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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

MICHAEL RAU, Plaintiff and Appellant, v. PNC BANK, Defendant and Respondent.	B278898 (Los Angeles County Super. Ct. No. BC575361)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ernest M. Hiroshige, Judge. Affirmed in part, reversed in part.

David Seal for Plaintiff and Appellant.

Wolfe & Wyman, Stuart B. Wolfe and David M. Chute for Defendant and Respondent.

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A bank denied a homeowner's application to modify the payment schedule for the second loan on his house, finding him financially ineligible on the basis of information supplied in a credit report. The homeowner then presented the bank with documentation to prove that the credit report was wrong. It took the bank another two years to reject the homeowner's request to reconsider its initial denial, and it did so on the ground that the borrower had already received a modification and the bank's policy was only to grant one modification per loan. The homeowner sued, and the trial court sustained a demurrer without leave to amend to the homeowner's claims for negligent processing of his loan modification application, for unfair competition, and for negligent misrepresentation. Accepting the facts in the homeowner's complaint as true (as we must), we conclude that the homeowner has stated a claim for negligence and unfair competition; he has not stated a claim for negligent misrepresentation and may not amend his complaint to allege additional claims. Accordingly, we reverse in part and affirm in part.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In 1995, Michael Rau (plaintiff) bought a home on Brenford Street in Woodland Hills (the property). The purchase was financed in part by a loan for which the lender took out a first deed of trust.

In January 2007, plaintiff borrowed $293,000 from National City Bank, and the loan was secured by a second deed of trust on the property. After plaintiff experienced financial difficulties in the wake of the "Great Recession," National City Bank in July 2009 temporarily modified the loan by (1) cutting

his monthly payments in half (from $901 to $459) for two years, and (2) allowing him to reapply for a modification in June 2011.

In October 2008, defendant PNC Bank (PNC) purchased plaintiff's loan from National City Bank.[1] PNC honored the temporary loan modification granted by National City Bank until it expired in June 2011.

In June 2011, PNC invited plaintiff to reapply for a loan modification and promised to grant one if, among other things, "his income showed he could pay a reasonable payment to avoid foreclosure." In doing its due diligence, PNC obtained a credit report from Experian indicating that plaintiff owed $1,377 per month to pay the mortgage on a rental property in Arizona (the Arizona rental property). On this basis, PNC in September 2011, denied plaintiff's application for a loan modification on the ground that his debt-to-income ratio did not meet the minimum guidelines for a modification.

Plaintiff protested that the Experian report was inaccurate because he had lost the Arizona rental property to foreclosure and no longer paid the $1,377 monthly payment. Plaintiff supplied documentary proof in the form of "public records" to support his claim. Plaintiff pressed PNC to reconsider, even going so far as hiring "a professional third party to assist" him.

In April 2014, PNC sent plaintiff a letter indicating that it would not reconsider its denial of his June 2011 application due to its "one modification per loan" rule.

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1 It is unclear whether this date is correct because plaintiff, as noted above, elsewhere alleges that *National City*—not PNC—temporarily modified his loan in July 2009, nine months after PNC is alleged to have acquired National City. This discrepancy is not material to our analysis of the issues in this appeal.

To this day, PNC has not initiated foreclosure proceedings on the property.

II. Procedural Background

In March 2015, plaintiff sued PNC.[2]

PNC demurred, but plaintiff filed a first amended complaint before the demurrer was heard.

PNC demurred to the first amended complaint, and the trial court sustained the demurrer with leave to amend.

