Filed 11/14/12 Mulville v. Wells Fargo Bank CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DUANE MULVILLE et al.,

Plaintiffs and Appellants,

v.

WELLS FARGO BANK, N.A. et al.,

Defendants and Respondents.

B237831

(Los Angeles County
Super. Ct. No. BC435534)

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

Brentwood Legal Services and Steven L. Zelig for Plaintiffs and Appellants.

Severson & Werson, Jan T. Chilton and Erik Kemp for Defendants and Respondents.

Duane and Beverly Mulville (collectively appellants)[1] appeal from an order of the trial court entering judgment in favor of Wells Fargo Bank, N.A., and its employee, Amanda Calkins (collectively respondents).[2] Appellants filed a complaint based on Wells Fargo's alleged breach of an agreement to modify appellants' home loan. The trial court sustained respondents' demurrers as to some of appellants' claims and granted summary judgment as to the rest. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[3]

In August 2006, appellants obtained a $500,000 home equity line of credit (HELOC) from Wells Fargo, secured by a deed of trust against their home in Simi Valley, California. Appellants refinanced their home in October 2006, obtaining a $999,999 loan from Wells Fargo, also secured by a deed of trust. The HELOC was subordinated to the refinance loan.[4]

After appellants experienced financial difficulties, they defaulted on the refinance loan and the HELOC. In 2007, appellants asked Wells Fargo for a loan modification in order to avoid foreclosure.

In October 2008, Wells Fargo sent appellants a letter, indicating that it was considering a loan modification for appellants. According to a declaration from

---

[1] For ease of reference, we will refer to appellants by their first names when necessary.

[2] The trial court sustained the demurrers of four other defendants named in the complaint, but appellants appeal only as to Wells Fargo and Calkins.

[3] Because this is an appeal from a demurrer and a summary judgment motion, the facts are taken from the complaint and the evidence submitted in the trial court.

[4] We therefore refer to the refinance loan as the first loan and the HELOC as the second loan.

Beverly, Wells Fargo "demanded an initial payment of approximately $5,142 in order to begin the modification process." She further stated that she asked Wells Fargo to put this requirement in writing, but it did not do so.

In December 2008, Wells Fargo recorded a notice of default, indicating appellants were $32,003.94 in arrears. A notice of trustee's sale was recorded in March 2009, indicating that the house was to be sold on April 9, 2009.

In August 2009, Wells Fargo sent appellants a letter inviting them to submit an application for the federal Home Affordable Modification Program (HAMP), part of an initiative "announced by President Obama to help homeowners."[5]

According to the complaint, Wells Fargo sent appellants a series of form letters in 2009, offering to help them remain in their home, stating that they were being considered for a loan modification, and asking for information. Beverly stated in her declaration that, after her initial contact with Wells Fargo in October 2008, she spent a year "resubmitting documentation that had already been submitted to Wells Fargo," but Wells Fargo then "demanded that it could begin to modify the loan if [appellants] paid $30,000. . . . [She], again, asked them to put this information in writing, but that never occurred."

The complaint alleged that, in November 2009, Calkins promised that if appellants would settle the second loan, Wells Fargo would permanently modify the first loan so that appellants could meet their monthly payments.[6] Appellants

---

[5] "'The United States Department of the Treasury and other federal agencies created HAMP pursuant to authority granted by the Emergency Economic Stabilization Act, title 12 United States Code section 5201 et seq. [Citation.] Mortgage servicers may voluntarily participate in HAMP. [Citation.] . . .' [Citation.]" (*Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1005, fn. 1 (*Barroso*).)

[6] Calkins is employed by Wells Fargo as a Loan Servicing Specialist.

alleged that they relied on this promise to make “a substantial payment on the second, resulting in its elimination.” However, Calkins then allegedly told appellants that their payment indicated they had “too much cash” and so were not candidates for a loan modification of the first. The evidence submitted in support of these allegations was Beverly’s statement in her declaration that, in late 2009, Calkins “expressly promised” that if appellants “could come up with the necessary cash to settle the second trust deed that Wells Fargo would in fact issue a permanent loan modification on the first loan.”

Respondents denied that Calkins promised Wells Fargo would modify the home loan if appellants satisfied the HELOC. Calkins stated in a declaration that she told appellants that they would have a better chance of qualifying for a modification on their first loan if they submitted documentation of “an increase in income or a decrease in their expenses.” She further stated that she never promised that Wells Fargo would modify the first loan if the second loan was eliminated or settled, and that Wells Fargo never made such a written agreement.

Respondents also submitted the declaration of Rhonda Bernard-Thomas, a Mortgage Quality Assurance Analyst at Wells Fargo, who stated that, as of November 30, 2009, appellants were “delinquent on the HELOC in the amount of $522,384.77.” She stated that appellants then made a payment of $20,000 toward the HELOC, which was accepted as full settlement of the HELOC. The deed of trust securing the HELOC was then reconveyed to appellants. Bernard-Thomas stated that “Wells Fargo does not have in its possession, nor has it ever had in its possession, a writing memorializing that an oral promise was made to modify a different loan if the HELOC was eliminated.”

