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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ANDRIJANA MACKOVSKA, Plaintiff and Appellant, v. BANK OF AMERICA, N.A. et al., Defendants and Respondents.	B271080 (Los Angeles County Super. Ct. No. SC121189)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Reversed and remanded with directions.

Law Offices of Lenore Albert and Lenore L. Albert for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton, Elizabeth Holt Andrews and Kerry W. Franich for Defendants and Respondents Bank of America, N.A., ReconTrust Company, N.A., Bank of New York Mellon, and Mortgage Electronic Registration Systems, Inc.

INTRODUCTION

Andrijana Mackovska appeals from a judgment entered after the trial court granted a motion for summary judgment on causes of action arising from the foreclosure sale of Mackovska's house. Following the sale, Mackovska sued Bank of America, N.A. for fraud, negligence, unjust enrichment, and violations of the Homeowner Bill of Rights (HBOR), Revenue and Taxation Code, Corporations Code, and Business and Professions Code. Mackovska also named ReconTrust Company, N.A., Bank of New York Mellon, and Mortgage Electronic Registration System, Inc. (MERS) as defendants in some causes of action.

We reverse the trial court's order granting summary adjudication on Mackovska's fraud cause of action because Bank of America failed to show Mackovska could not establish the elements of that claim, and we remand with directions to give Mackovska an opportunity to file a motion for leave to amend to add a cause of action for negligent misrepresentation. We affirm the trial court's order granting the defendants' motion for summary adjudication on Mackovska's causes of action for negligence, violation of the HBOR, and the Business and Professions Code, as well as the court's rulings on her other causes of action from which Mackovska has not appealed.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Loan and Default*

In 2006 Mackovska and Sonja Youngberg borrowed $553,600 to buy a house in Los Angeles. Bank of America serviced the loan as an authorized agent of Bank of New York

Mellon. The deed of trust securing the loan required Mackovska and Youngberg to pay all property taxes associated with the property.

Mackovska and Youngberg failed to pay property taxes for several years beginning in 2008. Bank of America paid the taxes and added the amounts to the unpaid balance of the loan, as authorized by the deed of trust. By March 2011 Bank of America had advanced Mackovska and Youngberg $42,000 in property tax payments, and their monthly payment on the note had increased from $1,773.22 to $5,664.21.

Mackovska and Youngberg's payments in June 2009, June 2010, and July 2010 were returned for insufficient funds. In July 2010 Bank of America sent Mackovska and Youngberg a notice of intent to accelerate the loan unless they promptly cured the deficiency. Their last regular monthly payment was in January 2011. In August 2011 Bank of America recorded a notice of default with a total past due amount of $57,711.28. On November 16, 2011 Bank of America recorded a notice of trustee's sale for December 12, 2011.

B. *The Loan Modification Efforts*

Upon receiving notice of the trustee's sale in November 2011, Mackovska and Youngberg went to a Bank of America branch to apply for a loan modification. In April 2012 Bank of America denied the application because the documentation was incomplete. Mackovska contends that, even though she supplied all of the required documents, Bank of America kept asking for more documents every two or three months. Nevertheless, in August 2012 Mackovska and Youngberg submitted a new loan modification application. In March 2013 Bank of America denied

the application, again on the ground the documentation was incomplete.

Some time prior to June 7, 2013 Mackovska and Youngberg submitted another loan modification application. A letter with that date from Bank of America advised Mackovska and Youngberg that, if they did not send Bank of America certain documents by July 7, 2013, including a tax form, pay stubs, and bank statements, they would no longer be eligible for the requested modification. According to Bank of America, Mackovska and Youngberg failed to submit the requested documents by July 7, 2013.

On July 17, 2013 ReconTrust, the foreclosure trustee, recorded a Notice of Trustee's Sale for August 12, 2013. Bank of America's customer relations management system included an entry for July 17, 2013 stating a Bank of America representative called Mackovska that day, told her the loan was 30 payments past due, and informed her the trustee had scheduled a foreclosure sale for August 12, 2013. The entry states Mackovska said she was only the co-borrower and the primary borrower, Youngberg, was making the payments on the note.

On August 5, 2013 Mackovska called her customer relationship manager, Rosa Javier, to ask about the status of the loan modification application and learned Javier was on vacation until August 12. Another bank employee told Mackovska she had sent an email to Javier's manager, Linda Streeter, and had asked Streeter to call Mackovska within 24 hours to update Mackovska on the status of her application. Mackovska did not receive a call from Streeter on August 6 or August 7, despite leaving multiple messages for her.

On August 8, 2013 Mackovska called again and asked to speak with Streeter. Later that afternoon, another Bank of America employee, Jesus Navarro, called Mackovska and, according to Mackovska, told her "everything is proceeding with the modification and he needs just a few papers to complete the modification and that no sale would take place." That evening Mackovska sent Navarro via fax the documents he requested. The next day Mackovska spoke with Navarro's assistant, who confirmed receipt of the fax and told Mackovska that "everything is in order for the Bank to finish the Loan Modification and that a sale of the property would not occur." According to Bank of America's customer relations management system, Rosa Javier left a voice mail for Mackovska or Youngberg that same day, August 9, 2013, stating that the August 12 foreclosure sale would proceed.

