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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

MARICELA VARGAS, Plaintiff and Appellant, v. OCWEN LOAN SERVICING, LLC, Defendant and Respondent.	B276239 & B283934 (Los Angeles County Super. Ct. No. BC538182)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephanie Bowick, Judge. Affirmed in part, reversed in part with directions.

Golden & Cardona-Loya and Jeremy S. Golden for Plaintiff and Appellant.

Wright Finlay & Zak and Jonathan D. Fink for Defendant and Respondent.

Maricela Vargas appeals from a judgment and a post-judgment order awarding attorney fees following the trial court's order granting a motion for nonsuit filed by Ocwen Loan Servicing, LLC ("Ocwen") on Vargas's claims for violation of Civil Code section 2923.6, subdivision (c)[1] (one of the provisions of the California Homeowner Bill of Rights ("HBOR")), as well as on her claims for fraud, negligent misrepresentation and negligence.

In case number B276239, Vargas contends that she introduced sufficient evidence at trial to withstand a motion for nonsuit as to each cause of action. In case number B283934, Vargas contends the court erroneously granted attorney fees to Ocwen on the theory that her claims arose out of a loan agreement that had an attorney fee provision.

We reverse the trial court's judgment because we conclude the court should not have granted nonsuit as to the HBOR claim. We affirm the trial court's ruling dismissing the claims for fraud, negligent misrepresentation and negligence. Because of our reversal of the judgment on which the attorney fee award is based, we reverse the order granting Ocwen attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Complaint and Pretrial Proceedings*

Vargas filed a complaint against Ocwen on March 4, 2014. The first cause of action alleged Ocwen violated the HBOR by conducting a trustee's sale while a loan modification application was pending (§ 2923.6, subd. (c)), failing to provide Vargas with a written notification that any appeal period pursuant to

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[1] All further references to statutory provisions are to the Civil Code.

subdivision (d) had expired (§ 2923.6, subd. (c)(1)), failing to provide a statutory wait time (§ 2923.6, subds. (d), (e)), and failing to provide written notice (§ 2923.6, subds. (d), (f)).

The second and third causes of action alleged Ocwen committed fraud and negligent misrepresentation by misrepresenting that it was considering Vargas for a loan modification when it did not intend to do so and instead fast-tracking the loan for foreclosure and conducting a trustee's sale. Ocwen's fourth cause of action, for negligence, alleged that Ocwen negligently foreclosed on Vargas's home while her loan modification application was pending.

Ocwen moved for summary judgment or, in the alternative, summary adjudication as to each of Vargas's claims. The trial court denied the motion, finding triable issues remained as to each of the causes of action.

2. *Evidence Adduced in Vargas's Case-in-Chief*

A six-day jury trial commenced on February 23, 2016, with Vargas presenting evidence over three days. Vargas's witnesses consisted of Ocwen senior loan analyst Gina Feezer, Vargas herself, her brother, her mother and the doctor for whom Vargas worked. The following pertinent evidence was introduced through these witnesses' testimony and the exhibits that were admitted.

a. *Loan history*

Vargas's parents purchased a house at 2737 Malabar Street in Los Angeles in 1966 when Vargas was eight years old. Vargas resided there with her parents and her brother until her family was evicted in 2014.

In 2007, Vargas, along with her two parents, obtained a "cash-out refinance" mortgage loan with a balloon note. The family modified that loan for the first time in 2010.

In 2011, Ocwen became the servicer of the loan. As a mortgage loan servicer, Ocwen collected payments and was responsible for customer service. If a loan went into default, Ocwen was responsible for sending out notices to customers. Ocwen also handled loan modifications sought by customers on loans it serviced. Legal action, including foreclosures on loan defaults that were not cured, was handled by outside counsel.

On April 20, 2012, Vargas obtained a loan modification from Ocwen reducing the interest rate on her loan from approximately 7.65 percent to 2 percent. The loan agreement lists Vargas as the borrower, with her parents also signing the agreement because they were listed on the title to the property. Vargas subsequently defaulted on that loan after making three payments, with the last in October 2012.

Vargas applied for another loan modification in February 2013,[2] but it was denied by Ocwen. A foreclosure sale was scheduled for July 26. On July 2, Vargas informed Ocwen she had applied for a state mortgage reinstatement assistance program called "Keep Your Home California." Outside counsel was notified that there was a pending resolution, resulting in the sale being postponed. Vargas's efforts were not successful. She made another request for a loan modification in September, which Ocwen denied.

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[2] Subsequent dates without a year specified refer to events in 2013.

b. *November loan modification request*

At some point, the Vargas family received a notice of a trust deed sale scheduled for December 3. On October 21, Ocwen also mailed Vargas a "foreclosure flyer notice" stating that a foreclosure sale had been scheduled for her home, "but it may not be too late to save it." The notice provided a number for Vargas to call to try to stop the foreclosure. It also listed Geesun Rodrigues, a home retention consultant, as the relationship manager for Vargas.

On November 9, Vargas telephoned Ocwen and told the representative she wanted to apply for a modification. The representative stated Ocwen would only send her an application if her income had changed. On November 12, Vargas spoke with Rodrigues and told him her income had gone up and she wanted to apply for a loan modification. Vargas had begun working more hours at her job beginning in September and was making $300 to $400 more per month. Rodrigues told Vargas he would send her a loan modification packet, and he stated "there will be no foreclosure on December 3rd." Vargas believed him. A further telephonic appointment was scheduled for December 2.

Ocwen faxed and mailed her the loan modification application on November 12. The application's instructions provided that the review process may take up to 30 days from receipt of the completed package, and any legal action on her loan would not be stopped or delayed during that time. The instructions stated that if the application was not complete, it would not be reviewed, and urged the applicant to return the completed package as quickly as possible. The application included a checklist of requested documentation.

Vargas faxed the loan modification application and attachments to Ocwen on Thursday, November 21, and her application was marked as received in Ocwen's system on Monday, November 25. The fax cover page indicated, "Here are the forms requested for the modification, including letter from my boss of increased working hours." The cover page further stated, "I will fax you the pay stub for 11-22-13 on Saturday, 11-23-13." Her 60-page submission included a November 19 letter from Vargas's employer stating she was currently scheduled to work 72-80 hours every two weeks "dependent on workload." Vargas also included a pay stub, a W-2 from her place of employment, her 2012 income tax returns, her bank account statements and a monthly rental agreement for the rental unit on her property. On November 23, she faxed to Ocwen the November 22 pay stub she had promised.

Feezer testified that Vargas's loan application was received by the underwriting department ("underwriting") on November 25. However, underwriting never reviewed the submission to determine if it was complete or merited a modification. Rather, on November 26, underwriting denied the application on the basis that Ocwen received it within seven business days of the foreclosure sale scheduled for December 3. On November 27, Ocwen sent a letter to Vargas stating, "We have carefully reviewed your request, and assessed your eligibility for modification. However, the results prevent us from being able to offer a loan modification . . . . [¶] As of the date of this letter your loan has a confirmed sale date within 7 Business days." The denial letter did not advise Vargas of any right to appeal. Ocwen sent an identical letter to Vargas on December 3. Ocwen had

never informed Vargas her package needed to be received more than seven business days before the scheduled sale date.

On December 1, Vargas telephoned Ocwen to reschedule her telephonic appointment with Rodrigues that had been set for December 2, because Vargas was visiting family in Tijuana. Vargas rescheduled the call for December 5. At this point, Vargas believed Ocwen had all the documents it had requested, and she believed her loan was under review for modification.