Beverly stated in her declaration that she and her husband “struggled to generate sufficient cash to settle or otherwise eliminate the second.” She further stated that "in settling the second loan as Calkins and Wells Fargo required, the tax implications of over $480,000 were detrimental," and she asserted that had they "not been promised the loan modification on the first loan, [they] would never [have] entered into such an agreement."

Appellants filed a complaint on April 12, 2010, and filed an amended complaint in July 2010. The first amended complaint alleged 10 causes of action: (1) fraud in the inducement and in performance; (2) negligent misrepresentation; (3) breach of written and implied contract; (4) negligence; (5) promissory estoppel; (6) declaratory relief; (7) quiet title; (8) slander of title; (9) violation of Rosenthal Fair Debt Collection Practices Act (Rosenthal Act) (Civ. Code, § 1788 *et seq.*); (10) intentional infliction of emotional distress. The trial court sustained with leave to amend respondents' demurrer to appellants' first amended complaint.

The second amended complaint is the operative complaint. Appellants alleged 12 causes of action: (1) fraud in the inducement and in performance; (2) negligent misrepresentation; (3) breach of written and implied contract; (4) negligence; (5) promissory estoppel; (6) declaratory relief; (7) quiet title; (8) slander of title; (9) intentional infliction of emotional distress; (10) violation of Rosenthal Act; (11) violation of California invasion of privacy act; (12) common law invasion of privacy.[7] Appellants alleged the Rosenthal Act and the invasion of privacy violations on behalf of a putative class.

The trial court sustained without leave to amend respondents' demurrers to the breach of contract, negligence, quiet title, slander of title, Rosenthal Act, invasion of privacy act, and common law privacy causes of action. The court sustained Calkins' demurrer, but overruled Wells Fargo's, to the intentional

---

[7] On appeal, appellants withdraw their causes of action for quiet title and slander of title.

infliction of emotional distress claim. The court overruled respondents' demurrers to the fraud, negligent misrepresentation, promissory estoppel, and declaratory relief claims.

Respondents moved for summary judgment or summary adjudication on the remaining claims. After holding a hearing, the court granted respondents' summary judgment motion.

The court found that there was a triable issue of fact as to whether Calkins, on Wells Fargo's behalf, orally agreed to modify appellants' $999,999 loan if appellants satisfied the HELOC. However, the court found that appellants had failed to allege any damages, reasoning that their $20,000 payment was money already owed to Wells Fargo, and that appellants failed to proffer admissible evidence that they suffered adverse tax consequences. The court further found that the alleged oral agreement was subject to the statute of frauds and that appellants had submitted no evidence of intent to defraud or to induce reliance. Appellants' intentional infliction of emotional distress claim failed because the alleged conduct did not rise to the level of outrageous behavior required for such a claim, and because damages for emotional distress based on allegations of fraud are not permitted. Because the cause of action for declaratory relief was based on the other causes of action, respondents were entitled to judgment in their favor on the declaratory relief claim.

Judgment was entered in favor of respondents and against appellants. Appellants filed a motion for a new trial. Appellants also filed a notice of appeal.

DISCUSSION

Appellants challenge both the order sustaining respondents' demurrers and the order granting their summary judgment motion.

I. Demurrers

"In reviewing an order sustaining a demurrer, we assume the factual allegations pleaded to be true and examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. [Citation.]" (*Barroso, supra*, 208 Cal.App.4th at p. 1004.)

A. HAMP

Appellants alleged in the complaint, and argue on appeal, that Wells Fargo was obligated by its participation in the Troubled Asset Relief Program (TARP) and HAMP to offer loan modifications to eligible homeowners. However, "courts have determined that lenders are not required under HAMP to modify eligible loans." (*Lucia v. Wells Fargo Bank, N.A.* (N.D.Cal. 2011) 798 F.Supp.2d 1059, 1070 (*Lucia*); see also, e.g., *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 559, fn. 4 [stating that courts have uniformly rejected claims of homeowners trying to assert rights arising under HAMP and citing cases].) Wells Fargo accordingly was under no obligation to modify appellants' loan. Moreover, "there is no express private right of action against TARP fund recipients." (*Pantoja v. Countrywide Home Loans, Inc.* (N.D.Cal. 2009) 640 F.Supp.2d 1177, 1185.) Appellants' attempt to rely on HAMP or TARP as the basis for any of its claims is unavailing.

B. Breach of Contract

In their breach of contract claim, appellants incorporated by reference the loan documents. They alleged that they satisfied the terms of the contract or were excused from performance, but that respondents breached the contract in numerous ways. They also alleged that respondents breached an implied contract that was created when they agreed to modify the first loan.