Three days later, on August 12, 2013, Mackovska learned through a real estate agent her house had been sold at an auction. Mackovska called the Bank and asked, "What happened with my house?" According to Mackovska, a Bank representative told her the bank was still processing the loan modification application and "a lot of time[s] mistakes happen and that the only way to fix mistakes is to file a lawsuit against the Bank." According to Bank of America, its representative told Mackovska a "workout" or modification is not guaranteed and only a customer relationship manager can advise a customer that a foreclosure sale is postponed. On August 15, 2013 ReconTrust recorded a Trustee's Deed Upon Sale showing the property sold on August 12, 2013.

C. *The Complaint, Demurrer, and Motion for Summary Judgment*

On August 14, 2013 Mackovska sued Bank of America, ReconTrust, The Bank of New York Mellon formerly known as The Bank of New York, CWALT, Inc., and MERS.[1] The complaint included causes of action for violation of the HBOR, unfair business practices under Business and Professions Code section 17500, fraud, declaratory relief, and breach of the covenant of good faith and fair dealing.[2]

The defendants demurred, and the trial court issued a tentative ruling indicating it would sustain the demurrer and grant Mackovska 10 days leave to amend. Mackovska, who originally represented herself, requested a continuance, arguing she did not receive the moving papers. The court continued the hearing on the demurrer, but before the court could issue a ruling Mackovska retained counsel and filed a first amended complaint. That complaint alleged causes of action for HBOR violations, fraud, unjust enrichment, negligence, and violations of Business and Professions Code section 17200 et seq. (the unfair competition law), the Revenue and Taxation Code, and the

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[1] Bank of America is the authorized agent of the investor in Mackovska's loan, Bank of New York Mellon, which is the trustee for the CWALT, Inc., Alternative Loan Trust 2006-OA10 Mortgage Pass-Through Certificates, Series 2006-OA10. ReconTrust was the foreclosure trustee, who acted at the request of Bank of America. MERS was the beneficiary of the deed of trust.

[2] We grant Mackovska's motion to augment the record with the complaint dated August 14, 2013 and a notice of pending action dated August 16, 2013.

Corporations Code. The defendants answered the first amended complaint and moved for summary judgment, apparently without either side having taken any discovery.

The defendants supported their motion with a separate statement of undisputed facts and the declaration of Karri Yurkovich, Bank of America's AVP Operations Team Manager of the Mortgage Resolution Team. The declaration attached records relating to Mackovska's loan, correspondence between Bank of America and Mackovska, entries from Bank of America's customer relations management system, and recorded notices.

In opposition, Mackovska did not file a separate statement that responded to each of the material facts the defendants contended were undisputed. She did file a memorandum of points and authorities in opposition to the motion for summary judgment and a declaration providing details of some of her communications with Bank of America. She stated Bank of America employees falsely represented to her the bank had everything it needed to process her application for a home loan modification and would postpone the noticed foreclosure sale. The defendants filed objections to Mackovska's declaration, contending that everything Mackovska claimed Bank of America representatives told her was inadmissible hearsay.

The court granted the motion for summary judgment. The court entered judgment for the defendants on January 20, 2016, and Mackovska timely appealed.

DISCUSSION

Mackovska appeals from the trial court's ruling on her causes of action for fraud, negligence, and violations of HBOR

and the unfair competition law. Mackovska does not appeal from the court's ruling on her causes of action for violations of the Revenue and Taxation Code, violations of the Corporations Code, or for unjust enrichment.

A. *Applicable Law and Standard of Review*

A trial court may grant a motion for summary judgment only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the undisputed facts warrant judgment for the moving party as a matter of law. (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.) In doing so, "[w]e apply the traditional three-step analysis to '(1) identify the pleaded issues, (2) determine if the defense has negated an element of the plaintiff's case or established a complete defense, and if and only if so, (3) determine if the plaintiff has raised a triable issue of fact.'" (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 358; see *Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, 175.) "A triable issue of material fact exists where 'the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.'" (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 643.)

We strictly construe the moving party's evidence and liberally construe the opposing party's evidence, and accept as undisputed only those portions of the moving party's evidence that are uncontradicted. (*Citizens for Odor Nuisance Abatement*,

supra, 8 Cal.App.5th at pp. 357-358; *Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 137.) "We disregard evidence to which a sound objection was made but consider any evidence to which no objection or an unsound objection was made." (*Ahn*, at pp. 136-137; see Code Civ. Proc. § 437c, subd. (c); *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542 [evidence relied on in supporting or opposing papers must be admissible].)

"We resolve any evidentiary doubts or ambiguities and view all inferences from the evidence in the light most favorable to the party opposing summary judgment." (*Huang v. Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 337-338; see Code Civ. Proc., § 437c, subd. (c); *Biancalana*, *supra*, 56 Cal.4th at p. 813.) Although we may affirm an order granting summary judgment if it is correct on any of the grounds asserted in the trial court regardless of the trial court's stated reasons (*Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 637; see *Citizens for Odor Nuisance Abatement*, *supra*, 8 Cal.App.5th at p. 358 ["[a] trial court's stated reasons for granting summary judgment do not bind us; we review the court's ruling, not its rationale"]), we resolve any doubts over whether summary judgment was appropriate in favor of the opposing party. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535; see *Guess v. Bernhardson* (2015) 242 Cal.App.4th 820, 826 ["we resolve all doubts regarding whether any triable issue of material fact exists in favor of the party opposing the motion for summary judgment or summary adjudication"].)

