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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

BRENDAN J. ROCHE, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A., Defendant and Respondent.	2d Civil No. B281278 (Super. Ct. No. 56-2014-00453286-CU-OR-VTA) (Ventura County)

Brendan J. Roche appeals from a summary judgment granted in favor of defendant Wells Fargo Bank, N.A. (Wells Fargo) on his wrongful foreclosure complaint. Appellant claims that Wells Fargo violated the "dual tracking" provisions of the Homeowner's Bill of Rights (HBOR; Civ. Code, § 2923.6, subd, (c))[1] by not postponing the foreclosure sale while his loan modification application was pending. (See *Giles v. JPMorgan Chase Bank, N.A.* (2017) 7 Cal.App.5th 907, 912; *Monterossa v.*

[1] All statutory provisions are to the Civil Code unless otherwise stated.

Superior Court (2015) 237 Cal.App.4th 747, 752-753.) After appellant submitted the loan modification application, appellant was asked to provide the 2012 business tax return for Recentis Intermediaries, LLC (Recentis), a company created and owned by appellant. The trial court granted summary judgment because appellant failed to provide the business tax return or submit a complete loan modification application before the property was sold. We affirm.

Facts and Procedural History

In 2003, appellant borrowed $2.9 million from Wells Fargo to refinance his home at 2238 Melford Court, Thousand Oaks, California. The loan was secured by a first deed of trust.

In 2011, appellant defaulted on the loan and requested a loan modification but failed to provide Wells Fargo the necessary documents. Appellant reinstated the loan by paying $166,752.71 and defaulted again in November 2012. A notice of default was recorded showing $140,000+ in arrears. Wells Fargo postponed the trustee's sale after appellant's wife, Ruth Roche, as co-trustee of the Brendan and Ruth Roche Trust, filed a Chapter 13 bankruptcy petition. The trustee's sale was postponed four more times in 2013.

In January 2014, appellant submitted a loan modification application which indicated that appellant sold 51 percent of his company (Recentis) to Breckenridge Insurance Services (Breckenridge) in 2011. Breckenridge closed down Recentis and paid appellant $17,000 a month for the first two months of 2012. In a hardship letter, appellant said that he was suing Breckenridge for not honoring his employment contract, that appellant was unemployed, and that he owed more than $700,000 in income taxes.

Wells Fargo requested that appellant provide a partnership Schedule K-1 and a copy of the Recentis 2012 business tax return to verify that Recentis was no longer doing business. Appellant told Justin McGee, a Wells Fargo employee, that he would provide the tax documents that day. Appellant, however, did not have the Recentis tax return and claimed that Breckenridge refused to give him a copy due to pending litigation.

On March 3 and 12, 2014, Wells Fargo advised appellant that the loan modification application was not complete. Appellant was told that the trustee's sale would proceed as scheduled on April 14, 2014 if appellant did not provide the business tax return. This was confirmed in follow-up letters on March 13 and 17, 2014.

On April 9, 2014, appellant told McGee that his accountant was trying to get the Recentis tax return from the Internal Revenue Service. McGee advised appellant that Wells Fargo would not postpone the foreclosure sale. The property was sold on April 14, 2014 for $2.874 million to a third party purchaser. Appellant claimed the house was worth $5 million.

Appellant sued for violation of HBOR (§ 2923.6 et seq.), fraud, negligence, negligent misrepresentation, promissory estoppel, breach of contract, breach of implied covenant, and intentional infliction of emotional distress. Wells Fargo moved for summary judgment. Granting the motion, the trial court ruled that "Wells Fargo requested the 2012 Recentis business tax return on February 11, 2014. [Appellant] never provided Wells Fargo with the 2012 Recentis return . . . [and] [t]he loan modification process ended in March 2014 . . . . [W]hen Wells Fargo conducted the foreclosure sale of the property on April 14, 2014, a complete loan modification application was not pending."

We review the grant of summary judgment de novo, applying the same rules and standards that govern the trial court's determination of a motion for summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Ibid.*)

HBOR Dual Tracking Protections

Appellant claims that Wells Fargo violated HBOR by proceeding with the trustee's sale while his loan modification application was pending. HBOR provides: "If a borrower submits a *complete application* for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer . . . shall not . . . conduct a trustee's sale, while the complete first lien loan modification application is pending." (§ 2923.6, subd. (c), italics added.)[2] Section 2923.6, subdivision (h) states that the loan modification application is "complete" when the borrower "has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer."