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 (*Oasis*).) "A cause of action for breach of implied contract has the same elements as does a cause of action for breach of contract, except that the promise is not expressed in words but is implied from the promisor's conduct." (*Yari v. Producers Guild of America, Inc.* (2008) 161 Cal.App.4th 172, 182.) "An implied contract 'consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words.' [Citations.]" (*California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1134.)

Appellants alleged that respondents breached the contract when they (1) "refused to provide any of the documentation that has been requested"; (2) failed to give appellants notice that the foreclosure was withdrawn; (3) "failed to take any steps to rectify the issues they have intentionally created and are continuing to breach the modification contract and engage in the highest level of institutional fraud imaginable"; (4) "published notices and sent letters that have slandered the title of the property"; (5) refused to answer appellants' inquiries; (6) refused to provide documentation establishing the validity of the foreclosure; (7) harassed and upset appellants; (8) destroyed evidence.[8]

---

[8] We do not list all of appellants' allegations because some are repetitive.

Appellants did not sufficiently allege a cause of action for breach of contract. First, there were no allegations to indicate appellants' "performance or excuse for nonperformance" under the contract. (*Oasis, supra*, 51 Cal.4th at p. 821.) Appellants did not satisfy the terms of the loan documents. There is no dispute that they defaulted on both the $999,999 loan and the $500,000 HELOC. Their complaint specifically alleged that they were in arrears. The complaint stated only that, despite "very significant personal problems, [appellants] in good faith continued servicing the subject loans, but eventually fell behind – like millions of others in the United States."

"While the allegation of performance 'can be satisfied by allegations in general terms' [citation], 'excuses must be pleaded specifically.' [Citations.]" (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1367 (*Durell*).) The vague statement that appellants had personal problems and fell behind like millions of other Americans, is not a sufficiently specific allegation of an excuse for their nonperformance.

Even if the statement were sufficient to allege an excuse for appellants' nonperformance, the complaint contains no allegations of facts indicating that respondents breached any terms of the loan documents. Appellants do not cite any terms of the loan documents that respondents allegedly breached. Their allegations concern respondents' alleged conduct in negotiating the payment of the HELOC. Appellants have failed to allege facts sufficient to state a breach of contract cause of action based on the loan documents.

Appellants' breach of contract claim also was based on the implied contract that allegedly was formed by which Wells Fargo would modify the first loan in exchange for the $20,000 payment on the HELOC. Even if we assume that appellants have sufficiently alleged the existence of an implied contract, we agree with respondents that any alleged oral promise to modify appellants' first loan is subject to the statute of frauds. Appellants challenge the contention that the statute of frauds applies, citing *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031 (*Garcia*).

"An agreement for the sale of real property or an interest in real property comes within the statute of frauds. (Civ. Code, § 1624, subd. (a)(3).) A mortgage or deed of trust also comes within the statute of frauds." (*Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 552 (*Secrest*).) "A contract coming within the statute of frauds is invalid unless it is memorialized by a writing subscribed by the party to be charged or by the party's agent. (Civ. Code, § 1624.) Under Civil Code section 1624, the party to be charged means '"the party to be charged in court with the performance to the obligation, i.e., the *defendant* in the action brought to enforce the contract."' [Citation.]" (*Ibid.*) Moreover, "[a]n agreement to modify a contract that is subject to the statute of frauds is also subject to the statute of frauds. [Citations.]" (*Id.* at p. 553.)

In *Secrest*, the court held that a forbearance agreement in which a lender agreed to forbear from exercising its right to foreclose under a deed of trust was subject to the statute of frauds. (*Secrest*, *supra*, 167 Cal.App.4th at p. 547.) The court reasoned that, although the forbearance agreement did not create, renew, or extend the note and deed of trust, it was an agreement to surrender an interest in land. (*Id.* at p. 553.)

Secrest rejected the borrowers' argument that their making the down payment on the forbearance agreement constituted part performance sufficient to estop the lender from asserting the statute of frauds. (*Id.* at p. 555.) The court stated that "'[t]he payment of money is not "sufficient part performance to take an oral agreement out of the statute of frauds" [citation], for the party paying money "under an invalid contract . . . has an adequate remedy at law."' [Citations.]" (*Ibid.*) The court acknowledged the argument that the borrowers fully performed their obligations under the forbearance agreement by their payment. However, the court noted that "[t]he principle that full performance takes a contract out of the statute of frauds has been limited to the situation where performance consisted of conveying property, rendering personal services, or doing something other than payment of money. (*Id.* at p. 556.) Pursuant to *Secrest*, the statute of frauds bars appellants' breach of contract claim based on Calkins' alleged oral promise to modify the first loan in exchange for the $20,000 payment on the HELOC.[9]

Appellants also argue that respondents violated the implied covenant of good faith and fair dealing. Appellants' allegations are based on respondents' conduct in allegedly breaching the agreement to modify the first loan, but "[t]he implied covenant of good faith and fair dealing is a contractual relationship and does not give rise to an independent duty of care. Rather, '"[t]he implied covenant of good faith and fair dealing is limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create obligations not contemplated by the contract."' [Citation.]" (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 206 (*Ragland*).) "'The covenant thus cannot "'be endowed with an existence independent of its contractual underpinnings.'" [Citation.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.' [Citation.]