The defendants contend we should review a trial court's rulings on evidentiary objections raised in summary judgment papers for abuse of discretion. The Supreme Court has not definitively ruled on this issue. (See *Reid*, *supra*, 50 Cal.4th at p.

535 ["we need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"]; *In re Automobile Antitrust Cases I and II* (2016) 1 Cal.App.5th 127, 141 [citing *Reid* and observing the standard of review is unsettled]; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255, fn. 4 [stating the issue "is by no means settled"].) Where the trial court fails to rule on evidentiary objections, however, we review those objections de novo. (See *Reid*, at p. 535; see *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451.)

B. *The Trial Court Erred in Granting Summary Adjudication on Mackovska's Fraud Cause of Action*

1. *Relevant Proceedings*

The first amended complaint asserted a fraud cause of action against Bank of America only.[3] Mackovska alleged Navarro told her on August 9, 2013 that "everything was in order for the loan modification, and that [Bank of America] has everything they need to finish the loan modification." Mackovska also alleged she provided Bank of America all of the documents it requested in connection with her loan modification application and Bank of America "advised [her] that it would cease all foreclosure activity during the loan modification process."

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[3] Mackovska argues the trial court erred in granting summary adjudication on the fraud cause of action against ReconTrust and MERS because they did not present any evidence in support of the motion. Mackovska, however, did not sue ReconTrust or MERS for fraud.

Mackovska further alleged Bank of America "refused to honor its prior statements and promises by refusing to complete the loan modification and instead foreclosing on [her] Property," "concealed material facts . . . regarding payments, notices, assignments, transfers, late fees and charges," and "knowingly and willfully made false representations" to Mackovska "intending to induce [her] reliance." Mackovska alleged she justifiably relied on Bank of America's misrepresentations, and as a result she suffered damage to her credit standing, costs, and loss of property.

In support of its motion for summary adjudication on the fraud cause of action, Bank of America argued generally that Mackovska had not pleaded all the elements of fraud, but Bank of America did not identify any specific element Mackovska failed to allege or alleged without sufficient specificity. Bank of America also submitted evidence it claimed "overwhelmingly establishe[d]" (1) "[n]o foreclosure activity occurred until well after [Bank of America] made numerous attempts to collect a complete loan modification application from [Mackovska]," (2) Bank of America "never misrepresented the status of [Mackovska's] loan modification application," and (3) Mackovska "had notice of the August 12, 2013 sale date." This evidence, presented through the declaration of Karri Yurkovich, included call logs from Bank of America's customer relations management system showing that, on August 9, 2013, Rosa Javier called someone and left a voice mail stating that Bank of America would not postpone the foreclosure sale scheduled for August 12. None of the evidence Bank of America submitted, however, refuted or even referred to Mackovska's allegation that on August 9, 2013

Navarro told Mackovska that Bank of America had everything it needed to finish the loan modification.

Mackovska argued the complaint sufficiently pleaded a cause of action for fraud. She also submitted a declaration stating Bank of America employees repeatedly told her "the loan modification was underway and that the sale would not occur." Among other details of her communications with Bank of America, Mackovska stated that Navarro's assistant (rather than Navarro) told her on August 9, 2013 that "everything is in order for the Bank to finish the Loan Modification and that a sale of the property would not occur." Mackovska attached to her declaration the documents she says she faxed to Navarro on August 8, 2013 at his request.

As noted, Mackovska did not file a separate statement as required by Code of Civil Procedure section 437c, nor did she submit any written objections to Bank of America's evidence pursuant to California Rules of Court, rule 3.1354(b).[4] Instead, she argued in her memorandum of points and authorities in opposition to the motion that Yurkovich's declaration was "insufficient or fraudulent" because it failed to state whether Yurkovich "was involved in the making of Bank of America's records" and "how the documents were reviewed."

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[4] Rule 3.1354(b) requires a party to serve and file all written objections to evidence separately from the other papers in support of or in opposition to a motion for summary judgment. The rule also requires the objections to identify with specificity the objectionable statement or material by stating its exhibit, title, page, and line number, and to state "the grounds for each objection to that statement or material."

On reply, Bank of America objected to most of Mackovska's declaration as hearsay. Bank of America also argued that Mackovska's declaration failed to show she submitted all of the required documents by the July 7, 2013 deadline and that she "conveniently" omitted any reference to the fact that Bank of America "told her multiple times that the sale date scheduled for August 12, 2013 was going forward."

The trial court granted Bank of America's motion for summary adjudication on Mackovska's fraud claim. The court reasoned Bank of America's evidence of the voice mail Rosa Javier left on August 9, 2013 for an undisclosed recipient (which the court characterized as a call to Mackovska) "negates the allegation that [Bank of America] misrepresented its intention not to go forward with the sale." The court stated Bank of America also submitted evidence Mackovska "was informed on numerous occasions that her loan modification application was incomplete and that she never responded to their requests for additional documents." The court noted that, because Mackovska did not submit a separate statement, the court did not know whether Mackovska disputed Bank of America's contentions that it had denied Mackovska's loan modification application for failure to submit required documents by July 7, 2013 and informed her on July 17 of the August foreclosure sale. The court also ruled Mackovska's testimony "does not clearly establish that [Bank of America] ever stated to her that the loan modification application was entirely complete." The court also ruled there was no evidence Bank of America "acted with the necessary fraudulent intent."