In the operative second amended complaint, plaintiff alleges five claims against PNC: (1) constructive fraud, (2) promissory estoppel, (3) negligence, (4) negligent misrepresentation, and (5) violations of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). Specifically, plaintiff alleges that PNC was negligent because it: (1) "denied" him a loan modification "based upon false data" found in the Experian report and "wrong math" in calculating his debt-to-income ratio using that data; (2) "denied" him a loan modification on the basis of a bogus reason that it would only grant one modification per loan; (3) did not "deny" his modification "in a timely manner" (and instead took more than two years to reject his reconsideration request); (4) did not accurately apprise him of the status of his reconsideration request and instead made inconsistent representations that his loan had been "charged off" (i.e., treated as a loss) and that he would receive a modification;

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2 Plaintiff evidently filed a prior lawsuit against PNC in October 2013. The trial court sustained the first amended complaint in that case with leave to amend. Plaintiff filed a second amended complaint, but voluntarily dismissed it. The pleadings in the other case are not part of the record in this appeal.

and (5) was obligated to grant a modification after entertaining his reconsideration request. Plaintiff's unfair competition law claim rests in part upon PNC's negligence in denying the loan modification. Plaintiff alleges that unnamed PNC employees "assured and promised" him that PNC would review the public records he offered to contradict the Experian report.

PNC demurred to this complaint. As pertinent to this appeal, PNC argued that plaintiff did not state a claim (1) for negligence or under the unfair competition law because PNC owed him no duty, and (2) for negligent misrepresentation because plaintiff did not plead the claim with sufficient particularity.

The trial court sustained the demurrer to all five of plaintiff's claims without leave to amend.

After the trial court entered judgment dismissing plaintiff's lawsuit, plaintiff filed this timely appeal.

DISCUSSION

Plaintiff argues that the trial court erred in sustaining the demurrer without leave to amend as to his claims for negligence, for violations of the unfair competition law, and for negligent misrepresentation; he does not challenge the dismissal of his claims for constructive fraud or promissory estoppel.

In reviewing a trial court's order sustaining a demurrer without leave to amend, we ask (1) whether the demurrer was properly sustained, and (2) whether leave to amend was properly denied. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1335 (*Schep*).) The first question requires us to """"determine whether the complaint states facts sufficient to constitute a cause of action."""" (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010.) In so

doing, we accept as true "all material facts properly pled" in the operative complaint (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152), and independently "'examine the complaint . . . to determine whether it alleges facts sufficient to state a cause of action'" (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230). The second question "'requires us to decide whether '"'there is a reasonable possibility that the defect [in the operative complaint] can be cured by amendment. [Citation.]'"'" (*Schep*, at p. 1335.)

I. Demurrer Properly Sustained?

A. Negligence (and Unfair Competition Law)

To state a claim for negligence, a plaintiff must allege (1) the defendant owes him a duty, (2) the defendant has breached that duty, and (3) the breach caused plaintiff injury. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820-821.) The first duty element is "a question of law to be determined on a case-by-case basis" and looks to "'the specific action[s] the plaintiff claims the [defendant] had a duty to undertake in the particular case.'" (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 62 (*Lueras*).)

"[A]s 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." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) That is because, in that role, "[l]enders and borrowers operate at arm's length." (*Lueras*, *supra*, 221 Cal.App.4th at p. 63.) Thus, lenders have no duty to issue a loan in the first place. Because a loan modification is nothing more than a renegotiation of a loan's terms, lenders also have no "duty of care to offer, consider, or approve a loan

modification, or to explore and offer foreclosure alternatives." (*Lueras*, at p. 67; *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 946 (*Alvarez*).)

However, once a lender agrees to consider a loan modification, the lender "owe[s] . . . a duty to exercise reasonable care in the review of [a borrower's] loan modification application[]." (*Alvarez*, *supra*, 228 Cal.App.4th at p. 944; *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1183 (*Daniels*); *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 904-906; cf. *Lueras*, *supra*, 221 Cal.App.4th at p. 69 [noting possible claim for negligent misrepresentation if lender provides "inaccurate or untimely communication[s] . . . about the status of a loan modification application"].) This duty to exercise reasonable care when reviewing a loan modification application encompasses a duty (1) not to lose documents (*Alvarez*, at p. 951; *Daniels*, at p. 1184); (2) not to mislead the borrower by entertaining a loan modification application while simultaneously pursuing foreclosure proceedings (so-called "dual tracking") (*Alvarez*, at p.951); (3) to process a loan modification application in a timely manner (*ibid.*; *Daniels*, at p. 1184); (4) to "fairly evaluate [a] loan modification application (*Daniels*, at p. 1184); and (5) to properly account for all of the borrower's loan payments (*ibid.*).

