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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

SUSAN ANGELL, Plaintiff and Appellant, v. ONEWEST BANK, etc., Defendants and Respondents.	B285563 (Los Angeles County Super. Ct. No. NC 060026)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ross Klein, Judge. Affirmed in part and reversed in part.

LA Superlawyers, William W. Bloch for Plaintiff and Appellant.

Dykema Gossett, J. Kevin Snyder, Lukas Sonicki for Defendants and Respondents.

Susan Angell appeals from a judgment on her complaint asserting tort and contract claims arising from the conduct of defendant OneWest Bank, the lender on plaintiff's condominium, in providing false and inflated payoff demands that caused a pending sale of the unit to fall apart. After the trial court sustained demurrers to plaintiff's tort claims, she voluntarily dismissed her contract claims and this appeal followed. We affirm in part and reverse in part.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

1. Plaintiff's Real Property Loan and Chapter 11 Proceedings Modifying Her Loan.

Susan Angell's (Plaintiff) operative second amended complaint alleged that plaintiff owned a condominium located in Long Beach, California. Plaintiff purchased the property in May 2006 with a loan from First Federal, defendant's predecessor-in-interest. The principal amount of the loan was $487,987, with a variable interest rate starting at 7.345 percent, and a monthly payment of $1,292.42. The note was secured by a deed of trust.

In November 2010, plaintiff began to experience financial difficulties and was unable to make payments on the note. In March 2011, defendant recorded a notice of default. After plaintiff's failure to cure the default, defendant filed a notice of trustee's sale with a sale date of July 7, 2011. At the time, the value of the property was below the value of the note.

On June 20, 2011, plaintiff filed for Chapter 11 bankruptcy protection. Defendant's claim filed in the bankruptcy proceeding asserted that the value of the note was $589,415.10. In January

[1] Sections 1 and 2 of our factual recitation reflect the allegations of plaintiff's second amended complaint.

2012, defendant and plaintiff entered into a stipulation that restructured the terms of the note. The amount of the loan was reduced to $300,000 and the interest rate was fixed at 5.25 percent. The new monthly payment, which would fully amortize the amounts due under the note, commenced in February 2012 at $1,656.61. Plaintiff alleges that she has made all payments on the note since that time.

On November 1, 2012, the bankruptcy court confirmed plaintiff's chapter 11 reorganization plan, including the modification of the terms of the note. Shortly thereafter, the bankruptcy court issued its final decree.

2. Plaintiff Reopens the Bankruptcy Case and Obtains Sanctions.

In May 2013, plaintiff entered into an agreement to sell the property to a third party for $402,000. An escrow was opened, and the escrow sought a payoff demand from defendant. Defendant sent a payoff demand of $609,804.59, which plaintiff asserted was inflated. Over the next five months, plaintiff sought an accurate payoff demand that reflected the new terms of the note. On separate occasions during the period from July 2013 to November 2013, defendant provided six different payoff figures ranging from $295,670.44 to $611,275.70.

Although plaintiff continued to make all payments required under the terms of the restructured loan, on January 9, 2014, defendant continued to insist plaintiff was in default and recorded a notice of sale, setting a trustee's sale of the property for February 3, 2014, claiming that $576,868.59 was owed on the note. As a result, plaintiff was unable to close escrow and had to cancel the sale of the property.

In January 2014, plaintiff reopened her chapter 11 proceedings by filing a motion for sanctions. The motion asserted that the proper mechanism for enforcing the terms of a confirmed plan was a motion for contempt. Plaintiff principally sought injunctive relief enjoining the sale of the property, and also sought damages "for [defendant's] actions" and attorneys' fees. The bankruptcy court required defendant to rescind the notice of sale and provide an accurate payoff figure, which, as of September 2014, was less than $280,000. Further, the bankruptcy court sanctioned defendant $15,000. Defendant paid the sanctions on August 26, 2014.

Nonetheless, on September 14, 2014, defendant provided a statement to plaintiff that asserted plaintiff owed a "deferred principal balance reduction of $269,333.10, and had a total unpaid principal balance of $556,346.82" that would be due upon the sale of the home. Defendant also asserted a new monthly payment of $3,317.00 and that the loan interest rate was adjustable. Although plaintiff has made numerous demands upon defendant to correct the erroneous loan balance figures, it has failed and refused to do so.

3. Plaintiff Commences This Action.

(a) Complaint and First Amended Complaint.