It is unclear whether the trial court ruled on the defendants' hearsay objections to Mackovska's declaration. The

court's ruling states Mackovska "submitted a declaration that is objectionable for lack of foundation. The declaration is also devoid of clear, admissible testimony refuting Defendants' evidence that it complied with all applicable requirements and did not engage in any unfair or fraudulent business practices."[5] The defendants, however, did not object to the declaration for lack of foundation. Moreover, whether the defendants "complied with all applicable requirements" for purposes of Mackovska's unfair or fraudulent business practices cause of action does not address the admissibility of Mackovska's statement that Navarro or his assistant told her the loan modification application was complete and the foreclosure sale would be postponed.

2. *Bank of America Failed To Negate an Element of Mackovska's Fraud Claim*

To satisfy its moving burden on summary adjudication, Bank of America had to provide evidence Mackovska could not establish one or more elements of her fraud cause of action. (See *Ahn*, *supra*, 223 Cal.App.4th at p. 136; *Y.K.A. Industries*, *Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 353.) The elements of fraud are (1) a misrepresentation in the form of a false representation, concealment, or nondisclosure, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.

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[5] The copy in the record of the defendants' objections includes a faint "O" in the column labeled "Court's Ruling," but the document is not signed by the court. No other document in the record indicates the court actually overruled the defendants' objections.

(*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255; *Geraghty v. Shalizi* (2017) 8 Cal.App.5th 593, 597.) Bank of America's motion for summary adjudication did not challenge any specific element of fraud, but its motion appeared directed to all of the elements except the second, knowledge of the statement's falsity.

a. *Misrepresentation*

Bank of America argued in the trial court that "overwhelming evidence" established Bank of America never misrepresented the status of Mackovska's loan modification application. In order to obtain summary adjudication (or at least to meet its initial burden), however, Bank of America had to show, not that the evidence supporting its version of the facts was "overwhelming," but that there was "no triable issue as to any material fact" (Code Civ. Proc., § 437c, subd. (c)). (See *Citizens for Odor Nuisance Abatement*, *supra*, 8 Cal.App.5th at p. 358; *Meddock*, *supra*, 220 Cal.App.4th at p. 175.) Bank of America's evidence admittedly told one (albeit, according to Bank of America, overwhelmingly stronger) version of what transpired between the bank's representatives and Mackovska. Bank of America, however, failed to show Mackovska did not possess, and could not reasonably obtain, evidence to support her version of events supporting her cause of action for fraud. (See *Y.K.A. Industries*, *supra*, 174 Cal.App.4th at p. 353.)

Moreover, even if Bank of America had met its burden, Mackovska created a triable issue of fact by submitting evidence that Bank of America misrepresented the status of her loan modification application and the foreclosure sale. Bank of America argues it made no such misrepresentation because it

submitted evidence the bank (1) denied Mackovska's loan modification application in July 2013, (2) shortly thereafter informed Mackovska of the date of the foreclosure sale, and (3) reaffirmed the date of the foreclosure sale through Rosa Javier's August 9, 2013 voice mail. None of this evidence, however, refuted Mackovska's statements in her declaration that Navarro and his assistant told her as late as August 9, 2013 the bank had what it needed to process her loan modification application and the foreclosure sale would be postponed. Indeed, Bank of America's evidence did not contradict or even refer to Mackovska's allegation and evidence that she spoke with Navarro and his assistant on August 8 and 9, 2013.

The trial court erred by crediting Bank of America's evidence the bank did not misrepresent its intention to go forward with the foreclosure sale and by not acknowledging, let alone liberally construing, Mackovska's contrary evidence. (See *Ahn*, *supra*, 223 Cal.App.4th at p. 137 [court must liberally construe opposing party's evidence]; accord, *Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.)[6] Bank of America acknowledges as much by stating in its respondent's brief that it "disproved the alleged misrepresentations, *at least*

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[6] We consider Mackovska's declaration as evidence in opposition to the motion for summary adjudication because the trial court did not sustain an objection to it. (See *Ahn*, *supra*, 223 Cal.App.4th at pp. 136-137.) Moreover, although the trial court did not rule on Bank of America's hearsay objections to certain of the statements by bank employees, the statements were admissible either because they were not hearsay or statements of a party opponent. (See Evid. Code, § 1220; *Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1150.) Bank of America does not argue otherwise.

inferentially, by showing that [Bank of America] had repeatedly told Youngberg and Mackovska that their loan modification applications were incomplete." (Italics added.) Summary judgment, however, is appropriate "'[o]nly when the inferences are indisputable.'" (*San Francisco Unified School District ex rel. Contreras v. First Student, Inc.* (2014) 224 Cal.App.4th 627, 645; see *Scalf*, at p. 1519.) The inference on which Bank of America moved for summary adjudication was very much disputed.

b. *Intent to induce reliance*

The trial court also found there was no evidence Bank of America acted with fraudulent intent. Mackovska argues her declaration was circumstantial evidence Bank of America had the necessary intent. Mackovska is correct.