On December 3, the foreclosure sale took place. Mid-Cal Realty Services, Inc., a third party, purchased the home at the public auction and then sold the property to West Ridge Rentals, LLC, with a grant deed recorded on December 13.

c. *Postforeclosure events*

On December 5, Vargas spoke with Rodrigues for their scheduled teleconference, and he told her about the denial of the loan modification request. However, apparently neither Vargas nor Rodrigues was aware that the property had been sold to a third party two days earlier. According to Feezer, the foreclosure department had not yet updated Ocwen's system with that information. The log notes Rodrigues added to the system on December 5 state that he informed Vargas that "as there is no sale date on the account," he would reevaluate the merits of Vargas's loan modification package, even though it had been denied due to a pending foreclosure sale.

At no point did Rodrigues or anyone from Ocwen inform Vargas that her application was filled out incorrectly or that any documentation was missing. Instead, in that December 5 call, Rodrigues told Vargas it looked like Ocwen had all the papers it needed for the modification. However, he requested two additional letters signed by both Vargas and the tenant of the

second unit on the property. The first letter was to provide information about the rental amount and the identity of the renter, and the second was to demonstrate the rental situation was ongoing. Vargas and Rodrigues scheduled another appointment for December 22.

On December 7, Vargas faxed to Ocwen the requested letters signed by her and her tenant. That same day, while Vargas was at work, her mother called to tell her a man had come to their house and told Vargas's mother their property had been sold. Vargas was incredulous, given that she was actively working with Owen on the loan modification request.

On December 18, Vargas called Ocwen to find out the status of her modification, and was informed by the customer service agent that her property had been sold to a third party. Vargas was surprised because she believed her loan modification request was still being reviewed. On December 19, Ocwen sent Vargas a letter stating it was unable to offer her a loan modification because "your loan has undergone foreclosure and the property is currently being marketed for sale." On December 20, the identical letter was mailed to Vargas again.

Despite these denial letters (and despite the fact that the property had already been sold to a third party), as of December 21, Vargas's loan modification application had gone to the underwriting department and was undergoing review. On December 23, Ocwen mailed Vargas a letter in response to the documents she had submitted on December 7. The letter indicated the application would be reviewed for completeness and stated that "[i]f we require further documentation, we will notify you through a letter indicating what documents are missing or incorrect." The letter further stated, "In certain circumstances,

you may have already received an approval or denial letter. If so, please disregard this letter. The terms of your approval or denial letter serve as the final determination of your modification application."

The Vargas family was evicted from the home in 2014.

3. *Ocwen's Motion for Nonsuit*

At the conclusion of Vargas's case, on the fifth day of trial, Ocwen moved for a nonsuit. With respect to the HBOR claims, Ocwen argued that (1) Vargas failed to demonstrate that "she submitted the completed modification within [a] reasonable time as specified by [Ocwen]"; (2) she failed to proffer evidence that her modification application was "pending" at the time the foreclosure sale occurred; (3) she failed to proffer evidence that her application showed a material change in her financial situation since her previous application of September 2013; and (4) she did not establish she had any right to appeal Ocwen's decision.

As to the fraud claim, Ocwen argued Vargas failed to establish any intentional misrepresentation, knowledge of falsity or scienter by Ocwen, or any intent to defraud. Ocwen also contended that Vargas failed to show justifiable reliance resulting in damages and did not show Ocwen failed to disclosed facts reasonably accessible only to Ocwen. As to the negligent misrepresentation claim, Ocwen argued Vargas failed to proffer evidence that Ocwen misrepresented any material fact without a reasonable ground for believing it to be true or intended to induce reliance. Ocwen further asserted she failed to establish justifiable reliance and resulting damages. Finally, as to the negligence claim, Ocwen argued that Vargas failed to establish "duty, breach, causation and resulting damages."

4. *The Court's Ruling Granting Motion for Nonsuit*

The court granted the motion for nonsuit as to each cause of action and issued an oral ruling that it reduced to a written ruling.

With respect to the HBOR claims, the court found that before the foreclosure sale took place, Ocwen properly denied Vargas's loan application as untimely because it was not submitted at least seven business days before the foreclosure sale. Because her application was untimely, Vargas was not entitled to appeal the denial, and Ocwen was not required to wait to conduct a trustee's sale until at least 31 days after notifying Vargas of the denial. The court also found Vargas did not show she had submitted documentation of a "material change" in her financial circumstances since the date of her previous modification application in September 2013, and thus failed to demonstrate that Ocwen was obligated to evaluate her application. Additionally, the court found that Vargas failed to establish that Ocwen had deemed her application "complete."

The court also granted the motion for nonsuit as to the three tort causes of action. As to the fraud claim, the court found that Vargas failed to provide any evidence showing an intent to defraud or a knowing misrepresentation by Ocwen. The court found insufficient evidence was provided as to the negligent misrepresentation claim as well because Vargas failed to show Rodrigues lacked reasonable grounds to believe his assertions were true, and Vargas had not submitted sufficient evidence showing she justifiably relied on any misrepresentation by Rodrigues. As to the negligence claim, the court found Vargas had not submitted any evidence to show that Ocwen owed Vargas any duties beyond those set forth in the loan agreement, or to

show there had been a mishandling of documents that deprived Vargas of the possibility of getting a modification.

5. *The Trial Court's Award of Attorney Fees to Ocwen*

The court concluded that Ocwen was the prevailing party because all of Vargas's claims were dismissed at trial. The court concluded that Vargas's claims arose under the promissory note and deed of trust for the property and, as such, attorney fees should be awarded under section 1717 and pursuant to the attorney fees provision in the note and/or deed of trust. (*Id.*) The court thus granted Ocwen's request for attorney fees in the amount of $103,607.90.

Vargas timely appeals from the judgment entered in Ocwen's favor and separately from the order granting Ocwen's motion for attorney fees.

DISCUSSION

1. *Standards of Review*

"A nonsuit may be granted after the plaintiff's presentation of evidence only when no evidence of sufficient substantiality exists to support a verdict for the plaintiff." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 378 (*Consolidated World Investments*); see *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838-839.) "'"[C]ourts traditionally have taken a very restrictive view of the circumstances under which nonsuit is proper. . . . [¶] In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give 'to the plaintiff['s] evidence all the value to

which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor. . . ."'" (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 347; see *Carson*, at p. 839 ["'[t]he judgment of the trial court cannot be sustained unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law'"].)

"We review rulings on motions for nonsuit de novo, applying the same standard that governs the trial court." (*Hernandezcueva v. E.F. Brady Co., Inc.* (2016) 243 Cal.App.4th 249, 257.) "[D]efects not specifically pointed out by the moving party cannot be considered by the trial court, or by us, in determining the merits of the motion." (*Consolidated World Investments*, *supra*, 9 Cal.App.4th at p. 378.)