On September 18, 2015, plaintiff commenced this action. Immediately thereafter, on September 22, 2015, plaintiff filed a first amended complaint stating claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) intentional misrepresentation, (5) negligent misrepresentation, (6) conversion, (7) intentional

infliction of emotional distress, (8) accounting, (9) declaratory relief, and (10) unfair competition.

(b) Demurrer to First Amended Complaint.

Defendant demurred, asserting that plaintiff's claims were barred by issue preclusion because they could have been litigated in the bankruptcy court sanction proceedings. Further, defendant argued on the merits principally that plaintiff's causes of action failed to state a claim because she could not establish it had breached any of the terms of the stipulation; it did not owe her a fiduciary duty; it did not exercise dominion and control over her property; and it did not engage in any unfair business practices or profit from its conduct in sending inaccurate payoff demands.

In opposition, plaintiff asserted that her claims were not barred by issue preclusion because there was no evidence the bankruptcy court had jurisdiction to hear her state law claims. On the merits, she asserted defendant breached the contract by continuing to demand monies that were not due; defendant owed a duty to present accurate payoff figures; and defendant's conduct, which blocked the sale of her property, was extreme and outrageous, and constituted both a conversion and an unlawful business practice. Plaintiff agreed to dismiss her breach of fiduciary duty claim without prejudice.

In ruling on the demurrer, the trial court held that issue preclusion applied to plaintiff's claims to the extent they were based on facts that occurred before her January 2014 contempt proceedings in the bankruptcy court. The trial court observed that "there is no dispute that the [issues] here are identical to those in the prior action [and] the decision in the former proceeding is final and on the merits."

With respect to the merits of plaintiff's claims, the trial court found plaintiff had pleaded breach of contract and the implied covenant of good faith and fair dealing by alleging defendant had demanded more than was due under the revised note of $300,000. However, the court found that plaintiff's tort claims for intentional and negligent misrepresentation failed because plaintiff did not rely on defendant's false payoff statements; plaintiff's claim for conversion failed because she did not allege that defendant assumed control of any of her property; plaintiff's intentional infliction of emotional distress claim failed because the bank's conduct in providing false information did not exceed the bounds of decency; and her claim for accounting failed because there was no fiduciary relationship. Lastly, the court held plaintiff had stated a claim for declaratory relief.

The trial court sustained defendant's demurrer to plaintiff's claims for intentional infliction of emotional distress and accounting without leave to amend. With respect to the other claims, plaintiff was given leave to amend.

(c) Second Amended Complaint.

Plaintiff's second amended complaint alleged claims for (1) breach of written contract, (2) breach of the implied covenant of good faith and fair dealing, (3) intentional interference with contract, (4) intentional interference with economic advantage, (5) negligent interference with prospective economic advantage, (6) declaratory relief, and (7) unfair competition. Plaintiff's new claims were based upon her assertion that after September 2014, defendant had continued to make improper payoff demands and such improper demands impeded her ability to sell the property.

(d) Demurrer to Second Amended Complaint.

Defendant demurred to plaintiff's claims for intentional interference and unfair competition on the grounds these claims were based on conduct that predated the bankruptcy court contempt proceedings. Further, her intentional interference with prospective economic advantage and negligent interference claims failed because she failed to allege a relationship with a third party; her unfair competition claim failed because she failed to allege whether defendant's conduct was fraudulent, unfair, or unlawful; and, in any event, her claim failed on all three prongs. Defendant requested judicial notice of the sanctions motion plaintiff made in the bankruptcy court. The trial court took judicial notice that the motion was filed, but did not take notice of the truth of its contents.

Defendant also moved to strike portions of plaintiff's second amended complaint that were in contravention of the trial court's ruling on the demurrer to the first amended complaint, namely, allegations of fact occurring before January 2014. Further, defendant argued plaintiff's new and additional claims should be stricken because she did not seek leave of court to assert such claims.

Plaintiff opposed the demurrer, asserting that: the filing of her sanctions motion did not, without more, vest the bankruptcy court with jurisdiction to hear her other disputes; she alleged defendant knew its action would interfere with her contract, and that she was in an economic relationship with a third party; and her unfair competition claims sufficiently pleaded that defendant's conduct constituted unlawful, unfair or fraudulent activity.

She also opposed the motion to strike, asserting that her new causes of action did not rely on facts predating 2014, and that there was no "partial collateral estoppel" such that allegations cannot be barred on a piecemeal basis.

4. Trial Court Sustains the Demurrer Without Leave to Amend to Plaintiff's Tort Claims; Plaintiff Dismisses Her Contract Claims With Prejudice.