An element of fraud is "intent to induce another's reliance on the misrepresentation." (*Conroy*, *supra*, 45 Cal.4th at p. 1255; see Civ. Code, § 1709 ["[o]ne who willfully deceives another with intent to induce him to alter his position to his injury or risk" is liable for fraud].) Liability exists not only where the defendant intends to induce reliance, but also where such reliance is reasonably expected to occur. (*Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 93; see *Gutierrez v. Wells Fargo & Co.* (N.D. Cal. 2009) 622 F.Supp.2d 946, 958 [applying California law]; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 807, p. 1163.) "'[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.'" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974; accord, *Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 767.) Fraudulent intent is generally

a question of fact. (See *People ex rel. Government Employees Insurance Company v. Cruz* (2016) 244 Cal.App.4th 1184, 1199 ["fraudulent intent is a question of fact and must often be established by circumstantial evidence"]; *Gutierrez*, at p. 958.)

Mackovska stated in her declaration that a Bank of America representative told her on August 5, 2013 that Rosa Javier was on vacation but that her loan modification application was "in process." After trying to reach Javier's manager for several days, Mackovska spoke with Navarro, who said the loan modification was "proceeding," the bank only needed "a few papers" to finalize the loan modification, and the foreclosure sale would not occur. On August 9, 2013 Mackovska spoke with Navarro's assistant who told her Navarro had received the additional requested documents and everything was "in order" and a foreclosure sale "would not occur." Bank of America admits it sold the property three days later and does not dispute the statements Navarro and his assistant made to Mackovska.

Mackovska's declaration, liberally construed, is evidence Navarro and his assistant made the statements concerning the status of Mackovska's loan modification application recklessly and without regard for their truth because they contradicted other information in Bank of America's possession as well as statements the bank previously made to Mackovska. (See *Susilo v. Wells Fargo Bank, N.A.* (C.D. Cal., Nov. 19, 2012, No. CV 11-1814 CAS (PJWx)) 2012 WL 5878201, at p. 5 [applying California law and holding that a bank's statement was made recklessly where the statement contradicted other information in the bank's possession and information the bank had previously provided the plaintiff].) Moreover, Bank of America could reasonably expect Mackovska to rely on the statements by Navarro and his

assistant by providing the documents they requested and waiting for the bank to process her loan modification instead of taking other action to attempt to avoid foreclosure. (See *Gutierrez*, *supra*, 622 F.Supp.2d at p. 958 [a jury could reasonably find fraudulent intent where the bank did not fully disclose its overdraft policies, which induced customers to incur overdraft fees].)

c. *Justifiable reliance*

Bank of America argues the trial court properly granted its motion for summary adjudication on the fraud cause of action because Mackovska did not allege justifiable reliance with sufficient specificity,[7] and, even if she had, Bank of America showed Mackovska could not have reasonably relied on the alleged misrepresentations because Rosa Javier "called, leaving a voice mail message to the effect that the foreclosure sale was going forward." Bank of America's memorandum in support of its motion for summary judgment did not specifically argue Mackovska could not establish the element of justifiable reliance, nor did Bank of America explain how the complaint lacked the necessary specificity. Arguably, Bank of America forfeited this

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[7] We interpret the reference to "reliance and causation of damages" in Bank of America's brief to include justifiable reliance, which "can be thought of as the mechanism of causation in an action for deceit." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1092; see *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 326-327 ["'[a] plaintiff may establish that the defendant's misrepresentation is an "immediate cause" of the plaintiff's conduct by showing that in its absence the plaintiff "in all reasonable probability" would not have engaged in the injury-producing conduct'"].)

argument. (See *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 355.)

Even if not forfeited, the argument lacks merit. The purpose of the particularity requirement in pleading fraud is to give the defendant sufficient notice of the charges and to allow a court to weed out meritless fraud claims. (See *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 838; *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793.) "'"A plaintiff asserting fraud by misrepresentation is obliged to . . .'"establish a complete causal relationship" between the alleged misrepresentations and the harm claimed to have resulted therefrom.'" [Citation.]' [Citation.] This requires a plaintiff to allege specific facts not only showing he or she actually and justifiably relied on the defendant's misrepresentations, but also how the actions he or she took in reliance on the defendant's misrepresentations caused the alleged damages." (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1499; accord, *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1007-1008.)

Mackovska alleged she "actually and reasonably relied on representations made by [Bank of America] and [its] agents and employees," and would not have "maintained [Bank of America] as [her] lender, servicer and trustee . . . and/or would have taken other legal action immediately" had she been aware of the true facts. She also alleged that, even though Bank of America told her on August 12, 2013 "the loan modification was underway," her house was sold at foreclosure that same day. Mackovska alleged that, as a result of Bank of America's misrepresentations, she suffered damages to her "credit standing, costs and loss of [her] property." These allegations gave Bank of America

sufficient notice of the substance of the alleged fraud and satisfied the specificity requirement for the element of justifiable reliance. (See *West*, *supra*, 214 Cal.App.4th at p. 795 [fraud claim pleaded with sufficient particularity where the plaintiff alleged she relied on certain bank representations, suffered enumerated damages, and would have hired an attorney to protect her rights had the bank not concealed the truth from her].)