"[I]n reviewing a trial court's interpretation of a statute, we apply a de novo, or independent, standard of review. [Citation.] In independently interpreting a statute, our task is to ascertain and effectuate the law's intended purpose. [Citation.] In interpreting a statute, we look first to the statute's words. [Citation.] The statutory language is generally the most reliable indicator of legislative intent. [Citations.] If the statutory language is unambiguous, we will presume the Legislature meant what it said and the plain meaning of the statute will prevail unless its literal meaning would result in absurd consequences that the Legislature did not intend. [Citations.] [¶] However, if the statutory language is ambiguous and is reasonably susceptible to more than one meaning, we look to a variety of extrinsic aids, including the ostensible objects to be

achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. (Citation.) Our ultimate objective in interpreting a statute is to construe the statute in a way that most closely comports with the apparent intent of the Legislature." (*People v. LaDuke* (2018) 30 Cal.App.5th 95, 100.) """We consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose."""" (*Hassell v. Bird* (2018) 5 Cal.5th 522, 540.)

2. *HBOR Claim*

a. *Statutory framework*

The HBOR was signed into law in 2012 to address the foreclosure crisis in California through "encouragement to lenders and loan servicers to engage in good faith loan modification efforts." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 904.) "One of the targets of the legislation is a practice that has come to be known as 'dual tracking.' 'Dual tracking refers to a common bank tactic. When a borrower in default seeks a loan modification, the institution often continues to pursue foreclosure at the same time.' [Citations.] The result is that the borrower does not know where he or she stands, and by the time foreclosure becomes the lender's clear choice, it is too late for the borrower to find options to avoid it. 'Mortgage lenders call it "dual tracking," but for homeowners struggling to avoid foreclosure, it might go by another name: the double-cross.'" (*Ibid.*; see *Monterossa v. Superior Court* (2015) 237 Cal.App.4th 747, 752.) Among other provisions, the HBOR thus included a prohibition against "dual tracking" and expanded

the notice requirements before any foreclosure takes place. (*Hardie v. Nationstar Mortg. LLC* (2019) 32 Cal.App.5th 714; *Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272 (*Valbuena*).)

At the time Ocwen addressed Vargas's final loan modification request and then foreclosed on Vargas's home, the prohibition against dual tracking was found in former section 2923.6,[3] which, at subdivision (c), provided that "[i]f a borrower

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[3] References in our opinion to former section 2923.6 are to the text of that statute as amended effective January 1, 2013. (Stats. 2012, ch. 86, § 7.) The dual-tracking prohibitions in former section 2923.6 expired pursuant to their sunset provision on January 1, 2018. (See former § 2923.6, subd. (k).) Effective January 1, 2018, most but not all of its provisions were reenacted or replaced with similar provisions when the Legislature enacted section 2924.11. (See Stats. 2012, ch. 87, § 15; *Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1117.) Because there was no express savings clause in the legislation that took effect on January 1, 2018, during the time period from January 1 to December 31, 2018, courts questioned whether the protections available under the pre-2018 statute but not reenacted in section 2924.11 were still in effect. (See, e.g., *Schmidt v. Citibank, N.A.*, *supra*, 28 Cal.App.5th at pp. 1116-1117; *Haynish v. Bank of America, N.A.* (N.D.Cal., May 31, 2018, No. 17-cv-01011-HRL) 2018 WL 2445516 at pp. *4-*6 [dismissing dual-tracking claims after finding repeal of the prior HBOR statute terminated all pending claims based on that statute].)

However, effective January 1, 2019, section 2924.11 was repealed, and the Legislature reenacted the provisions of former section 2923.6, with some amendments. (Stats. 2018, ch. 404, §§ 7, 14-15, eff. Jan. 1, 2019.) Moreover, the Legislature specifically expressed its intent via a savings clause that claims

submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer before a scheduled foreclosure sale, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending." Pursuant to former section 2923.6, subdivision (h), "an application shall be deemed 'complete' when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer."

Once a complete application had been submitted, former section 2923.6, subdivision (c), further provided in pertinent part that the mortgage servicer "shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs: [¶] (1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired. [¶] (2) The borrower does not accept an offered first lien loan modification within 14 days of the offer. [¶] (3) The

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brought under the original pre-2018 HBOR statute be permitted to proceed. (Stats. 2018, ch. 404, § 26 ["[t]he section [of the HBOR], or part of a section, that was amended, added, or repealed [effective as of January 1, 2018] shall be treated as still remaining in force for the purpose of sustaining any proper action, suit, or proceeding for the enforcement of such a liability, as well as for the purpose of sustaining any judgment, decree, or order"].) Therefore, we apply the HBOR provisions in force as of the time of Ocwen's consideration of Vargas's loan modification request and ultimate foreclosure in late 2013.

borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification." (Former § 2923.6, subd. (c).)

In the event the mortgage servicer denied a loan modification application, it was required to send a written notice to the borrower identifying the reasons for denial, including "[t]he amount of time from the date of the denial letter in which the borrower may request an appeal of the denial of the first lien loan modification and instructions regarding how to appeal the denial." (Former § 2923.6, subd. (f).) Further, the borrower had "at least 30 days from the date of the written denial to appeal the denial and to provide evidence that the mortgage servicer's determination was in error." (*Id.*, subd. (d).) The servicer was prohibited from recording a notice of default or a notice of sale or conducting a trustee's sale until 31 days after the borrower was notified in writing of the denial. (*Id.*, subd. (e)(1).)

Former section 2923.6, subdivision (g), specifically applied to borrowers who had previously applied for a loan modification. It provided that "the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated . . . prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer." (Former § 2923.6, subd. (g).) This provision sought to "minimize the risk of borrowers submitting multiple

applications for first lien loan modifications for the purpose of delay." (*Ibid.*)

A companion HBOR provision, section 2923.7, provides that mortgage servicers are required to promptly establish a single point of contact for a borrower requesting a foreclosure prevention alternative. "The single point of contact provision, like the dual-tracking provision, is intended to prevent borrowers from being given the runaround, being told one thing by one bank employee while something entirely different is being pursued by another." (*Jolley v. Chase Home Finance, LLC, supra*, 213 Cal.App.4th at pp. 904-905.) This single point of contact is responsible for "[c]ommunicating . . . the deadline for any required submissions to be considered" for the available foreclosure prevention options, and for "notifying the borrower of any missing documents necessary to complete the application." (§ 2923.7, subds. (b)(1), (2).) Further, this contact is responsible for "[h]aving access to current information and personnel sufficient to timely, accurately, and adequately inform the borrower of the current status of the foreclosure prevention alternative." (*Id.*, subd. (b)(3).)

Former section 2924.10 (which the Legislature has made clear applies to Vargas's claims) provided in relevant part that when a borrower submits a complete modification application or submits any document in connection with such an application, the mortgage servicer must provide written acknowledgment of the receipt of the documentation within five business days of receipt. In its initial acknowledgment of receipt of the loan modification application, the mortgage servicer is required to give the borrower an estimate of when a decision on the loan modification will be made after a complete application has been

submitted, and also to notify the borrower of any deadlines (including deadlines to submit missing documentation) or any deficiencies in the borrower's loan modification application. (Former § 2924.10, subd. (a), added by Stats. 2012, ch. 86, § 13, repealed by sunset provisions of same.)