The trial court observed that its ruling on defendant's demurrer to the first amended complaint determined that claim preclusion barred plaintiff "from asserting claims arising prior to and embraced by the contempt motion." The trial court sustained defendant's demurrer without leave to amend to: plaintiff's claim for intentional interference with contract because plaintiff had not pleaded an intent to disrupt the contract; plaintiff's claims for intentional and negligent interference with economic advantage because plaintiff had failed to allege a relationship with more than a prospective third party; and the unfair business practices claim because plaintiff's accounting claim had been dismissed.[2] The trial court denied defendant's motion to strike because the facts plaintiff alleged that predated the bankruptcy contempt

[2] The trial court noted defendant's objections to plaintiff's tort theories (intentional interference with contract, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, and unfair competition) on the grounds plaintiff did not seek leave of court to assert these new theories. "Although [defendant is] technically correct, the Court would have allowed the filing if it had been requested. Judicial economy dictates that the Court address these new theories on the merits rather than striking the Causes of Action and then ruling on a motion to amend."

hearing provided background for plaintiff's claims. Defendant was ordered to answer the remaining causes of action within 20 days.

On July 24, 2017, plaintiff dismissed, with prejudice, her remaining claims based on contract theories (breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief), for purposes of expediting an appeal.

DISCUSSION

Plaintiff argues that issue preclusion does not bar her claims because there was no evidence she had an opportunity to present her case in bankruptcy court; second, there was no evidence that the bankruptcy court had jurisdiction to award damages in connection with the bankruptcy court motion; and third, the trial court had no jurisdiction to bifurcate her claims into pre- and post-January 2014 conduct. Defendant contends that as a threshold matter, plaintiff's voluntary dismissal of her breach of contract claims is not reviewable on appeal, and in any event, the demurrer to her second amended complaint was properly sustained.

I. REVIEWABILITY OF DISMISSED CLAIMS.

Ordinarily, a voluntary dismissal on the plaintiff's request is a ministerial act that does not give rise to the right to an appealable judgment. (*Austin v. Valverde* (2012) 211 Cal.App.4th 546, 550–551; *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 975.) However an appeal may be taken after a voluntary dismissal with prejudice after an adverse court ruling, if the dismissal is made solely for the purpose of expediting an appeal. (*Flowers v. Prasad* (2015) 238 Cal.App.4th

930, 936, & fn. 3; *Goldbaum v. University of California* (2011) 191 Cal.App.4th 703, 708; cf. *Gutkin, supra,* 101 Cal.App.4th at p. 975 [dismissal of complaint without prejudice did not have legal effect of final judgment and could not serve to expedite appeal].) Such a dismissal has the "the legal effect of a final, appealable judgment." (*Goldbaum, supra*, 191 Cal.App.4th at p. 708.) Here, plaintiff unequivocally dismissed her entire action with prejudice for purposes of expediting an appeal.

II. DEFENDANT FAILS TO SHOW THAT CLAIM OR ISSUE PRECLUSION APPLIES TO PLAINTIFF'S STATE LAW CLAIMS.

The trial court alternatively based its ruling on claim preclusion (first amended complaint) and issue preclusion (second amended complaint). As recently explained by our Supreme Court, both issue preclusion (collateral estoppel) and claim preclusion (res judicata) operate to prohibit relitigation of issues and claims. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) Claim preclusion bars claims that were, or should have been, advanced in a prior suit involving the same parties. The doctrine has three requirements: (1) the same cause of action, (2) between the same parties, (3) after a final judgment on the merits in the prior action. (*Ibid.*) Where two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right. (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 558.) However, the same wrongful conduct may result in the violation of different primary rights. (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 342.)

Issue preclusion prohibits the relitigation of issues argued and decided in a prior case, even where the second suit raises different causes of action. However, unlike claim preclusion, issue preclusion bars issues, not entire causes of action. Further, issue preclusion can be raised as a bar in a subsequent action by a person who was not a party or privy to the first action. (*DKN Holdings LLC v. Faerber*, *supra*, 61 Cal.4th 813, 824.) Issue preclusion will apply (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit (4) asserted against one who was a party in the first suit or in privity with that party. (*Id.* at pp. 824–825.) Notably, issue preclusion applies to issues that were actually raised, while claim preclusion can encompass claims that could have been raised.

Plaintiff contends, without citation to authority, that the Bankruptcy Court did not have jurisdiction to adjudicate her state law claims. We need not address the issue, however, because defendant has not met its burden of showing that claim or issue preclusion was proper. The party asserting issue or claim preclusion has the burden of establishing the requisite elements. (*Patel v. Crown Diamonds, Inc.* (2016) 247 Cal.App.4th 29, 40 (*Patel*).)

