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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MIRIAM FABER, Plaintiff and Appellant, v. U.S. BANK, N.A., Defendant and Respondent.	B276884 (Los Angeles County Super. Ct. No. LC100264)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth A. Lippitt, Judge. Affirmed.

Jeffery P. Boykin for Plaintiff and Appellant.

Finlayson Toffer Roosevelt & Lilly and Matthew E. Lilly, for Defendants and Respondents.

* * * * * *

A homeowner entered into a forbearance agreement with her bank that allowed her to make reduced loan payments for a year. When the bank subsequently denied her application for a loan modification and told her she still owed the difference between the year's worth of regular payments and reduced payments, she sued. The trial court granted summary judgment to the bank. We conclude there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In May 2007, Miriam Faber (plaintiff) refinanced her Woodland Hills condominium (the property) with a $403,000 loan from Downey Savings and Loan Association, F.A. The promissory note memorializing the loan required a $1,931.04 monthly payment until July 1, 2012 (at which point the interest rate became variable), and was secured by a deed of trust on the property. The deed of trust expressly stated that (1) any "[e]xtension of the time for payment" would not "operate to release" plaintiff's "liability," and (2) "[a]ny forbearance by Lender in exercising any right or remedy including, . . . Lender's acceptance of payments . . . in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy."

After defendant U.S. Bank, N.A. (U.S. Bank) acquired the loan in 2008, plaintiff applied for a modification of her loan in July 2009, September 2010, and May 2011. Finding her financially ineligible for a loan modification, U.S. Bank denied all three applications.

When plaintiff informed U.S. Bank in May 2011 that she was unemployed, U.S. Bank in July 2011, "extend[ed] a special forbearance to [her] while [she] receiv[ed] unemployment

benefits." Under this "special forbearance," U.S. Bank (1) "allow[ed] [plaintiff] to make reduced [monthly] payments" of $1,180.79 "while [she] attempt[s] to gain employment," and (2) agreed to consider whether she was eligible for a loan modification under federal law. The forbearance period was initially three months, and was later extended to a full year. Both U.S. Bank's July 2011 initial letter and its November 2011 extension letter provided that "[d]uring this forbearance, all provisions of the [deed of trust] shall remain in full force." The November 2011 letter informed her that her account would "continue to be reported to the credit reporting repositories until [her] account is current." Although one U.S. Bank representative told plaintiff that she would "most likely" get a loan modification if she made her reduced payments on time and was a "good candidate," U.S. Bank also stated, and plaintiff understood, that there was "no guarantee" her modification application would be granted.

Just as the year-long forbearance was ending in July 2012, plaintiff filed her fourth loan modification application. U.S. Bank denied the application because her "payment-to-income ratio [was] outside the Acceptable Debt-to-Income Range." A few days later, U.S. Bank informed plaintiff that she still owed arrearages of $14,408.10, reflecting the shortfall between the full and reduced monthly payments during the forbearance period; the bank gave her 30 days to pay.

Plaintiff made no further payments.

II. Procedural Background

Plaintiff sued U.S. Bank in May 2013. In the operative third amended complaint, plaintiff asserted claims for (1) promissory estoppel, (2) fraud, and (3) violation of the unfair

competition law (Bus. & Prof. Code, § 17200 et seq.). As to all three claims, plaintiff alleged she was "lured into default" because U.S. Bank "continued to" expect her to pay the full loan payments "while actively" telling her, via the forbearance agreement, that "her loan was not in default and that she was not behind on her payments." She also alleged that U.S. Bank said "she would qualify for a [loan] modification."

U.S. Bank moved for summary judgment. Plaintiff opposed the motion, but submitted no evidence. The trial court granted summary judgment.

After judgment was entered, plaintiff filed this timely appeal.

DISCUSSION

Summary judgment is appropriately granted "where 'all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286, quoting Code Civ. Proc., § 437c, subd. (c).) In other words, summary judgment is warranted where "the plaintiff has not established, and reasonably cannot be expected to establish, one or more elements of the cause of action in question." (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 500.) """We review the trial court's decision [granting summary judgment] de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.' [Citation.]" (*Hartford Casualty Ins. Co.*, at p. 286.)