For material violations of section 2923.6, a borrower may sue for "actual economic damages" after a trustee's deed upon sale has been recorded. (§ 2924.12, subd. (b); *Valbuena, supra*, 237 Cal.App.4th at p. 1273.) "A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to this section." (§ 2924.12, subd. (h), formerly subdivision (i).)

b. *Timeliness of loan modification application*

Ocwen's stated reason for the denial of Vargas's November 2013 loan modification request was that "[a]s of the date of this letter [November 27] your loan has a confirmed sale date within 7 Business days." The trial court agreed that Vargas "submitted the application only seven business days before the scheduled sale date on December 3," and thus "her application submission was not within a reasonable time frame as determined by [Ocwen] under [section 2923.6, subd. (h)]." The trial court concluded that Ocwen was entitled to refuse to consider Vargas's application for this reason, concluding that Vargas's application was "untimely, properly denied, [and] not considered on the merits" and accordingly, Vargas was not entitled to an appeal of the denial. However, at the time of the events in question, the HBOR did not permit Ocwen to reject Vargas's application as untimely due to the proximity of the scheduled foreclosure, and therefore Ocwen was obligated to

review the application and afford Vargas any applicable protections under the HBOR.

The evidence at trial demonstrated that Ocwen faxed and mailed the application to Vargas on November 12. After filling out the application, Vargas faxed it to Ocwen along with the requested supporting documentation on Thursday, November 21. On Saturday, November 23 she faxed to Ocwen an additional pay stub dated November 22. The scheduled foreclosure date was Tuesday, December 3. The evidence at trial demonstrated that Ocwen counted the foreclosure date as being six business days from the date of submission of Vargas's application.[4]

Vargas presented evidence that she was never informed of Ocwen's requirement that the completed loan modification package be provided at least seven business days before the scheduled foreclosure date.[5] She also testified that when she

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[4] We take judicial notice of the fact that in 2013 the Thanksgiving holiday was Thursday, November 28. Thus, assuming that Vargas "submitted" her loan package on Monday, November 25 (since November 23 was a Saturday), and counting the Friday after Thanksgiving as a business day as Ocwen appears to have done, she submitted it six business days before the scheduled foreclosure sale.

[5] Ocwen points to evidence submitted in connection with its motion for summary judgment to argue that in January 2013 Vargas in fact received correspondence from Ocwen stating that a completed loan application must be delivered to Ocwen no later than seven business days prior to the scheduled foreclosure date. However, this evidence was not introduced at trial, and thus we may not consider it in assessing whether a nonsuit was properly granted. (*OCM Principal Opportunities Fund, L.P. v. CIBC*

spoke on November 12 with Rodrigues, her single point of contact, he not only did not inform her of Ocwen's deadline for submitting an application, but also told her that the scheduled foreclosure sale would not go forward.

Ocwen's internal seven business day deadline has been at issue in several reported decisions in state and federal court. In *Valbuena,* our colleagues reversed the trial court's ruling granting Ocwen's demurrer on another complaint alleging violations of the HBOR. (*Valbuena*, *supra*, 237 Cal.App.4th at p. 1275.) In that case, as here, Ocwen had denied the borrowers' request for a loan modification because the borrowers submitted the application within seven business days of a confirmed foreclosure date. (*Id.* at p. 1270.) The borrowers in *Valbuena* alleged that Ocwen sent its letter inviting them to apply for a modification on March 13 and the borrowers received it on March 18. Unlike in Vargas's case, in which Vargas presented evidence that Ocwen never notified her in advance of the seven business day restriction, Ocwen's letter to the *Valbuena* borrowers advised them that the foreclosure sale would not be stopped unless a complete application was delivered to Ocwen "'no later than 7 business days prior to the scheduled foreclosure sale date.'" (*Ibid.*) On March 21, three days after the borrowers received Ocwen's invitation, they sent Ocwen documentation in support of their loan modification request and, upon Ocwen's request, sent additional documents on March 23. The foreclosure

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World Markets Corp. (2007) 157 Cal.App.4th 835, 845 ["the body of evidence pertinent to nonsuit is that identified in the plaintiff's opening statement or case-in-chief"].)

sale took place two days later, on March 25, and on that day Ocwen sent the borrowers the denial letter. (*Id.* at pp. 1270, 1274-1275.)

In *Valbuena*, Ocwen argued that the borrowers' loan modification application was not timely or complete because the borrowers were still submitting additional documents two days before the scheduled foreclosure date. (*Valbuena, supra,* 237 Cal.App.4th at p. 1274.) "Ocwen relie[d] on the statute's definition of a 'complete' submission—that is, all documents required by the mortgage servicer within the reasonable timeframe specified by the mortgage servicer—(see Civ. Code, § 2923.6[, subd. (h)])—to argue that the modification application was not complete because it was not received seven or more days before the scheduled foreclosure sale." (*Valbuena,* at pp. 1274-1275.) The borrowers countered that since they did not receive the letter inviting them to apply for a modification until March 18, it would have been impossible to submit a completed application more than seven business days before the scheduled foreclosure on March 25. (*Ibid.*) The appellate court found that a triable issue of fact existed as to whether Ocwen had provided the borrowers with a reasonable timeframe for submission of their application. (*Id.* at p. 1275.)

In *Cornejo v. Ocwen Loan Servicing, LLC* (E.D.Cal., Aug. 16, 2016, No. 1:15-cv-000993-JLT) 2016 WL 4382569 (*Cornejo*), the federal district court denied Ocwen's motion for summary adjudication on the plaintiff borrowers' claim under former section 2923.6. Their claim was based on Ocwen's rejection of their loan modification request on the ground that it was submitted fewer than seven days before the foreclosure date. (*Cornejo*, at pp. *11-*14.) The court noted that under former

section 2923.6, subdivision (h), a loan servicer may set a "reasonable timeframe" for documents to be received for the application to be "deemed 'complete.'" However, the court found a fact issue remained as to whether Ocwen's seven business day timeframe was "reasonable." (*Id.*, at p. *12.) Although the application form informed the borrowers of Ocwen's deadline, Ocwen had not identified a logical basis for imposing a seven day requirement. (*Id.* at pp. *11-*12.) While Ocwen had "'testified that its advisement . . . that an application must be submitted at least seven days prior to a foreclosure sale is to protect Ocwen in judicial foreclosure cases or bankruptcy cases because of the potential need for a court order to postpone an active foreclosure sale,'" those concerns were not implicated in a nonjudicial foreclosure. (*Ibid.*) The court found, "Without Ocwen offering reasons for the imposed deadline, the Court is unable to determine the reasonableness of the timeline, particularly where—as Defendants acknowledge—the Homeowner Bill of Rights indicates servicers need only five business days to evaluate a loan modification application, acknowledge its receipt, and inform applicants if the application is deficient or complete. See Cal. Civ. Code § 2924.10." (*Cornejo*, at p. *13; see also *Bingham v. Ocwen Loan Servicing, LLC* (N.D.Cal., Apr. 16, 2014, No. 13-CV-04040-LHK), 2014 WL 1494005 at p. *5 [where Ocwen denied loan modification application submitted five business days before a scheduled foreclosure sale because the sale date was within seven days, court denied Ocwen's motion to dismiss plaintiff's section 2923.6 claim and rejected Ocwen's contention that it did not "offer" loan modifications less than seven days before a foreclosure sale].)

We conclude that the trial court here erred in finding Vargas's loan modification application was not timely submitted. Former section 2923.6, subdivision (c), provided that no trustee's sale could take place while a complete loan modification application was pending. (Former § 2923.6, subd. (c).) Neither that provision itself, nor any other provision in the HBOR, contained a caveat that an application for a loan modification must be submitted at least seven business days prior to a scheduled foreclosure sale. At the time of this foreclosure, no HBOR provision set forth any deadline at all. While section 2923.7 makes the individual borrower's single point of contact responsible for "communicating . . . the deadline for any required submissions to be considered" for a foreclosure prevention option (§ 2923.7, subd. (b)(1)), no provision gave loan servicers discretion to set their own deadlines for submissions of loan modification applications when a foreclosure sale is pending.