---

[9] In *Garcia*, this court noted that "[a] party is estopped to assert the statute of frauds as a defense 'where [the] party, by words or conduct, represents that he will stand by his oral agreement, and the other party, in reliance upon that representation, changes his position, to his detriment.' [Citation.]" (*Garcia*, *supra*, 183 Cal.App.4th at p. 1040, fn. 10.) We thus held that the plaintiffs' promissory estoppel claim was not barred by the statute of frauds. (*Ibid.*) We address appellants' promissory estoppel claim below.

The ‘covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party’s rights to the benefits of the agreement.’ [Citation.]” (*Durell*, *supra*, 183 Cal.App.4th at p. 1369.)

Appellants accordingly cannot assert a claim based on the implied covenant of good faith and fair dealing independent of their claim that respondents breached the alleged contract to modify the first loan. Moreover, “[o]utside of the insured-insurer relationship and others with similar qualities, breach of the implied covenant of good faith and fair dealing does not give rise to tort damages. [Citations.]” (*Ragland, supra*, 209 Cal.App.4th at p. 206.)

The trial court did not err in sustaining the demurrers to appellants’ breach of contract claim.[10]

C. Negligence

In their negligence cause of action, appellants repeated the allegations of the breach of contract claim, but alleged that respondents performed those acts negligently. For example, the complaint alleged that respondents negligently

---

[10] Appellants contend that their situation is similar to *Barroso*, in which this court reversed the trial court order sustaining a demurrer as to the plaintiff’s breach of contract cause of action against a lender who foreclosed on her home, but the facts of *Barroso* are quite different. In that case, the plaintiff attached to her complaint and incorporated by reference an actual modification agreement between her and the lender, setting forth the monthly payment amount and schedule. (*Barroso*, *supra*, 208 Cal.App.4th at p. 1005.) She made monthly payments under the modification agreement, and the lender acknowledged receipt of at least one of those payments. Nonetheless, her home was sold in a foreclosure sale. The issue we addressed was whether the plaintiff “failed to allege performance of a condition precedent to formation of a valid agreement to modify the terms of her loan,” such as whether she was required to have her signature on the agreement notarized. (*Id.* at p. 1009.)

refused to provide documentation they requested, negligently failed to give them notice that the foreclosure was withdrawn, "negligently failed to take any steps to rectify the issues they have intentionally created," negligently refused to answer their inquiries, negligently forced them to file a lawsuit, negligently pursued an illegal foreclosure, and so forth.

The elements of any negligence cause of action are duty, breach of duty, proximate cause and damages. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 526.) "'[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.' [Citation.]" (*Ragland, supra*, 209 Cal.App.4th at p. 206.) Appellants did not allege any facts sufficient to indicate that respondents owed them a duty of care, and they have made no argument on appeal in support of this contention.

"[A]bsent special circumstances not present here a loan transaction is at arm's length and there is no fiduciary relationship between the borrower and lender. [Citations.]" (*Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 466.) Appellants have alleged no special circumstances that would indicate a fiduciary relationship. The complaint accordingly does not allege facts sufficient to state a cause of action for negligence.

D. Rosenthal Act

The Rosenthal Act "was enacted 'to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts, and to require debtors to act fairly in entering into and honoring such debts.' Cal. Civ. Code § 1788.1. . . . A debt collector violates the act when it engages in harassment, threats, the use of profane language, false simulation of the judicial process, or when it cloaks its true nature as a licensed collection agency in an effort to collect a consumer debt. See Cal. Civ. Code §§ 1788.10-1788.16. . . . [¶] '[F]oreclosure pursuant to a deed of trust does not constitute debt collection under the [Rosenthal Act].' [Citations.]" (*Sipe v. Countrywide Bank* (E.D.Cal. 2010) 690 F.Supp.2d 1141, 1151 (*Sipe*).)

The Rosenthal Act accordingly does not apply to any foreclosure activity by respondents. Moreover, the complaint contains "no non-conclusory factual content to plausibly suggest that [respondents] violated the [Rosenthal Act] by engaging in acts (such as harassment) prohibited by the statute. [Citations.]" (*Sipe*, *supra*, 690 F.Supp.2d at pp. 1151-1152.) The complaint alleged that appellants were eligible for loan modification under HAMP and "were met with the same failures and deceptions." There were no allegations of conduct prohibited by the statute. The trial court properly sustained respondents' demurrers as to the Rosenthal Act claim.