Under this precedent, some—but not all—of PNC's alleged conduct breaches in one or more ways the legally cognizable duty of care a lender owes a borrower.

Plaintiff's allegation that PNC relied on "false data" boils down to an assertion that it did not "fairly evaluate" his reconsideration request because it did not exercise due care in weighing the Experian report against the public records plaintiff

provided. When faced with conflicting information, a lender is to "'use good business judgment in reconciling the inconsistency.'" (*Farasat v. Wells Fargo Bank, N.A.* (D.Md. 2012) 913 F.Supp.2d 197, 204, fn. 15; accord, *Kirk Corp. v. First American Title Co.* (1990) 220 Cal.App.3d 785, 807 [escrow company has duty to take "corrective steps" when faced with "conflict[ing]" instructions].) PNC may well have exercised good business judgment in crediting Experian's report over plaintiff's proffered counter-evidence or in concluding that the foreclosure of the Arizona rental made plaintiff an even greater risk, but all we have before us is plaintiff's allegation that PNC disregarded more accurate public records, and we must accept that allegation as true. Plaintiff's allegation that PNC acted unreasonably in taking more than two years to reject his request for reconsideration based on the public records he submitted also states a claim. (See *Alvarez*, *supra*, 228 Cal.App.4th at p. 951; *Daniels*, *supra*, 246 Cal.App.4th at p. 1184.)

Plaintiff's remaining allegations do not state a viable claim for negligence. Plaintiff alleges that PNC acted unreasonably in adopting a "one modification per loan" policy, but a lender has no duty to offer a loan modification at all (*Lueras*, *supra*, 221 Cal.App.4th at p. 67), so adopting a "one and done" policy violates no cognizable duty. Plaintiff makes several allegations that PNC did not accurately apprise him of the status of his reconsideration request—by telling him his loan had been "charged off," telling him he would receive a modification, and ultimately rejecting his request on a newly minted "one modification per loan" policy—but these claims are based on misstatements of PNC employees, and thus sound in negligent misrepresentation, not negligence. (*Lueras*, at pp. 68-69.)

Plaintiff's negligent misrepresentation allegations are defective for the reasons explained below. Moreover, at least one of the representations plaintiff alleges PNC made is inconsistent with plaintiff's allegations elsewhere in his complaint that PNC expressly conditioned its willingness to modify his loan upon plaintiff's financial eligibility, and "inconsistent . . . allegation[s are] properly ignored" (*Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 733). Plaintiff lastly alleges that PNC was obligated to modify his loan because it entertained an application to do so. We are aware of no authority accepting such an absolute, "in for a penny, in for a pound" mandate. What is more, we decline to create one given that it would create a powerful disincentive for lenders to entertain loan modifications in the first place.

PNC raises three objections in response. First, PNC cites *Aspiras v. Wells Fargo Bank, N.A.* (2013) 219 Cal.App.4th 948 for the proposition that lenders owe borrowers no duty of care whatsoever when considering loan modification applications. But *Aspiras* was depublished in 2014. (*Aspiras v. Wells Fargo Bank, N.A.*, review den. and opn. ordered nonpub. Jan. 15, 2014, S214297.) Second, PNC contends that, even if a duty of care exists, *Lueras* sets its outer boundary. But *Lueras* spoke to whether a lender owed a duty to offer, consider, or approve a loan modification in the first place (*Lueras*, *supra*, 221 Cal.App.4th at pp. 63-64, 67), not what duty of care it owes once it voluntarily agrees to entertain one. PNC does not acknowledge (or, for that matter, even cite) *Alvarez*, *Daniels*, and the other cases recognizing a duty of care once a lender entertains a loan modification request, and thus makes no effort to analyze plaintiff's claims under this precedent. Lastly, PNC argues (for

the first time at oral argument) that plaintiff suffered no damage because his loan modification application was denied without any foreclosure, and thus denied without causing him any injury. This argument ignores plaintiff's allegations that he incurred the cost of hiring "a professional third party to assist" him.