In the *Valbuena* and *Cornejo* decisions, the courts entertained Ocwen's argument that subdivision (h) of former section 2923.6 permitted servicers to set a "reasonable" deadline before a foreclosure sale for the submission of applications. But former subdivision (h) merely provided that "an application shall be deemed 'complete' when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer." (Former § 2923.6, subd. (h).) Although former subdivision (h) gave mortgage servicers discretion to set a reasonable timeframe for receiving all documents such that an application could be deemed "complete," we do not interpret it to bestow on servicers the discretion to deem an application

untimely because it is submitted seven business days or less from a scheduled foreclosure.

Notably, the *current* version of section 2923.6, subdivision (c), effective since January 1, 2019, includes a deadline for submitting a loan modification application when a foreclosure is scheduled. In that newly amended provision, the Legislature inserted a clause stating that borrowers must submit their complete applications "at least five business days before a scheduled foreclosure sale" in order to receive the protections of the HBOR, including stopping a pending foreclosure sale. (§ 2923.6, subd. (c).) The Legislature's amendments to section 2923.6 support the interpretation that the statute did not previously provide a deadline or give loan servicers the right to set a seven business day deadline. (See *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 492 ["[a]lthough an expression of legislative intent in a later enactment is not binding upon a court in its construction of an earlier enacted statute, it is a factor that may be considered"].) While adding this express deadline to subdivision (c), the Legislature left untouched subdivision (h) and its reference to the mortgage servicer's "reasonable timeframes." It would be inconsistent with the current subdivision (c) to interpret subdivision (h) as authorizing mortgage services to require submissions seven business days before a foreclosure sale. In turn, this supports our reading that former subdivision (h) never provided such authority to servicers like Ocwen.

Our interpretation is borne out by the pertinent legislative history for the current version of section 2923.6. That legislative history reflects that the Legislature amended the bill to add the five business day deadline as a result of negotiations "with the

Bankers to remove opposition to the bill" by adding a deadline that did not exist in the statutes that sunset as of January 1, 2018. (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 818 (2018-2019 Reg. Sess.) as amended June 21, 2018, p. 8.) The Assembly Committee report states as follows: "**Recent amendments remove all opposition to the bill.** When this bill passed out of the Senate, it had opposition from a number of trade and business associations, including . . . the California Mortgage Bankers Association . . . . Amendments agreed to in the Assembly Banking Committee were sufficient to remove all registered opposition to the bill . . . . In removing their opposition, these associations write: [¶] While the reinstated provisions of the HBOR were purposefully intended to sunset and while we remain concerned about the measure's impact on access to credit in the current mortgage marketplace, we are pleased to remove our Opposition to the measure based on amendments that the author has agreed to accept. These amendments are described immediately below: [¶] . . . "Establish that no application will be deemed complete if all documents required by the mortgage servicer are not received more than five business days before any scheduled foreclosure sale. [¶] [This amendment] represent[s] *changes to HBOR law that were not part of the law that sunset on January 1, 2018*." (*Id.* at pp. 7-8 (emphasis added).)

Former section 2923.6 did not permit mortgage lenders and servicers to impose their own deadlines for receipt of complete loan modifications applications when a foreclosure sale was pending. Therefore, the trial court erred in concluding that Ocwen properly denied Vargas's application as untimely.

c. *Completeness of application*

In addition to concluding Vargas's application was untimely, the trial court also determined that Vargas's evidence did not show she submitted a complete loan modification application, and therefore the HBOR protections under former section 2923.6 were not triggered. Under former section 2923.6, subdivision (h), "an application shall be deemed 'complete' when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer." (Former § 2023.6, subd. (h).) However, Ocwen never reached a determination prior to the foreclosure as to whether Vargas's application was complete. Indeed, Feezer testified that on November 26, Ocwen decided to deny the application as untimely before reviewing it to determine if it was complete.

In *Dias v. JP Morgan Chase, N.A.* (N.D.Cal., Mar. 19, 2015, No. 5:13-CV-05327-EJD) 2015 WL 1263558, the court rejected the defendant loan servicer's interpretation "that Section 2923.6 does not apply if, in hindsight, Defendants consider a claimant's application to be incomplete." (*Dias*, at p. *5.) In that case, the borrowers alleged they submitted their application in early June, but the mortgage servicer, Chase, recorded a notice of trustee sale on June 6. The court found that "[t]here is no indication that Plaintiffs' application was incomplete on June 6. Allowing Chase to declare three months after recording a Notice of Trustee Sale that a loan modification is incomplete would permit any mortgage servicer to circumvent the protections afforded by the statute. Mortgage servicers cannot manipulate the statute to immunize themselves from liability by recording a notice of trustee sale and then stating that the loan modification

application was incomplete. To find otherwise would undermine the purpose and spirit of the HBOR." (*Ibid.*) Rather, the court held, "Completeness of a loan modification application should be considered at the time the notice of trustee sale is recorded." (*Ibid.*)

In *Mace v. Ocwen Loan Servicing, LLC* (N.D.Cal. 2017) 252 F.Supp.3d 941, the court took a similar view when interpreting subdivision (h) of former section 2923.6: "The statute defines completeness by when the borrower has supplied the required documents to the mortgage servicer, not when the mortgage servicer completes its review and acknowledges that no further documents are required. The statutory language does not permit a mortgage servicer to create a moving target so borrowers have no way of knowing whether a loan modification application is complete until the mortgage servicer tells them so. Far less does it permit a mortgage servicer to delay its determination of completeness and conduct foreclosure proceedings while the application awaits review. Rather, the clear implication of section 2923.6(h) is that a mortgage servicer must tell the borrowers in advance what documents are required and specify 'reasonable timeframes' for the submission of those documents. [Citation.] If the 'borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer,' then the application is complete." (*Mace*, at pp. 946-947; see also *Cornejo, supra*, 2016 WL 4382569 at p. *14 ["[d]efendants fail to identify any authority to support their assertion that misrepresentations that were not considered by Ocwen when evaluating Plaintiffs' application now mandate a determination that the application was incomplete].)

We agree that the question whether Vargas's application was complete should be measured as of the date of the December 3 foreclosure. Vargas proffered evidence that as of the date of the foreclosure, she believed Ocwen had all the documents it had requested up until that time, and she believed her loan was under review for modification. She had completed each section of the application and submitted all the documents listed on the application checklist, including her pay stubs, W-2, most recent tax returns, bank account statements, and the rental agreement for her rental unit. In addition, she submitted a letter from her employer demonstrating her work hours.