Moreover, Bank of America's evidence purporting to show Mackovska could not have justifiably relied on the alleged misrepresentations failed to shift the burden to Mackovska. Bank of America argues its evidence showed Mackovska "learn[ed] the true facts on August 9" when Rosa Javier left "a voice mail message to the effect that the foreclosure sale was going forward on August 12, 2013," thus precluding Mackovska from justifiably relying on statements by Navarro or his assistant. But Bank of America did not submit any evidence disputing Navarro or his assistant spoke with Mackovska and told Mackovska what she says they said. Nor did the bank submit evidence showing that Mackovska ever received Javier's message (or that Javier even called Mackovska) or that Javier called Mackovska *after* Mackovska spoke with Navarro or his assistant. Bank of America again merely presented an alternative version of the facts that at best contradicted Mackovska's version and raised a factual issue about the veracity of the information Mackovska received from Navarro and his assistant.[8] Bank of America's evidence did not establish

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[8] Bank of America also contends Rosa Javier (not Navarro) was Mackovska's single point of contact at the bank and thus she could not have relied on anything Navarro or his assistant told her. This argument is belied by Bank of America's conflicting

Mackovska could not prove justifiable reliance. (See *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 [whether a plaintiff's reliance on a misrepresentation is justifiable is generally a question of fact that may be decided as a matter of law only where "'reasonable minds can come to only one conclusion based on the facts'"]; accord, *Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 132.)

d. *Resulting damage*

Bank of America also argues its evidence showed Mackovska's alleged damages were caused, not by her reliance on any of its representations, but by her failure to pay property taxes and make monthly payments on the loan. Bank of America's evidence did establish that Mackovska defaulted on her loan and that Bank of America notified Mackovska shortly after July 17, 2013 the bank would foreclose on August 12, 2013. But it did not preclude Mackovska from proving her cause of action by showing that Bank of America also entered into subsequent discussions with her about modifying her loan and told her the bank would postpone foreclosure while it processed her application.

Nor did Bank of America establish Mackovska did not suffer damages, including the loss of her house, as a result of her reliance on Bank of America's alleged misrepresentations. Mackovska only had to show her reliance on Bank of America's misrepresentations was a substantial factor of the resulting

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contention that a "team" of its representatives constituted Mackovska's single point of contact, along with a variety of employees, including Navarro, who spoke with Mackovska about her loan prior to foreclosure.

damages, not the sole cause. (See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814, fn. 9 ["a misrepresentation may be the basis of fraud if it was a substantial factor in inducing the plaintiff to act and . . . it need not be the sole cause of damage"]; accord, *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 963; see also 5 Witkin, Summary of Cal. Law, *supra*, Torts, § 808, p. 1165 ["the fraud need not be the sole cause; reliance is established where the representation substantially influenced plaintiff's choice, even though other influences operated as well"].) She did.

C. *The Trial Court Properly Granted Summary Adjudication on Mackovska's Negligence Cause of Action, But Mackovska May Be Able To Amend Her Complaint To Add a Negligent Misrepresentation Cause of Action*

1. *Relevant Proceedings*

Mackovska alleged the defendants owed her duties "to maintain proper and accurate loan records" and "to discharge and fulfill the other incidents attendant to the maintenance, accounting and servicing of loan records." She also alleged the defendants breached their duties by "failing to properly and accurately credit payments made by Plaintiff[ ] toward the loan, preparing and filing false documents, and foreclosing on the Subject Property without having the legal authority and/or proper documentation to do so."

The defendants argued they did not owe Mackovska a duty of care because their alleged conduct fell within the scope of

traditional lending activities.[9] Mackovska did not directly respond to this argument. Instead, she argued a bank has a duty to refrain from making material misrepresentations about the status of a loan modification application or a foreclosure sale. In the event the trial court granted the defendants' motion for summary adjudication on her negligence cause of action, she requested leave to amend the complaint to allege a negligent misrepresentation cause of action.

Citing *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, the court agreed with the defendants and ruled that Mackovska alleged a cause of action for negligence "and[,] as a matter of law, a lender does not owe a borrower a duty of care." (See *Conroy v. Wells Fargo Bank, N.A.* (July 28, 2107, C078914) ___ Cal.App.5th ___, ___, 2017 WL 3205559, at p. 9 ["'as a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money'"].) The trial court acknowledged "the general duty to refrain from making misrepresentations, including negligent misrepresentations, regarding the status of a loan modification application," but ruled Mackovska's claim was for negligence, not negligent misrepresentation. The court denied Mackovska's request for leave to amend to add that cause of action, stating: "Plaintiff's request for leave to allege an entirely new cause of action in response to [the motion for summary judgment] and in order to survive judgment is improper. Moreover, such a claim would suffer from the same defects as the fraud claim."

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[9] The defendants also argued and submitted evidence purportedly showing they kept accurate records of Mackovska's loan and had authority to foreclose on it.

Mackovska argues the court erred by granting the defendants' motion on her cause of action for negligence and by denying her leave to amend.

2. *The Trial Court Properly Granted Summary Adjudication on Mackovska's Negligence Cause of Action*

Mackovska cites *Alvarez v. BAC Home Loan Servicing, L.P.* (2014) 228 Cal.App.4th 941 for the proposition that a lender has a duty "to timely and carefully process [loan modification] applications and avoid mishandling them." She argues the defendants breached that duty by failing to comply with certain guidelines issued in connection with the Home Affordable Modification Program (HAMP) Guidelines. (See 12 U.S.C. § 5219a.)

