supplant their existing contractual duty. In order to avoid the harm that plaintiffs encountered, plaintiffs had to make their required loan payments. According to the allegations of their complaint, they did not. Plaintiffs identify no current law which would require a bank to continue the loan modification process indefinitely while the borrower fails to make payments on an already-delinquent loan.[3]

Moreover, plaintiffs do not allege that they did not believe foreclosure would occur. And if they were to so allege, the alleged belief would be unreasonable. Justifiable reliance is required to establish causation in a fraud claim. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976.) Plaintiffs had no reasonable basis to believe that they could continue to stay in their home without making loan payments, or that OneWest would refrain from foreclosing and instead modify their loan. Plaintiffs received the notice of default on March 21, 2009. They do not allege that OneWest promised not to pursue foreclosure. Nor do they allege that they brought their loan current. Foreclosure was eminently foreseeable, OneWest's vague loan modification-related statements notwithstanding. The trial court, therefore, did not err by finding that plaintiffs failed to state a fraud cause of action and by denying leave to amend.

II. <u>CLRA cause of action</u>

The CLRA was enacted "to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." (Civ. Code, § 1760.) Civil Code section 1770 sets forth unlawful practices in connection with "the sale or lease of goods or services to any consumer." "Goods," under the CLRA, are defined as "tangible chattels bought or leased for use primarily for

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[3] Plaintiffs' assertions (made in their opening brief but not in their first amended complaint) that OneWest employed a "robo-signer" would not render their fraud claim actionable. (See *Cerecedes v. U.S. Bankcorp* (C.D. Cal. July 11, 2011) 2011 U.S. Dist. LEXIS 75559, *15-16 [allegations of "robo-signing" irrelevant in light of plaintiffs' default on loan].)

personal, family, or household purposes." (Civ. Code, § 1761, subd. (a).) "Services" are defined as "work, labor, and services for other than a commercial or business use."

Plaintiffs argue that the CLRA applies to their dispute with OneWest because of the following quotation from a 1919 United States Supreme Court case: "'It is clear from the statutes referred to and the authorities cited and from the understanding of business men in commercial transaction, as well as of jurists and legislators, that mortgages, bonds, bills and notes have for many purposes come to be regarded as property and not as the mere evidences of debts, and that they may thus have a situs at the place where they are found like other visible, tangible chattels.'" (*De Ganay v. Lederer* (1919) 250 U.S. 376, 381.)

Plaintiffs' reliance on this single citation from a case with no relevance to the CLRA is unavailing. Civil Code section 1770 lays out specific "unfair methods of competition and unfair or deceptive acts or practices" that constitute violations of the CLRA. Neither plaintiffs' first amended complaint nor their briefs on appeal attempt to explain what provision(s) OneWest violated.

Furthermore, based on established case law, the CLRA does not apply to the proposed loan modification that forms the crux of plaintiffs' suit. *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1488, found that the CLRA did not apply to an action in which plaintiffs alleged that a lender overcharged them fees in conjunction with a home loan because the lender's actions "were undertaken in transactions resulting in the sale of real property," not goods or services. *Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 233, concluded that "neither the express text of CLRA nor its legislative history supports the notion that credit transactions separate and apart from any sale or lease of goods or services are covered under the act." The California Supreme Court explained the limits of the CLRA by holding that it does not pertain to life insurance policies. (*Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 61 *(Fairbanks*).) The court further held that "ancillary services" provided by insurers—like those also provided by sellers of investment securities, bank deposit accounts, and loans—which include "assist[ing] prospective customers in selecting products that suit

their needs, and . . . provid[ing] additional customer services related to the maintenance, value, use, redemption, resale, or repayment," do not fall under the CLRA. (*Fairbanks*, at p. 65.)