Under former section 2924.10, subdivision (a)(4), Ocwen had five business days from receipt of the application to notify Vargas in writing of any deficiencies with respect to her application. The evidence that Vargas introduced at trial suggested Ocwen did not communicate to Vargas that her application was not complete. Further, under former section 2923.7, subdivision (b)(2), Vargas's designated representative Rodrigues was required to notify her if any documents were missing. (Stats. 2018, ch. 404, § 9, eff. Jan. 1, 2019.) Feezer testified the fact that Rodrigues requested additional letters on December 5 regarding Vargas's rental unit necessarily demonstrated that Vargas had not yet submitted a "completed package." However, Vargas testified that although Rodrigues asked for two additional letters documenting the rental income, he told her that it "looks like we got all the papers we need for the modification." The trial court was required to accept Vargas's testimony as true and disregard the conflicting evidence in deciding whether to grant the motion for nonsuit. Crediting the testimony from Vargas and viewing the facts in the light most

favorable to her, we conclude that the trial court erred in determining Vargas's evidence was not sufficient for a jury to conclude that her application was "complete."[6] (See *Sung Kyu Kang v. Wells Fargo Bank, N.A.* (S.D.Cal., Mar. 22, 2018, No. 18cv332-MMA) 2018 WL 1427081 at p. *4 ["if the 'borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer,' then the application is complete, even where the mortgage servicer later requested additional documents"].)

d. *Material financial change since previous application*

The trial court concluded that Vargas had failed to meet her additional burden to show that, since her prior application for a loan modification in September, she had experienced "a material change in [her] financial circumstances" and that she had "documented" that change and submitted it to Ocwen, such that Ocwen was obligated to evaluate her November 2013 application. (Former § 2923.6, subd. (g).) We conclude that these issues also should have been determined by the jury after it heard Ocwen's evidence.

Vargas informed Rodrigues on November 12 that her income had gone up since her last application because she was

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[6] We reject Ocwen's argument on appeal that Vargas's loan modification application was incomplete because it was missing signatures from Vargas's parents. This argument was not made before the trial court, and, in any event, Ocwen makes no showing that their signatures were necessary. As the evidence at trial demonstrated, Vargas was the sole borrower under the previous loan modification agreement.

getting more hours at work, and he agreed to send her a loan application.[7] When she returned the application, she submitted a November 19 letter from her employer stating that she was currently scheduled to work 72-80 hours every two weeks. She also included her current pay stubs. However, she did not attach her pay stubs covering the period at the time she had previously applied for a modification in September. Nor did she attach any other documentation specifically showing that her income had increased since the denial of her September request.
Ocwen argues the trial court correctly determined it was therefore impossible to compare her income at that time with her income as of November to determine if it had materially changed.

However, Ocwen did not reject Vargas's application for failing to demonstrate changed circumstances, but rather did so on the basis that it was untimely. (See *Agraan v. Select Portfolio Servicing, Inc.* (E.D.Cal., Dec. 21, 2017, No. 2:17-cv-02163-KJM-CKD) 2017 WL 6558130 at p. *4 [in rejecting servicer's defense that it was not obligated to consider loan modification application under § 2923.6, subd. (g), court relied in part on fact that servicer's denial letter "makes no mention" of determination that the borrowers did not demonstrate a material financial change].) To permit an after-the-fact determination that the application did not demonstrate a

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[7] Vargas contends on appeal that she had experienced an additional change to her finances because the value of her home had recently been reassessed, resulting in lowered property taxes. However, Vargas did not present any evidence at trial that she had submitted proof to Ocwen of her decreased tax burden. Therefore, the trial court did not err in failing to consider it.

material change would run counter to the protective policies behind the HBOR.

Further, Ocwen's conduct after its November 27 denial letter does not suggest that Ocwen believed Vargas's application should not be considered based on a failure to show a material change. Ocwen continued to work with Vargas on a review of the merits of her application, and Vargas presented evidence that Rodrigues advised her that it looked like Ocwen had all the documentation it needed from her submissions on November 21 and 23. Rodrigues did not tell her that her application was deficient and would not be considered because it did not show changed circumstances. He asked for further documentation on the rental income, but never requested documents showing Vargas's income as of the time of her September application. One reasonable explanation is that Ocwen already had easy access to Vargas's income reported as part of her September application submitted to Ocwen. (See *Ivey v. Chase Bank* (N.D.Cal., Jan. 22, 2015, No. 14-cv-02289-NC) 2015 WL 294371 at p. *2 [borrower sufficiently documented a change of circumstances between submission of two loan modification applications where his prior loan modification application had listed his income as $14,000, and he submitted a second application listing $22,000 as his income].) The fact that Vargas's modification application (futilely) progressed to the underwiting stage in December suggests that Ocwen was not concerned about the lack of documentation regarding her income in September. Given that we are required to draw all reasonable inferences in Vargas's favor on this appeal, we conclude there was sufficient evidence for the jury to find Vargas had met her burden to show she

submitted sufficient documentation to Ocwen of her changed financial circumstances.

3. *Fraud and Negligence Claims*

To state a cause of action for fraudulent misrepresentation, the plaintiff must allege (1) a misrepresentation, (2) knowledge of its falsity, (3) intent to defraud or induce the plaintiff's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255; *Geraghty v. Shalizi* (2017) 8 Cal.App.5th 593, 597.) "The elements of negligent misrepresentation are similar to intentional fraud except for the requirement of scienter; in a claim for negligent misrepresentation, the plaintiff need not allege the defendant made an intentionally false statement, but simply one as to which he or she lacked any reasonable ground for believing the statement to be true." (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184.) "[A] lender does a owe a duty to a borrower to not make material misrepresentations about the status of an application for a loan modification or about the date, time, or status of a foreclosure sale." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 68 (*Lueras*).)

The trial court concluded the fraud claim should be dismissed because Vargas failed to present any evidence that Ocwen representative Rodrigues intended to defraud Vargas or had knowledge of the falsity of any of his representations. We agree. The evidence suggested that Rodrigues did not know the foreclosure sale went forward on December 3 and, lacking that knowledge, continued to work with Vargas on her request for a loan modification. Because a reasonable jury could not render a verdict for Vargas on her fraud claim based on the evidence she

presented, the trial court correctly granted the motion for nonsuit as to the fraud claim.

The trial court also found Vargas failed to proffer sufficient evidence that she justifiably relied on Rodrigues's alleged misrepresentation, requiring dismissal of the negligent misrepresentation claim and providing another basis for dismissal of the fraud claim. We agree with the court.

"'Actual reliance occurs when a misrepresentation is "'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,'" and when, absent such representation, "'he would not in all reasonable probability, have entered into the contract or other transaction.'"'" (*Conroy v. Regents of University of California*, *supra*, 45 Cal.4th at p. 1256.) A plaintiff asserting a misrepresentation claim must "'"'"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.) "Forbearance—the decision not to exercise a right or power—is sufficient . . . to fulfill the element of reliance necessary to sustain a cause of action for fraud or negligent misrepresentation." (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 174.)

a. *Reliance by foregoing bankruptcy protection*

At trial, Vargas's brother Claudio testified that in mid-to-late November, Vargas discussed the impending December 3 foreclosure with her family. She told Claudio she

was working with Ocwen on a loan modification, and she did not discuss with him any other option to avoid foreclosure. When asked specifically if Vargas had told Claudio she would file for bankruptcy if the modification did not work out, Claudio testified, "She considered it but . . . her response was that bankruptcy would be the last option . . . [¶] [b]ecause of her credit. . . [S]he had good credit and that was the last option. . . ." According to Claudio, "she did not want to exercise that option." Vargas's mother testified that, before the foreclosure, Vargas discussed the idea of bankruptcy but was unsure whether she was going to do it. Vargas herself testified as follows:

"Q. By Mr. Golden: . . . If you had known that there was going to be foreclosure on December 3rd, would you have taken some action to save your home?

"A. Yes, I would.

"Q. What would you have done?

"A. File for bankruptcy.

. . . [¶] . . .