E. Invasion of Privacy Claims

Appellants' second amended complaint alleged two causes of action not contained in their first amended complaint. First, they alleged that respondents violated statutory invasion of privacy laws by illegally recording telephone calls with appellants. (Pen. Code, §§ 631, subd. (a), 632, subd. (a), 637.) Second, they alleged that respondents violated their common law right of privacy.

"It is the rule that when a trial court sustains a demurrer with leave to amend, the scope of the grant of leave is ordinarily a limited one. It gives the pleader an opportunity to cure the defects in the particular causes of action to which the demurrer was sustained, but that is all. [Citation.] 'The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend.' [Citation.]" (*Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1329.)

The trial court order sustaining the demurrer to the first amended complaint did not grant appellants leave to amend. Appellants offer no explanation for their attempt to add new causes of action without having obtained the court's permission to do so. The court did not err in sustaining without leave to amend the demurrers as to both invasion of privacy claims.

II. Summary Judgment

"We review the trial court's grant of summary judgment de novo, 'viewing the evidence in a light favorable to the plaintiff as the losing party, liberally construing the plaintiff's evidentiary submission while strictly scrutinizing the defendant's own showing, and resolving any evidentiary doubts or ambiguities in the plaintiff's favor. [Citation.]' [Citation.] 'A defendant moving for summary [judgment] meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o)(2), (p)(2).) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations or denial of her pleadings, "but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).)' [Citation.]" (*Wang v. Heck* (2012) 203 Cal.App.4th 677, 683.)

A. Fraud

The complaint relied on HAMP to allege that respondents fraudulently induced them to pay off the HELOC by promising a loan modification in return. As discussed above, courts have uniformly held that lenders are not required under HAMP to modify eligible loans. (*Lucia*, *supra*, 798 F.Supp.2d at p. 1070.) To the extent, therefore, that appellants' claim is based on respondents' failure to modify their loan under HAMP, it is barred. Appellants' fraud claim also fails because they have not submitted evidence sufficient to raise a triable issue of material fact.

"The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably and reasonably relied on the representation; and (5) the plaintiff suffered resulting damages. [Citation.]" (*Ragland*, *supra*, 209 Cal.App.4th at pp. 199-200.) "'Deception without resulting loss is not actionable fraud. [Citation.]' [Citation.]" (*Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1184.) "In order to establish a cause of action for fraud a plaintiff must plead and prove in full, factually and specifically, all of the elements of the cause of action. [Citation.] General and conclusory claims of fraud will not suffice. [Citations.]" (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 156 (*Conrad*).)

"[A] claim of fraud cannot be permitted to serve simply as an alternative cause of action whenever an enforceable contract is not formed. Accordingly, in order to support a claim of fraud based upon the alleged failure to perform a promise, it must be shown that the promissor did not intend to perform at the time the promise was made. [Citation.] Although it has been suggested that failure to perform a promise is sufficient to prove fraud, '[t]his is not, and has never been the law,' and 'if plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he [should] never reach a jury.' [Citation.]" (*Conrad, supra,* 45 Cal.4th at pp. 156-157.)

The complaint alleged that Wells Fargo fraudulently induced appellants to take out the loans in the first place, knowing that they eventually would be unable to pay them, and that it paid its employees "substantial kick backs and illegal compensation" to do so. It further alleged that, when appellants were seeking loan modifications, respondents ignored their telephone calls and lied to them when they said they would modify the first loan if appellants paid off the second loan. Appellants alleged that they reasonably relied on this misrepresentation and "would not have resolved the second [loan] and would have taken other steps to protect themselves," and that they "wasted an extraordinary amount of time trying to work with [respondents] in good faith."

The complaint alleged the following damages to support their fraud cause of action: (1) they were forced to hire counsel; (2) they "are upset and worried during virtually all waking hours and their sleep is affected"; (3) they "invested much of their own time trying to research the issues, locating documents and doing other things for the purpose of proving to [respondents] that which should not have needed any proof, i.e., that the loan modification had been perfected and payments had been made"; (4) "[v]arious other forms of economic and non-economic loss according to proof."