Mackovska, however, did not allege that the defendants breached a duty "to timely and carefully process" her loan modification application or that they violated the HAMP Guidelines, nor did she ask for leave to amend to add any such allegations. Mackovska cannot avoid summary adjudication by raising a new theory of liability on appeal that she never asserted in the trial court. (See *Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1383 ["a plaintiff may not oppose summary judgment with a new unpleaded legal theory"]; *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1186 [plaintiff forfeited a theory of liability under the Labor Code by failing to allege its violation in the complaint or request leave to amend the complaint before the hearing on defendant's motion for summary judgment].)

3. *Mackovska May Be Able To State a Cause of Action for Negligent Misrepresentation*

The trial court concluded Mackovska failed to allege Bank of America had a duty of care, but the court acknowledged the bank had a duty to refrain from making misrepresentations. Because the court had already ruled Mackovska's fraud claim was defective, the court concluded Mackovska could not state a claim for negligent misrepresentation. To the extent Mackovska can state a cause of action for fraud, however, she may also be able to state a cause of action for negligent misrepresentation. (See *Tenet Healthsystem*, *supra*, 245 Cal.App.4th at p. 845 [complaint that states cause of action for fraud "necessarily sufficiently pleads the elements of . . . negligent misrepresentation"].)

Therefore, on remand, the court should allow Mackovska to file a motion for leave to amend pursuant to California Rules of Court, rule 3.1324, to assert a negligent misrepresentation cause of action. Although Mackovska has generally described the nature of her proposed amendment, under rule 3.1324 she must provide a copy of the proposed amendment or amended pleading and identify the proposed changes, and include a separate declaration specifying the effect of the amendment, why the amendment is necessary and proper, when the moving party discovered the facts giving rise to the amendment, and why the moving party did not request the amendment earlier. (See Cal. Rules of Court, rule 3.1324(b).) The court can rule on the propriety of amending the complaint to add a cause of action for negligent misrepresentation after the parties have had an opportunity to present evidence and argument on these requirements.

D. *The Trial Court Properly Granted Summary Adjudication on Mackovska's HBOR Cause of Action*

Mackovska alleged all of the defendants violated HBOR by (1) recording a notice of default without complying with certain requirements of Civil Code sections 2923.5 and 2923.55, (2) "dual tracking" her loan in violation of Civil Code section 2923.6,[10] and (3) failing to provide a single point of contact as required by Civil Code section 2923.7. The trial court granted the defendants' motion for summary adjudication on this cause of action because Civil Code sections 2923.5 and 2923.55 were not in effect when Bank of America recorded the notice of default on Mackovska's loan, Mackovska failed to demonstrate she submitted a "complete" loan application that would trigger HBOR's dual tracking protections, and Mackovska failed to show any damages as a result of Bank of America's failure, if any, to provide a single point of contact.

Mackovska argues the trial court erred because, even if HBOR was not in effect at the time Bank of America recorded the notice of default, the trial court "never analyzed" whether Bank of America complied with the terms of a consent judgment entered in *U.S. v. Bank of America* (D.D.C. 2013) 922 F.Supp.2d 1, which Mackovska contends are substantially similar to the provisions of HBOR. (See Civ. Code, § 2923.4 [stating that nothing in HBOR "obviates or supersedes the obligations of the signatories to the consent judgment" entered in that case].) As the defendants point out, however, Mackovska's allegations never

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10 "Dual track" foreclosures "occur when a servicer continues foreclosure proceedings while reviewing a homeowner's application for a loan modification." (*Lueras*, *supra*, 221 Cal.App.4th at p. 86, fn. 14.)

referred to the consent judgment or asserted a cause of action for violation of its terms,[11] and she did not oppose summary adjudication on this ground. As was the case for her negligence cause of action, Mackovska cannot avoid summary adjudication on her HBOR claims by raising a new theory of liability on appeal without having sought leave to amend her complaint in the trial court. (See *Christina C.*, *supra*, 220 Cal.App.4th at p. 1383; *Aleksick*, *supra*, 205 Cal.App.4th at p. 1186.)

E. *The Trial Court Properly Granted Summary Adjudication on Mackovska's Unfair Competition Cause of Action*

1. *Relevant Proceedings*

Mackovska alleged Bank of America violated the unfair competition law by engaging in fraudulent, unlawful, and unfair practices. She identified four allegedly fraudulent practices "with respect to mortgage loan servicing, assignments of notes and deeds of trust, [and] foreclosure of residential properties and related matters." These were (1) "[i]mproperly characterizing customers' accounts as being in default or delinquent status to

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[11] Even if the complaint had alleged a violation of the consent judgment (also called the National Mortgage Settlement), only state attorneys general have standing to sue banks for noncompliance. (See *Penermon v. Wells Fargo Bank, N.A.* (N.D. Cal. 2014) 47 F.Supp.3d 982, 992, fn. 2.) It was for this very reason that "the California Legislature passed HBOR to give borrowers a private right of action and to apply these requirements to all servicers, not just the five [National Mortgage Settlement] signatories who were already subject to similar standards." (*Ibid.*)

generate unwarranted fees"; (2) "[i]nstituting improper or premature foreclosure proceedings to generate unwarranted fees"; (3) "[f]ailing to provide adequate monthly statement information to customers regarding the status of their accounts, payments owed, and/or basis for fees assessed"; and (4) "[s]eeking to collect, and collecting, various improper fees, costs and charges, that are either not legally due under the mortgage contract or California law, or that are in excess of amounts legally due."