"Q. By Mr. Golden: Is there a reason you did not do it in November of 2013?

"A. As I mentioned before, I relied on Mr. Rodrigues's discussion with not going with the foreclosure while I was going to do a modification packet."

Vargas contends that her testimony that she forwent filing for bankruptcy was sufficient to demonstrate the reliance element.[8] We conclude, however, that Vargas's vague, conclusory

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[8] Vargas also contends on appeal that she "spent time and expenses in assembling the documents" for the loan modification

and speculative testimony that she would have pursued bankruptcy as an option to avoid foreclosure was not sufficient to meet her burden at trial to proffer sufficient evidence that she took action or refrained from taking some action that caused her damages, in reliance on misrepresentations by Rodrigues.

In *Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, the appellate court found the plaintiff borrowers "failed to plead or produce evidence establishing detrimental reliance" on the defendant bank's alleged false promise to postpone the property foreclosure date. (*Id.* at p. 947.) The borrowers failed to show that they took any action, refrained from any particular action, or substantially changed their position in reliance on the bank's false promise. (*Ibid.*; see *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1308 [omission of any allegation that plaintiff expended any money or declined other available offers in reliance on bank's alleged misrepresentation was "fatal to plaintiff's claim for negligent misrepresentation"].) The court contrasted the lack of any showing of actual reliance with that alleged by the borrower in *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218 (*Aceves*). (*Jones*, at p. 949.)

The borrower in *Aceves* had filed for bankruptcy after defaulting on her residential home mortgage loan. (*Aceves, supra*, 192 Cal.App.4th at p. 221.) The bank promised to work with her on a loan reinstatement and modification if she would forgo further bankruptcy proceedings. The borrower pled in her complaint that she relied on the bank's promise "by declining to convert her chapter 7 bankruptcy proceeding to a chapter 13

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application, but we do not consider this contention because no evidence or argument was offered in the trial court to support it.

proceeding, by not relying on her husband's financial assistance in developing a chapter 13 plan, and by not opposing [the bank's] motion to lift the bankruptcy stay." (*Id.* at p. 227.) The *Aceves* court held that the complaint sufficiently pled detrimental reliance. (*Id.* at pp. 221-222; see also *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1041 [homeowners' "actions in procuring a high cost, high interest loan by using other property they owned as security were sufficient to support detrimental reliance"].)

Numerous federal district courts have addressed whether reliance is sufficiently pled in complaints that contain only conclusory allegations by borrowers that they would have filed for bankruptcy if they had known the foreclosure was going forward. In *Panaszewicz v. GMAC Mortg., LLC* (N.D.Cal., May 22, 2013, No. C 13-01162 MEJ) 2013 WL 2252112, the plaintiff borrower sued her mortgage company for promissory estoppel, alleging that she defaulted on her mortgage loan after the company's representative promised to postpone the trustee's sale of her home. She alleged that, in reliance on that promise, she did not take legal steps, including seeking a temporary restraining order or filing for bankruptcy, to protect her home from foreclosure. (*Id.* at pp. *1, *5.) The court found that "*Plaintiff has not alleged that she either made preliminary steps in filing for a TRO or bankruptcy petition or intended to do so, but withdrew such action in reliance on [the loan servicer representative's] statement*. Rather, as plead [*sic*], from the time Plaintiff received the Notice of Default . . . Plaintiff did not avail herself of any judicial means to halt the sale and, significantly, this inaction merely continued after her children spoke with [the representative]. Thus, even if [the representative's] statement is construed as a promise to

postpone the trustee's sale, it was not the impetus for Plaintiff's abandoning her efforts to obtain judicial relief because she never made such efforts in the first place. [The representative's] statement thus did not effect any change in Plaintiff's conduct or compel her to abandon her legal recourse. As plead [*sic*], therefore, there are no facts demonstrating detrimental reliance by Plaintiff." (*Id.* at p. *5; see also *Nguyen v. PennyMac Loan Services, LLC* (C.D.Cal., Dec. 5, 2012, No. SACV 12–01574-CJC) 2012 WL 6062742 at p. *8 [finding plaintiff did not sufficiently allege detrimental reliance where the complaint contained "only conclusory statements that Plaintiff failed to file for bankruptcy or 'investigate' other 'possible scenarios to stave off impending foreclosure.' . . . Plaintiff does not allege that he was induced to take some specific action, that he actually changed his position in reliance on Defendants' purported promises, or that other possible workout options he might have pursued would have been successful"]; *Clark v. Wachovia Mortg.* (C.D.Cal., June 9, 2011, No. SACV 11-00226-CJC) 2011 WL 9210348 at p. *4 [finding plaintiff had "not alleged that she took any actions toward pursuing bankruptcy protection or a short sale prior to Wachovia's alleged promises [or] that she declined to take any steps related to filing for bankruptcy protection or proceeding with a short sale after Wachovia's alleged promises"].)

We need not address whether general allegations about foregoing filing for bankruptcy are sufficient to withstand a demurrer challenging whether reliance has been sufficiently pled. Here, in considering whether the trial court properly granted nonsuit, we are concerned with the sufficiency of the evidence introduced at trial that Vargas in fact relied to her detriment on Rodrigues's misstatements. We conclude, in order to present

sufficient evidence on the reliance element, Vargas needed to provide more than just conclusory and speculative assertions that she would have sought bankruptcy protection had she known on November 12 that the foreclosure was going to go forward on December 3. By November, more than a year had passed since Vargas initially defaulted on her April 2012 loan; multiple trustee's sale dates had been set and postponed; and her multiple loan modification requests had all been denied. However, Vargas proffered no evidence that she had taken any steps to explore the option of bankruptcy as of November 12. For example, she did not testify that she had communicated with a bankruptcy attorney or obtained the documents that she would need to fill out in order to file for bankruptcy. She did not provide any evidence that she told Ocwen she was exploring the option of bankruptcy and was asked to hold off while her modification request was being considered. Having failed to provide any evidence of any action taken towards declaring bankruptcy, Vargas did not provide sufficient evidence as to the reliance element.

b. *The trial court's exclusion of testimony regarding other actions in reliance on Ocwen's alleged misrepresentation*

On appeal, Vargas contends that the trial court inappropriately excluded her testimony regarding actions other than filing for bankruptcy that she forwent in reliance on her belief that a foreclosure would not be taking place on December 3. When Vargas's counsel asked her, "If you knew there was going to be a foreclosure, would you have done anything different?," the trial court sustained Ocwen's objection on the basis that the question called for speculation and had been asked and

answered. During a sidebar, Vargas's counsel made an offer of proof that Vargas would testify that if she had known the December 3 foreclosure was not going to be stayed, she would have been "trying to figure out another way to get more income," by getting more work or increasing her tenant's rent. Her counsel acknowledged that the time period for these actions in reliance would have to be after November 12, when she testified she was told the foreclosure would not go forward while her application was being reviewed. But the court noted that Vargas had already been trying to increase her income before November 12 so that she could qualify for a loan modification, and thus those efforts were not done in reliance on any alleged misrepresentation by Ocwen on November 12. Further, the court pointed out that by November 12 it would have been too late to work on increasing her income to qualify for some other unnamed possible foreclosure prevention option. Finally, the court noted Vargas had already testified about her efforts to raise her income. Therefore, the court ruled that counsel could not question Vargas to elicit testimony that she forwent other means to acquire income in reliance on Rodrigues's misrepresentation.