In support of their opposition to the summary judgment motion, appellants filed the declaration of Evan M. Selik, the lawyer who took Calkins' deposition. Selik stated that Calkins admitted during her deposition that she did not recall whether she told Beverly that Wells Fargo would modify the first loan if appellants paid off the second loan. Calkins also admitted that, at the time she signed the declaration, she did not remember the information stated in paragraphs 9 and 10. Paragraph 9 stated: "During my telephone conversations with the Plaintiffs in this action I communicated to Plaintiffs that, if they were to submit documentation evidencing an increase in income or a decrease in their expenses, they would have a better chance of qualifying for a modification on the First Loan." Paragraph 10 stated: "I never promised Plaintiffs orally or otherwise that if a subordinate loan on the Subject Property was eliminated or settled, that Wells Fargo would modify the First Loan."[11]

Appellants also submitted Beverly's declaration. Beverly stated that, in 2007, after contacting Wells Fargo for a loan modification, she repeatedly submitted documentation to the bank, but Wells Fargo claimed it did not receive it. She further stated that Wells Fargo demanded payment of $5,142 in order to begin the loan modification process, describing this as an attempt "to extort and oppress us," and stating that it "greatly upset me." After Calkins "expressly promised [her] that if [appellants] could come up with the necessary cash to settle the second trust deed that Wells Fargo would in fact issue a permanent loan modification on the first loan," appellants "struggled to generate sufficient cash to settle" the $500,000 second loan. She stated that "in settling the second loan as Calkins and Wells Fargo required, the tax implications of over $480,000 were detrimental and from which we are still damaged." Beverly further asserted that they would not have agreed to settle the second loan if they had not been promised the loan modification and that their other option was "not paying the second loan at all and

---

[11] Appellants make much of the alleged discrepancies between Calkins' deposition and her declaration, but the trial court found that there was a triable issue of fact as to whether Calkins orally agreed to modify appellants' first loan if they settled the second loan. The alleged discrepancies accordingly are irrelevant.

allowing foreclosure without a deficiency judgment," thus avoiding "the huge tax implications."

Appellants also submitted a declaration by Duane, who stated that he "attempted to communicate with Wells Fargo and became very frustrated by the horrible communication system which it employed, and the fact that they routinely lost our documentation, and constantly asked that same be resubmitted." He further stated that the problem "occurred over an extended period of time and was of great concern to me because the family home was at stake. I suffered a tremendous level of emotional distress, which effectively has been chronic and enduring for several years now and which upsets me constantly. In addition, I am also upset by the way Wells Fargo treated my wife Beverly. I feel their conduct was cruel and shocking." Those two statements are the entirety of his declaration.

Appellants have not raised a triable issue of material fact to support their fraud claim. Appellants have proffered no evidence at all to support the allegation that Wells Fargo fraudulently induced them to take out the loans in the first place.

Nor have appellants proffered sufficient evidence to defeat the summary judgment motion as to the alleged fraud pertaining to the loan modification. The evidence that respondents made a promise with no intent to perform and that appellants relied to their detriment thereon is vague and stands in sharp contrast to that offered in *Ragland*, *supra*, 209 Cal.App.4th 182.

After the plaintiff in *Ragland* lost her home through foreclosure, she sued, asserting causes of action for, inter alia, fraud and negligent misrepresentation. She submitted detailed evidence that her signature had been forged on about 15 documents and that several representatives from the bank had told her she needed to miss a loan payment in order to qualify for a loan modification. Her evidence in opposition to summary judgment set forth the specifics of numerous conversations during the month the loan payment was due, including names, dates, and exactly what was said by her and the bank representative during those conversations. (See *Ragland*, *supra*, 209 Cal.App.4th at pp. 187-189.) On appeal, the court reversed the grant of summary adjudication on the plaintiff's negligent misrepresentation, fraud, and two other causes of action, finding that she had raised triable issues of misrepresentation, reliance, and damages. (*Id.* at pp. 187, 196-200.)

Unlike *Ragland*, in which the plaintiff's evidence was highly detailed, appellants' evidence is extremely vague. Even though we are to construe the evidence in appellants' favor, in support of the first element that the defendant made a false representation, they proffered only the statement that, in late 2009, Calkins promised to modify the first loan if they settled the second. (Compare *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1060 ["To sufficiently plead the first requirement, that the defendant made a promise, the complaint must state '"*facts* which 'show how, when, where, to whom, and by what means the representations were tendered.'" [Citation.]' [Citation.]"].)

Appellants also have failed to raise a triable issue as to damages. Unlike *Ragland*, in which the plaintiff lost her home through foreclosure and testified in her deposition that she could have made the payment as of the date of the foreclosure sale, appellants never alleged that they lost their home. Although the complaint alleged that the foreclosure sale was scheduled for May 13, 2010, apparently the foreclosure did not take place because the record indicates that appellants were still in their home at the time of the summary judgment hearing on September 21, 2011.

The only evidence of damages is Beverly's statement that there were "tax implications of over $480,000," but she does not state what those "implications" were or how they affected her and her husband. She also stated that they "had the option of not paying the second loan at all and allowing foreclosure without a deficiency judgment." Respondents submitted evidence that they accepted appellants' $20,000 payment as full settlement of the $500,000 HELOC, an assertion that appellants do not challenge.