We accordingly conclude that plaintiff's operative complaint states a claim for negligence, albeit only on the grounds of (1) PNC's alleged failure to consider and reconcile the conflicting information regarding plaintiff's debt-to-income ratio, and (2) PNC's unexplained and unreasonable delay in rejecting plaintiff's request for reconsideration. For the same reasons, and because a business practice is deemed "unlawful" or "unfair" if, respectively, it is forbidden by common law doctrines such a negligence or involves "unfair" conduct causing more harm than good (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1196; *Prakashpalan v. Engtrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1133-1134), plaintiff's operative complaint also states a claim for violations of the "unlawful" and "unfair" prongs of the unfair competition law.

B. Negligent Misrepresentation

To state a claim for negligent misrepresentation, a plaintiff must allege that (1) the defendant misrepresented a past or existing material fact, (2) the defendant did so without a reasonable ground for believing the fact to be true, (3) the defendant acted with the intent to induce plaintiff's reliance on the misrepresented fact, (4) the plaintiff was ignorant of the truth and justifiably relied on the misrepresentation; and (5) the plaintiff suffered damage as a result. (*Goonewardene v. ADP, LLC* (2017) 5 Cal.App.5th 154, 175, review granted Feb. 15, 2017, S238941.) A claim for negligent misrepresentation must be "pled

with the same specificity required in a[n] . . . action for fraud." (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.) Where, as here, fraud or negligent misrepresentation is alleged against a corporation or other collective entity, the plaintiff is obligated to "allege the names of the persons who made the alleged [misrepresentations], 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.)

Plaintiff's operative complaint does not satisfy this particularly requirement. Plaintiff alleges only that "certain" PNC "employees" made various misrepresentations, but says nothing about their names, whether they had the authority to speak for PNC, or when they made these alleged misrepresentations. This claim was properly dismissed.

II. Leave to Amend Properly Denied?

Plaintiff argues he should be granted further leave to amend and file a third amended complaint. He offers four reasons why there is, in his view, a """"reasonable possibility that the defect[s] [in the operative complaint] can be cured by amendment."""" (*Schep*, *supra*, 12 Cal.App.5th at p. 1335.)

First, plaintiff asserts that he has retained a new attorney who should be given a chance to try his hand at pleading plaintiff's case. We reject this assertion. Not only does the retention of a new attorney say nothing about whether the defects previously identified in the complaint can be cured, but adopting plaintiff's proposed assertion would effectively create a "get out of dismissal free card" whenever a litigant retains new counsel. We decline to forge such an instrument for mischief and abuse.

Second, plaintiff contends that he is entitled to a further chance to amend because the law of foreclosure is "rapidly evolving." We reject this contention as well. Not only is the foreclosure law plaintiff cites a few years old, but the malleability of the law as a *general* matter says nothing about whether the *specific* defects in plaintiff's complaint can be cured.

Third, plaintiff posits that he can cure the defect in his negligent misrepresentation claim by adding more specificity regarding his many conversations with unnamed PNC employees. We disagree. Plaintiff has not cured the lack of specificity in his negligent misrepresentation claim in three iterations of his complaint, even after the deficiency was called to his attention. Because plaintiff offers no more than vague assurances of more specificity in his appellate briefs, we conclude that it is not reasonably possible that giving plaintiff a fourth bite at the apple will cure a defect he has been unwilling or unable to fix three times before.

Lastly, plaintiff argues that he can state a valid claim for wrongful foreclosure. He is wrong. As its name suggests, the tort of wrongful foreclosure is premised on a foreclosure (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408), and PNC has not affected any foreclosure.

DISPOSITION

We affirm the judgment dismissing plaintiff's claims for constructive fraud, promissory estoppel, and negligent misrepresentation. We reverse the judgment dismissing plaintiff's claims for negligence and under the unfair competition law, but only to the extent they rest upon (1) PNC's alleged failure to consider and reconcile the conflicting information regarding plaintiff's debt-to-income ratio, and (2) PNC's

unexplained and unreasonable delay in rejecting plaintiff's request for reconsideration. We affirm the denial of further leave to amend. We remand for further proceedings on the validly stated claims. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.