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[2] Wells Fargo argues that section 2923.6 was amended, effective January 1, 2018 (Stats. 2012, ch. 87, § 8), to eliminate the prohibition against dual tracking, as was section 2924.12 (Stats. 2012, ch. 87, § 17; Stats. 2014, ch. 401, § 7), which no longer authorizes actual economic damages for a section 2923.6 dual tracking violation. These statutory amendments are prospective. (§ 3.) There is no expression of legislative intent to make the statutory changes retroactive or applicable to 2014 foreclosure sales. (See, e.g., *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207-1208.)

The first amended complaint alleges that appellant submitted a "complete loan modification application, which had yet to be reviewed nor denied, at the time of the non-judicial foreclosure sale on April 14, 2014." In opposing a summary judgment motion, appellant cannot rely on conclusory allegations in his complaint. (*Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1014.) It is undisputed that McGee requested a copy of the Schedule K-1 and the 2012 business tax return on February 11, 2014. Appellant said he would fax over the documents within the hour but failed to do so. On February 12, 2014 Wells Fargo sent appellant a letter stating that the business tax return had to be provided by February 27, 2014.

Appellant argues that the loan modification application was complete without the Recentis tax return. But his unilateral interpretation is not what HBOR says. It requires that the borrower provide "all documents required by the mortgage servicer." (§ 2923.6, subd. (h).) Appellant argues that the document request must be reasonable, otherwise mortgage servicers could abuse HBOR. Appellant presented no evidence that the business tax return was unnecessary or that Wells Fargo asked for the tax return to do an end run around HBOR. Appellant was the founder and CEO of Recentis and retained a 24.5 percent ownership interest after selling a majority interest in the company. It was unknown whether Recentis was dissolved and whether the 2012 business tax return was the last one filed with the IRS. Andrea Kruse, Vice President of Loan Documentation at Wells Fargo, stated that "[t]he Recentis business tax return was required by Wells Fargo due to the large ownership interest [appellant] held in Recentis. Additionally, because Recentis was allegedly dissolved in February 2012, the

2012 business tax return was necessary to verify that Recentis was closed and that it was the final tax return."

Appellant contends that Kruse's declaration lacks foundation and that only a loan underwriter could say the business tax return was necessary. McGee, however, testified that his supervisor and the loan underwriter determined that the application was not complete and directed him to remove the application. McGee stated that if he forwarded an incomplete application to underwriting, it would cause delays and affect his job performance review and bonus. Appellant claims that Wells Fargo used the bonus as a financial incentive to get McGee to reject the loan modification application but offered no competent evidence one way or another.

Appellant argues that he provided Wells Fargo an IRS 4506-T form, authorizing Wells Fargo to get his tax records from the IRS. Pursuant to HBOR, it is not mortgage servicer's responsibility to gather the required documentation. HBOR requires that the borrower submit a complete application (§ 2923.6, subd. (c)) and provide the mortgage servicer all requested documents (§ 2923.6, subd. (h)). The moving papers show that 4506-T forms were used to verify financial information previously provided by the borrower. Appellant was and is responsible for his actions after he sold a majority interest in his company and sued the controlling partner for breach of contract. Breckenridge did not to honor appellant's request for a copy of the 2012 business tax return. That was not Wells Fargo's fault and it had no duty as a mortgage servicer to get a copy of the tax return for appellant.

Appellant asserts that it was unreasonable for Wells Fargo to give him three weeks to get the business tax return.

Wells Fargo requested the K-1 and Recentis business tax return on February 11, 2014. Appellant said "I've got them" and that he would fax over the documents "in the next hour." When appellant failed to do so, he was asked three times on the phone and twice in writing to provide the tax return. Appellant was told that the loan modification application was not complete and that it would proceed with the foreclosure. Wells Fargo confirmed this in writing on March 13 and March 17, 2014. In an April 9, 2014 phone call, McGee told appellant that Wells Fargo was unable to postpone the trustee's sale set for April 14, 2014.

Appellant, in his opposition papers, states "I believe that I spoke to Mr. McGee again after the April 9, 2014 telephone call. Mr. McGee led me to believe that the sale would not go forward because I was still trying to get the Recentis return." The trial court did not err in disregarding the self-serving declaration. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22.) The verified First Amended Complaint states: "Plaintiff did not receive ***any*** telephone calls or other communications from Mr. McGee or WELLS [FARGO] after April 7, 2014." The same admission appears in the original complaint. In a summary judgment proceeding, "'[a]dmissions of material facts made in an opposing party's pleadings are binding on that party as "judicial admissions." They are *conclusive* concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her.' [Citations.]" (*St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1248.)