The United States District Court applied this holding to a proposed loan modification in *Justo v. Indymac Bancorp* (C.D.Cal. Feb. 19, 2010) 2010 U.S. Dist. LEXIS 22831. The plaintiffs alleged that defendant loan servicers violated the CLRA because they "falsely pledged to help mortgagors modify their loans, but failed to negotiate a modification or to offer a reduction of the principal balance." (*Justo*, at p. *8.) The court disagreed, finding that under *Fairbanks*, a loan modification is not a good, and that it is also not a service: "The loan modification itself, like a life insurance policy, is merely a contract specifying the schedule of loan repayment. It involves no work or labor, nor any repair to a chattel. And the attendant services of collecting financial information, negotiating a modification, or selecting the appropriate payment plan are not 'services' any more than the ancillary services related to insurance policies." (*Justo*, at pp. *9-10.) Other district courts have likewise concluded that the CLRA does not apply to mortgage loans. (See *Sato v. Wachovia Mortg., FSB* (N.D.Cal. Mar. 31, 2012) 2012 U.S. Dist. LEXIS 46554; *Mejia v. EMC Mortg. Corp.* (C.D.Cal. Feb. 2, 2012) 2012 U.S. Dist. LEXIS 13256.)

Plaintiffs' remaining argument that OneWest was acting as a real estate broker clearly fails. No facts alleged in the first amended complaint would support this conclusion, and plaintiffs make no credible argument on appeal. As such, the trial court properly dismissed the CLRA claim without leave to amend.

III. <u>Unfair business practices cause of action</u>

Plaintiffs' cause of action for violation of Business and Professions Code section 17200 (section 17200) is also untenable. A section 17200 claim "is not an all-purpose substitute for a tort or contract action." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173.) Instead, it is an equitable action intended to prevent unfair business practices and restore money or property to victims of such practices. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150.) Section 17200

defines "unfair competition," in pertinent part, as "any unlawful, unfair or fraudulent business act or practice." The law encompasses a broad scope of conduct, covering business practices that are "unfair," even if technically not "fraudulent" or "unlawful." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) The scope of practices covered by section 17200, though, is not unlimited. (*Cel-Tech*, at p. 182.)

A section 17200 claim "borrows" violations of other laws and treats the violations as unlawful practices. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383.) As pleaded in the first amended complaint, plaintiffs' section 17200 cause of action is predicated entirely on their fraud cause of action—the allegations for both causes of action are essentially identical. Because plaintiffs' fraud claim fails, their section 17200 claim also fails. (See *Wolski v. Fremont Investment & Loan* (2005) 127 Cal.App.4th 347, 357.)

In their reply brief, plaintiffs (for the first time) argue that OneWest's actions were unfair because they violated the recently signed "California Homeowner Bill of Rights" (Assem. Bill No. 278 (2011-2012 Reg. Sess.); Sen. Bill No. 900 (2011-2012 Reg. Sess.)). Among other things, the California Homeowner Bill of Rights is intended to prohibit "'dual track' foreclosures that occur when a servicer continues foreclosure while also reviewing a homeowner's application for a loan modification." (See "Governor Brown Signs California Homeowner Bill of Rights" (July 11, 2012).) http://gov.ca.gov/news.php?id=17627.)

Plaintiffs clearly have no cause of action under the California Homeowner Bill of Rights—the law does not go into effect until January 1, 2013. We further find that the enactment of the law does not mean that OneWest's actions constituted unfair business practices. *Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394 enunciated the following definition of "unfair" conduct: "(1) The consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." (*Id.* at p. 1403.) Plaintiffs have not stated any

substantial injury that that they suffered that could not have reasonably been avoided. Plaintiffs could have prevented the loss of their home (and any of their vaguely described attendant problems) by bringing their loan current. They did not. Instead, they continued to live in their house for more than a year after the notice of default was recorded. OneWest never informed plaintiffs that they need not comply with their contractual loan repayment obligations. It was plaintiffs' own failure to pay their loan that caused their injury.

Accordingly, the trial court properly granted OneWest's motion for judgment on the pleadings and denied leave to amend.

DISPOSITION

The judgment in favor of OneWest is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.