Beverly asserted that she repeatedly submitted documentation to Wells Fargo, supporting the allegation that they were "substantially inconvenienced and spent substantial time and effort relative to this process." However, there is no evidence of the documentation they allegedly spent so much time gathering. Moreover, the fact that it took time for them to submit the documentation required to determine if they were eligible for a loan modification certainly does not indicate that they suffered damages.

Appellants also asserted that they "spent enormous amounts of time fighting through Wells Fargo's telephone system and received conflicting and inconsistent statements from Wells Fargo's representatives," causing them "substantial upset and concern." Frustration with a difficult-to-navigate telephone system and inconsistent customer service is hardly a unique experience and is not sufficient to support a claim that they suffered damage from respondent's alleged fraud.

"'Whatever its measure in a given case, it is fundamental that "damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery."' [Citation.]" (*Wells Fargo Bank, N.A. v. FSI, Financial Solutions, Inc.* (2011) 196 Cal.App.4th 1559, 1573-1574.) Appellants' evidence of damages is too speculative and remote to support their claim. Beverly's vague reference to tax implications and her speculation that they had the option of allowing the foreclosure to go through do not raise a triable issue of fact as to whether they suffered damages from the forgiveness of the $500,000 loan in exchange for a payment of $20,000.

The trial court did not err in granting summary judgment on appellants' fraud claim.

B. Negligent Misrepresentation

Appellants' sole allegation in the complaint is that, in the alternative to fraud, they alleged that respondents' acts "were performed as a result of negligence."

"The elements of negligent misrepresentation are (1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. [Citations.]" (*Ragland*, *supra*, 209 Cal.App.4th at p. 196.)

Appellants' negligent misrepresentation claim fails for the same reason as their fraud claim – the lack of evidence sufficient to raise a triable issue as to whether they suffered damages.

C. Promissory Estoppel

"‘"The elements of a promissory estoppel claim are ‘(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.’"’ [Citation.]" (*Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 225 (*Aceves*).) Under promissory estoppel, "‘a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement. [Citations.]’ [Citation.]" (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672, fn. 1.) "‘[A] promise is an indispensable element of the doctrine of promissory estoppel. The cases are uniform in holding that this doctrine cannot be invoked and must be held inapplicable in the absence of a showing that a promise had been made upon which the complaining party relied to his prejudice . . . .' [Citation.] The promise must, in addition, be 'clear and unambiguous in its terms.' [Citation.] 'Estoppel cannot be established from . . . preliminary discussions and negotiations.' [Citation.]" (*Garcia*, *supra*, 183 Cal.App.4th at p. 1044.)

Appellants rely on *Garcia* to argue that the trial court erred in granting summary judgment in favor of respondents on their promissory estoppel cause of action. In *Garcia*, the plaintiffs contacted their lender to ask for a postponement of a foreclosure sale while they obtained funds to cure their default by refinancing other property they owned. The lender agreed to postpone the foreclosure. Before the deadline, the plaintiffs asked the lender for another extension in the event the new loan on their other property did not close in time. The lender's representative reassured them that the foreclosure would not occur without his approval and agreed to extend the deadline if they needed more time. The new loan took longer than expected, so the plaintiffs left messages for the representative to let him know. The foreclosure took place on the original date, unbeknownst to the plaintiffs, who went ahead with the refinancing of their other property. When they contacted the representative, he stated that there had been a mistake and the foreclosure should not have occurred.

On appeal, this court reversed the trial court's summary adjudication of the plaintiffs' promissory estoppel claim. (*Garcia*, *supra*, 183 Cal.App.4th at p. 1046.) Although "[a]s a general rule, a gratuitous oral promise to postpone a foreclosure sale or to allow a borrower to delay monthly mortgage payments is unenforceable," we held that the plaintiffs' "actions in procuring a high cost, high interest loan by using other property they owned as security were sufficient to support detrimental reliance" for their promissory estoppel claim. (*Id.* at pp. 1039, 1041.)

Appellants also rely on *Aceves*, which similarly concluded the plaintiff had stated a claim for promissory estoppel. (*Aceves*, *supra*, 192 Cal.App.4th at p. 225.) The plaintiff in *Aceves* filed for chapter 7 bankruptcy protection after she was unable to make her loan payments. The bank promised to work with her on a loan reinstatement and modification if she would forgo further bankruptcy proceedings. In reliance on that promise, the plaintiff did not convert her bankruptcy case to a chapter 13 proceeding or oppose the bank's motion to lift the bankruptcy stay. The bank foreclosed on the property after the bankruptcy court lifted the stay. On appeal, the court reversed the order sustaining the bank's demurrer to the promissory estoppel claim. (*Id.* at pp. 225-231.) The court found a clear and unambiguous promise by the bank to negotiate a loan modification and reasonable reliance by the plaintiff on that promise. (*Id.* at pp. 226-227.) The court also found detriment, discussing the protections offered by bankruptcy and noting that chapter 13 bankruptcy's "'greatest significance for debtors is its use as a weapon to avoid foreclosure on their homes.'" (*Id.* at p. 228.)