The central factual premise of all three of plaintiff's claims is the same—namely, that U.S. Bank promised (1) that its acceptance of reduced loan payments under the forbearance agreement would not result in any arrearages, and (2) that it would grant her fourth loan modification application. This is the promise underlying plaintiff's promissory estoppel claim; it is the false promise underlying plaintiff's fraud claim; and it constitutes the unlawful, fraudulent, and unfair conduct underlying plaintiff's unfair competition law claim. In other words, if this central premise is untrue, then U.S. Bank has established that one element of each of plaintiff's claims is missing and that summary judgment was properly granted. (See *Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411, 416 [promissory estoppel requires proof of """"""a promise clear and unambiguous in its terms"""""]; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 [fraud requires proof of a "misrepresentation," which includes a "false representation"]; *Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 36 [unfair competition law "borrows violations of other laws and treats them as unlawful practices"].)

The undisputed evidence does not show that U.S. Bank ever promised plaintiff that (1) it would not later seek to recover the full amount of loan payments during the forbearance period, or (2) it would grant her fourth loan modification application.

As to the first alleged promise, both documents memorializing the forbearance provided that "all provisions of the [deed of trust]" would "remain in full force" "[d]uring th[e] forbearance [period]," and the deed of trust provided that the lender's acceptance of reduced payments would "not be a waiver of or preclude the exercise of any right or remedy" and would not

"operate to release" her "liability." Together, these provisions expressly reserve U.S. Bank's right to collect the full amount of the loan payments due and owing during any forbearance period. (Accord, *Crane v. Wells Fargo* (N.D.Cal. Mar. 24, 2014, No. CV 13-01932 KAW) 2014 WL 1285177, *5-*6 [so concluding, while interpreting identical contractual language].) This is also consistent with the general understanding that a "forbearance" is a temporary reprieve, not a modification of the loan itself. (See *Boerner v. Colwell Co.* (1978) 21 Cal.3d 37, 44, fn. 7 ["A 'forbearance' of money is the giving of further time for the repayment of an obligation or an agreement not to enforce a claim at its due date."].)

As to the second alleged promise, both the July 2011 and November 2011 letters memorializing the forbearance period advised plaintiff, respectively, that she "may be considered" for a loan modification, and that there was "no guarantee that [she] will be eligible" for a loan modification. And the U.S. Bank employee echoed the lack of any definitive promise by indicating that plaintiff would "most likely" obtain a modification, but only if she made reduced payments "on time" and was "a good candidate" for a modification. These statements do not constitute a promise to modify plaintiff's loan.

Plaintiff makes two arguments in response.

First, she asserts that U.S. Bank employees also told her that her loan was "not in default," that she was "not behind on her payments," and that she should not "worry" about the late-payment notices she kept receiving during the forbearance period. However, these oral statements appear only in her verified complaint. We may not consider them now because "a party's own verified pleading may not be used as evidence for or

against a summary judgment motion." (*Coppinger v. Superior Court* (1982) 134 Cal.App.3d 883, 888.) Even if we considered these oral statements, they do not create a triable issue of fact as to whether U.S. Bank promised to forego the shortfall in monthly payments (the sole issue to which the statements are relevant) because the statements are entirely consistent with the true nature of the forbearance U.S. Bank granted and that was reflected in all of its letters: Plaintiff was neither in default nor behind in her payments (and thus had no reason to worry) until the point in time (here, September 2012) at which her loan modification was denied, and she failed to pay the arrearages.

Second, plaintiff contends that her claims are not barred by the statute of frauds. We need not reach this issue because her claims fail due to the absence of any actionable promise.[1]

DISPOSITION

The judgment is affirmed. U.S. Bank is entitled to recover its costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ

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1 In light of our conclusion, we also need not reach the question whether plaintiff also failed to create a triable issue of material fact on the issue of damages.