Mackovska arguably alleged an unlawful business practice by accusing Bank of America of "fail[ing] to act in good faith as [it] take[s] fees for services but do[es] not render them competently and in compliance with applicable law." She alleged unfair business practices by accusing Bank of America of "unfair and overly aggressive servicing that result[s] in the assessment of unwarranted and unfair fees against California consumers, and premature default often resulting in unfair and illegal foreclosure proceedings." And Mackovska alleged that, "[a]s a direct and proximate cause" of these practices, she "and California consumers have suffered and will continue to suffer damages in the form of unfair and unwarranted late fees and other improper fees and charges."

In its motion for summary adjudication, Bank of America argued among other things that Mackovska lacked standing to sue under the unfair competition law because "she cannot show that she is entitled to the available remedies under the statute." In particular, Bank of America argued and submitted evidence purportedly showing Mackovska suffered no "injury in fact" because she defaulted on the loan. In opposing the motion, Mackovska presented evidence that Bank of America "engaged in

conduct that would be likely to deceive the public at large" and she cited *Lueras*, *supra*, 221 Cal.App.4th 49 for the proposition that "it is fraudulent or unfair for a lender to proceed with foreclosure after informing a borrower he or she has been approved for a loan modification, or telling the borrower he or she will be contacted about other options and the borrower's home will not be foreclosed on in the meantime."

The trial court granted Bank of America's motion for summary adjudication. The court ruled Bank of America had negated Mackovska's allegations of fraudulent, unlawful, and unfair business practices. In particular, the court found Bank of America had submitted detailed evidence "establishing that [Mackovska] defaulted on her mortgage payments and failed to pay her property taxes," which Mackovska did not dispute. The court also found Mackovska failed to submit evidence establishing the existence of any unfair, illegal, or fraudulent business practices in connection with the foreclosure or her underlying default.

2. *Mackovska Did Not Raise a Triable Issue of Fact on Standing or Causation*

Mackovska argues the trial court should have denied the defendant's motion for summary adjudication on each prong of the unfair competition law. With regard to alleged fraudulent business practices, Mackovska argues she satisfied the requirements of *Lueras*, *supra*, 221 Cal.App.4th 49, to allege both economic injury and causation. The court in *Lueras* held "the allegation that [a borrower's] home was sold at a foreclosure sale is sufficient to satisfy the economic injury prong of the standing requirement of [Business and Professions Code] section 17204."

(*Lueras*, at p. 82.) With regard to causation, *Lueras* requires borrowers seeking redress under the unfair competition law to allege a causal connection between the allegedly unlawful, unfair, or fraudulent conduct and the borrower's economic injury. (*Ibid.*) In that case, the court held the borrower could satisfy this requirement by alleging "Bank of America's misrepresentations caused him to lose his home through foreclosure." (*Id.* at pp. 82-83.)

Mackovska argues she satisfied these requirements because she suffered economic injury when she lost title to her house, and Bank of America caused that injury by "misrepresent[ing] the status of her loan modification application and the postponement of her sale date leading to her inaction." That, however, is not what she alleged. Instead, she alleged she suffered economic injury in the form of "unfair and unwarranted late fees and other improper fees and charges." Mackovska again improperly attempts to expand her pleading by introducing new facts or theories of liability in her opposition to summary adjudication or on appeal without having asked for leave to amend. (See *Laabs*, *supra*, 163 Cal.App.4th at p. 1258; *Oakland Raiders*, *supra*, 131 Cal.App.4th at p. 648.) "'[A] plaintiff wishing "to rely upon unpleaded theories to defeat summary judgment" must move to amend the complaint before the hearing.'" (*Laabs*, at p. 1254; *Oakland Raiders*, at p. 648.) Mackovska did not move or otherwise request leave to amend her unfair competition cause of action.

Mackovska also argues Bank of America's practices were unlawful because they violated the HBOR, the consent judgment in *U.S. v. Bank of America*, *supra*, 992 F.Supp.2d 1, and the HAMP Guidelines, and that Bank of America failed to submit

evidence showing its practices were "fair." The trial court correctly ruled, however, that Bank of America submitted sufficient evidence showing the fees and charges it assessed Mackovska were not unfair or unwarranted, and Mackovska offered no evidence to the contrary. She now argues Bank of America did not submit an expert declaration or deposition concluding that Bank of America's practices were "fair," but Mackovska did not file objections to Bank of America's evidence in the trial court. (See Cal. Rules of Court, rule 3.1354.) Therefore Bank of America shifted the burden to Mackovska to show she suffered injury "in the form of unfair and unwarranted late fees and other improper fees and charges," which she failed to do.[12]

DISPOSITION

The judgment is reversed and remanded with directions for the trial court to vacate its order granting the defendants' motion for summary judgment and to enter a new order denying the motion for summary adjudication on Mackovska's cause of action for fraud and granting the motion for summary adjudication on Mackovska's causes of action for negligence, violations of the HBOR, and violations of the unfair competition law. The trial court is also directed to allow Mackovska to file a motion for leave

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[12] Mackovska purports to appeal from a trial court order sustaining the defendants' demurrer to the original complaint's cause of action for "wrongful foreclosure." There is no indication in the record, however, the trial court ever sustained a demurrer, and neither the original complaint nor the first amended complaint included a cause of action for wrongful foreclosure.

to amend her complaint pursuant to California Rules of Court, rule 3.1324, to add a cause of action for negligent misrepresentation. Each side is to bear its costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.