In *Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267 (*Valbuena*), plaintiff defaulted on his house

mortgage and submitted a loan modification application. The lender wrote to plaintiff, requesting that he provide additional documents within seven days. (*Id*. at p. 1274.) Plaintiff received the letter the day of the deadline and immediately transmitted the documents. (*Ibid*.) The Court of Appeal held that by alleging "transmittal of the additional documents requested by [the lender] on the date of request, plaintiffs have sufficiently alleged that a complete loan modification application was pending at the time [defendant] foreclosed on their home in violation of section 2923.6." (*Id.* at p. 1275.)

Unlike *Valbuena*, appellant failed to provide the business tax return despite many requests to do so. Appellant argues that he was not given a reasonable time to get the tax return. But he was given several weeks to do so. Appellant stopped making mortgage payments on the $2.9 million loan in November 2012 and waited until January 2014 to apply for a loan modification. Wells Fargo postponed the trustee's sale numerous times and finally sold the property on April 14, 2014. The dual tracking protections of HBOR were not triggered until appellant submitted a complete loan modification application. There are no material triable facts that Wells Fargo requested unnecessary documents or refused to give appellant a reasonable time to submit a complete loan modification application. (See, e.g., *Valbuena*, *supra*, 237 Cal.App.4th at pp. 1274-1275.)

Appellant argues that his investor-friend, Chuck Burtzloff of CRB Investments, LLC (CRB), was ready to pay off the first trust deed if appellant did not qualify for the loan modification. HBOR ensures "that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation

options, if any, *offered . . . through the borrower's mortgage servicer*, such as loan modifications or other alternatives to foreclosure." (§ 2923.4, subd. (a), italics added; see *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 950.) We reject the argument that Wells Fargo had a duty to find appellant third party financing or broker CRB's buy-out of the loan.

Appellant argues that Wells Fargo failed to advise him that he could repay or reinstate the loan, thereby violating section 2923.7, subdivision (b)(4).[3] Appellant had the option to repay or reinstate the loan which is both a contract and statutory right (§§ 2903 [right of redemption]; 2943, subd. (a)(5) [borrower's right to obtain a payoff demand statement]) outside the purview of HBOR. Repaying or reinstating a loan is not a "loan modification" within the meaning of HBOR. Nor is filing for Chapter 13 bankruptcy protection a foreclosure prevention alternative. (§ 2920.5, subd. (c)(2)(C).) Under HBOR, the mortgage servicer's obligation to explore foreclosure alternatives is narrowly construed "in order to avoid crossing the line from state foreclosure law into federally preempted loan servicing." (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 232.)

Appellant was aware of his options and asked McGee how he could get a payoff quote and a quote to reinstate the loan. Appellant admitted that he got a payoff quote from the trustee, and that he in turn provided the information to his investor friend, CRB, prior to the trustee's sale. CRB decided not to payoff

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[3] Section 2923.7, subdivision (b)(4) provides that the lender shall ensure "that a borrower is considered for all foreclosure prevention alternatives offered by, or through, the mortgage servicer, if any."

or reinstate the loan. Appellant makes no showing that Wells Fargo violated HBOR or is liable for appellant's loss.

Negligence and Promissory Estoppel

The remaining causes of action for contract and tort damages incorporate the HBOR allegations and allege that Wells Fargo mismanaged the loan modification application and told appellant the foreclosure sale would be postponed. The trial court found that "[t]he remaining claims are based on purported promises to postpone the foreclosure sale during [loan] modification review. . . . Wells Fargo has established that the loan modification application was never completed, and that the loan modification process ended in March [2014]." There was no HBOR violation. Until appellant submitted a complete loan modification application, Wells Fargo had no duty to postpone the trustee's sale or provide appellant a written determination on the loan modification application.

Appellant's remaining arguments are based on unpled negligence theories and violate the rule that a party cannot avoid summary judgment by raising new legal theories on appeal. (See *Christine C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1383; *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663; *Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.) Appellant may not defeat a summary judgment motion by "present[ing] a 'moving target' unbounded by the pleadings." (*Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 176.)

Disposition

The judgment (order granting summary judgment) is affirmed. Wells Fargo is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Vincent J. O'Neill, Judge

Superior Court County of Ventura

Gomez & Simone and Mark A. Gomez, Stuart R. Simone, Ashlie E. Fox for Plaintiff and Appellant

Severson & Werson and Jon D. Ives, Jan T. Chilton and Kerry W. Franich, for Defendant and Respondent.