We need not reach the question whether the trial court abused its discretion in limiting Vargas's testimony in this respect because any such error was harmless. Even if the court had permitted Vargas to testify that she would have tried to increase her income if she had known the foreclosure was still scheduled for December 3, such testimony would not have been enough to create a jury question on the issue of reliance. Given that Vargas had already been trying to raise her income prior to November 12 so that she could qualify for a loan modification, and given the short time period between the alleged

misrepresentation on November 12 and the scheduled foreclosure date of December 3, no reasonable juror could have found that Vargas had additional concrete measures that successfully would have increased her income that she abandoned in reliance on Ocwen's assurances. (See *Mehta v. Wells Fargo Bank, N.A.* (S.D.Cal., Mar. 29, 2011, No. 10CV944 JLS AJB) 2011 WL 1157861 at p. *2 [finding "Plaintiff fails to nudge his misrepresentation claims across the line from conceivable to plausible" when it was not realistic he could have pursued alternative options to avoid foreclosure with such a short time before the scheduled sale]; affd. 510 F.Appx. 498 (9th Cir. 2013) ["given the short time frame between the promise and the foreclosure date, it is not plausible that Mehta would have pursued the claimed avenues of relief"].)

The trial court did not err in granting the motion for nonsuit as to Vargas's claim for negligent misrepresentation.

4. *Negligence Claim*

"To state a cause of action for negligence, a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries." (*Lueras, supra*, 221 Cal.App.4th at p. 62.)

In the cause of action for negligence, Vargas's complaint alleges that Ocwen wrongfully conducted a trustee's sale while her loan modification application was pending. The complaint alleges that Ocwen undertook the activity of reviewing and processing her application, and breached its duty to exercise due care in reviewing her application. The trial court granted Ocwen's motion for nonsuit as to this cause of action, concluding that Ocwen did not owe Vargas a duty of care. Further, the court

found Vargas had not presented any evidence that Ocwen "mishandled" her application.

"'The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.] Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court.'" (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1012.)

Because "[l]enders and borrowers operate at arm's length," "'[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.'" (*Lueras, supra*, 221 Cal.App.4th at p. 63, quoting *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096 (*Nymark*).) However, there is a split of authority among our state appellate courts regarding whether lenders or loan servicers who are considering loan modification applications from borrowers fall within this general no-duty rule, or whether they instead owe a duty of care to the borrowers.

In *Lueras*, the appellate court concluded no such duty is owed, finding that "a loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution's conventional role as a lender of money. A lender's obligations to offer, consider, or approve loan modifications and to explore foreclosure alternatives are created solely by the loan documents, statutes, regulations, and relevant directives and announcements from the United States Department of the Treasury, Fannie Mae, and other governmental or

quasi-governmental agencies." (*Lueras*, *supra*, 221 Cal.App.4th at p. 67.) The court found if the lender violates these obligations, the borrower has recourse through a breach of contract action or a claim under the consumer protection statutes. (*Id.* at p. 68.)

The court relied on *Nymark*'s analysis in reaching the conclusion that a lender owed no duty of care to a borrower in preparing an appraisal of the real property security for a loan. (*Lueras, supra*, 221 Cal.App.4th at p. 63.) As noted in *Lueras*, the *Nymark* court "reached this holding by considering the six factors identified in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*) to determine whether to recognize a duty of care. [Citation.] Those factors are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm." (*Lueras,* at p. 63.)

In *Lueras*, the court similarly found that "[t]he *Biakanja* factors do not support imposition of a common law duty to offer or approve a loan modification. If the modification was necessary due to the borrower's inability to repay the loan, the borrower's harm, suffered from denial of a loan modification, would not be closely connected to the lender's conduct. If the lender did not place the borrower in a position creating a need for a loan modification, then no moral blame would be attached to the lender's conduct." (*Lueras*, *supra*, 221 Cal.App.4th at p. 67; see *Carbajal v. Wells Fargo Bank, N.A.* (C.D.Cal., Apr. 10, 2015, No. CV 14-7851 PSG) 2015 WL 2454054 at p. *6; affd. 697 F.Appx. 555 (9th Cir. 2017) ["[t]he fundamental harm that a

borrower experiences in the foreclosure context is loss of property and the root cause of that harm is the borrower's inability to make agreed-upon loan payments in a timely manner. While the 'missed opportunity' to delay or prevent the loss of property can be cast as a derivative harm, it is strange to impose a negligence duty on lenders to carefully review modification applications when there is no such tort duty to approve applications as a result of that review"].) Thus, the *Lueras* court held, banks and loan servicers owe no duty to borrowers in connection with their handling of loan modification applications. (*Lueras*, *supra*, 221 Cal.App.4th at p. 68; see also *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 207 [Fourth Appellate District finding lender had no duty to borrower because lender's advice at base of negligence claim was directly related to the issue of loan modification and thus fell within the scope of conventional role as a lender of money]; accord, *Rufini v. CitiMortgage, Inc.* (2014) 227 Cal.App.4th 299, 312 [First Appellate District]; *Anderson v. Deutsche Bank Nat. Trust Co. Americas* (9th Cir. 2016) 649 F.Appx. 550, 551-552; but see *Rossetta v. CitiMortgage, Inc.* (2017) 18 Cal.App.5th 628, 640 [Third Appellate District finding lender owes duty to borrower in part because, by the time a borrower applies for a loan modification, "[t]he parties are no longer in an arm's length transaction and thus should not be treated as such"]; *Alvarez v. BAC Home Loan Servicing, L.P.* (2014) 228 Cal.App.4th 941, 948 [First Appellate District concluding servicer owed duty of care to borrower after agreeing to consider loan modification request]; *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1183-1184 [Sixth Appellate District concluding bank owed duty of care, given application of *Biakanja* factors to particular circumstances].)

We need not apply the *Biakanja* factors to the individual facts in evidence in the instant case to determine whether Ocwen owed a duty of care to Vargas in processing her loan application. The California Supreme Court has held that courts should not base their determination whether a duty of care exists "on the facts of the particular case," but rather should examine the "entire category of cases" to determine if imposing a duty is "justified by clear considerations of policy." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772.) By evaluating foreseeability and public policy justifications at a "relatively broad level of factual generality," courts "preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make." (*Id.* at p. 772.) We agree with the conclusion in *Lueras* that an application of the *Biakanja* factors yields the conclusion that banks and loan servicers do not owe a duty of care to loan modification applicants.

We therefore conclude the trial court correctly determined that Vargas failed to establish the first element of her negligence claim, and it was properly dismissed.

5. *Attorney Fee Award*

Because the judgment dismissing Vargas's claims has been reversed, the order awarding attorney fees, which is based on that judgment, cannot stand. (*Ventas Finance I, LLC v. Franchise Tax Board* (2008) 165 Cal.App.4th 1207, 1211; *Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1105.) We reverse the trial court's order awarding Ocwen attorney fees, without prejudice to the court reconsidering after

retrial of the HBOR claim whether an attorney fee award to either party is appropriate.

DISPOSITION

The judgment is reversed. The order granting nonsuit as to the HBOR cause of action is reversed, and the matter is remanded for a new trial on the HBOR cause of action. The trial court's order granting nonsuit as to the causes of action for fraud, negligent misrepresentation, and negligence is affirmed. The order granting Ocwen's motion for attorney fees is reversed. The parties are to bear their own costs on appeal.

STONE, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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