Garcia and *Aceves* do not help appellants. In both cases, the plaintiffs proffered evidence of promises that were clear and unambiguous, satisfying the first element. Appellants have submitted no such evidence here.

Second, the plaintiffs in *Garcia* and *Aceves* both took actions to their detriment in reliance on the lenders' promises. The *Garcia* plaintiffs procured a high cost, high interest loan using their other property as security in exchange for the promise not to foreclose. The plaintiff in *Aceves* gave up her rights in bankruptcy in exchange for the bank's promise to negotiate a loan modification. Here, appellants, who were $32,003.94 in arrears, paid $20,000 in full settlement of the $500,000 second loan in exchange for an alleged promise to modify their first loan.

Moreover, the plaintiffs in *Garcia* and *Aceves* proffered evidence that they were injured by their reliance, the fourth element of promissory estoppel. In both cases, the plaintiffs' homes were foreclosed upon. Here, Wells Fargo did not foreclose, but accepted $20,000 to settle the $500,000 HELOC. Wells Fargo did not modify the first loan, but it had no obligation to do so. It is not clear here what conduct appellants assert respondents are estopped from doing – accepting the $20,000 payment in full settlement of the $500,000 loan? Appellants assert that they had the option of allowing the foreclosure to go through, so are they asserting respondents are estopped from *not* foreclosing on their home? The evidence does not raise a triable issue that appellants were injured by Wells Fargo's conduct in accepting the $20,000 payment and not foreclosing on appellants' home.

As discussed above, appellants' only evidence submitted in opposition to summary judgment was that there were unexplained adverse tax consequences, and they were inconvenienced because of the time and effort expended in submitting documentation to qualify for the loan modification. Appellants have submitted no evidence that they were injured by their reliance on respondents' alleged promise to modify the first loan.

D. Intentional Infliction of Emotional Distress

The intentional infliction of emotional distress cause of action in the complaint repeated the allegations set forth above. These include the allegations that respondents refused to provide requested documentation; failed to give them notice that the foreclosure was withdrawn; "failed to take any steps to rectify the issues they have intentionally created and are continuing to breach the contract and engage in the highest level of institutional fraud imaginable"; refused to provide them with documentation that the foreclosure was valid; "repeatedly lied"; "forced" them to file the instant lawsuit; and "[v]arious other acts purposefully designed to upset and oppress [them]." Appellants alleged that each of these acts "upset [them] greatly."

"'"[T]o state a cause of action for intentional infliction of emotional distress a plaintiff must show: (1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." [Citation.] "Conduct, to be '"outrageous"' must be so extreme as to exceed all bounds of that usually tolerated in a civilized society."' [Citations.]" (*Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1108 (*Johnson*).)

"Although 'emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry' [citation], to make out a claim, the plaintiff must prove that emotional distress was *severe* and not trivial or transient. [Citation.] [¶] The California Supreme Court has set a 'high bar' for what can constitute severe distress. [Citation.] 'Severe emotional distress means "'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'" [Citations.]' [Citations.]" (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1376.)

The trial court did not err in granting summary judgment in favor of respondents on appellants' intentional infliction of emotional distress claim. Appellants have submitted no evidence that would raise a triable issue of fact as to whether respondents engaged in conduct "'"so extreme as to exceed all bounds of that usually tolerated in a civilized society."'" (*Johnson*, *supra*, 204 Cal.App.4th at p. 1108.) Contrary to the allegations in the complaint, the record contains documentation that respondents followed the proper procedures in commencing foreclosure proceedings and provided appellants with such documentation.

Appellants also have submitted no evidence that respondents acted with the "'"intention of causing or reckless disregard of the probability of causing emotional distress."'" (*Johnson*, *supra*, 204 Cal.App.4th at p. 1108.) Nor have they proffered any evidence to suggest that they suffered severe or extreme emotional distress. Beverly generally asserted in her declaration that she "suffered a tremendous level of emotional distress, which effectively has been chronic and enduring for several years now and which upsets me constantly." This vague, conclusory statement is not sufficient to create a triable issue of fact to support their intentional infliction of emotional distress claim. The trial court did not err in granting summary judgment in favor of respondents on appellants' intentional infliction of emotional distress claim.

D. Declaratory Relief

The trial court ordered judgment entered in respondents' favor on appellants' declaratory relief claim because it was based on "the other defective causes of action." "The court may properly grant summary adjudication of a claim for declaratory relief. [Citation.] '[D]eclaratory relief does not lie in a case in which a complaint makes no case on the merits and would merely produce a useless trial. [Citation.]' [Citation.]" (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1156.) The trial court did not err in granting summary judgment.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.