Here, the burden is on defendant to establish that plaintiff should have brought her claims in the bankruptcy sanction proceedings and that such claims would be within the bankruptcy court's jurisdiction. In *Patel, supra,* 247 Cal.App.4th 29, the court was similarly confronted with an assertion of claim preclusion based upon a prior bankruptcy court proceeding. There, although the defendants produced the pleadings from the bankruptcy court and the bankruptcy court's rulings dismissing them, they failed to introduce the motions challenging the

pleadings. As a result, the trial court in *Patel* was unable to discern the basis for the motions sufficient to apply collateral estoppel. "'[A] primary factor in determining whether to give collateral estoppel effect to a prior final judgment is whether the record in the former proceeding adequately reflects the issues actually litigated and decided in that proceeding.' [Citation.]" (*Patel, supra,* 247 Cal.App.4th at p. 40.)

The defendant here has likewise provided an inadequate record and insufficient argument for us to conclude that plaintiff's claims are barred by issue or claim preclusion. Aside from plaintiff's motion for sanctions in the bankruptcy court, which the trial court judicially noticed, the record contains no order from the bankruptcy court indicating the scope of its ruling, and no transcript of the proceedings from which we can determine the matters ruled on and decided. In short, there is no way to tell from this record what the Bankruptcy Court adjudicated. Defendant has therefore failed to establish that issue or claim preclusion bars plaintiff's claims.

III. MERITS.

A. Standard of Review.

We independently review the trial court's ruling on a demurrer and determine de novo whether the second amended complaint stated facts sufficient to allege a cause of action. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100.) We assume the truth of the facts pleaded, reasonable inferences from those facts, and matters that may be judicially noticed. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20.) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he [or she] describes the

defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213.) We determine whether the plaintiff has shown how the complaint may be amended and that such amendment will change the legal effect of the pleading. (*Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 726.)

B. Plaintiff's Tort Causes of Action State Claims for Relief.

Here, because we conclude there was no judicially noticeable basis for determining that plaintiff's tort and contract claims were adjudicated in the Bankruptcy Court, we hold that claim or issue preclusion do not apply, and we will consider all facts pleaded and, based thereon, determine whether plaintiff has stated claims for relief.

1. Intentional Interference with Contract.

Under California law, a stranger to a contract may be liable for interfering with the performance of a contract. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 513–514.) The elements of the cause of action are (1) the existence of a valid contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) the defendant's acts designed to induce a breach of that contract; (4) actual breach or disruption of that contract; and (5) resulting damage. (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148; *Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 997.)

Here, defendant disputed that plaintiff had pleaded facts showing that it actually intended to interfere with the pending sale. We disagree. Plaintiff has alleged that defendant knew of the correct loan balance on plaintiff's loan and knew of the

pending sale, yet gave fluctuating and inaccurate payoff amounts contrary to the terms of the note, acting deliberately despite knowledge of plaintiff's pending sale. As a result of these false payoff amounts, the pending sale was cancelled, causing plaintiff damages.

Furthermore, plaintiff alleged that defendant deliberately provided false payoff information. Taken as a whole, these allegations are sufficient.

2. Intentional Interference with Prospective Business Advantage.

Claims for contract interference and business interference are separate but related torts. The elements of the two claims are substantially the same, but a plaintiff alleging business interference must also show that the defendant's action "was wrongful 'by some measure beyond the fact of the interference itself.' [Fn. omitted.] [Citation.]" (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393.) As a general rule, this wrongfulness element is not required in a contract interference claim because contracts are entitled to greater protection from interference. (*Popescu v. Apple Inc.* (2016) 1 Cal.App.5th 39, 44.)

Here, defendant contends that plaintiff failed to allege a specific third party with whom she had a contractual relationship, and as a consequence, she could not allege the remaining elements of the claim. We disagree. Here, the complaint alleges that in 2013 plaintiff entered into an agreement to sell the property to a third-party buyer, defendant knew about the agreement (it responded to plaintiff's request for a payoff demand), and that defendant's inconsistent and inflated payoff demands caused the sale to fall apart. These allegations

are sufficient to show that plaintiff had an actual buyer and that the defendant knew that plaintiff had a buyer for her property.

3. Negligent Interference with Prospective Business Advantage.

The tort of negligent interference with prospective business advantage is established where the plaintiff demonstrates (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if defendant did not act with due care its actions would interfere with the plaintiff's relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was interfered with or disrupted, and the plaintiff lost in whole or in part the economic benefits or advantage reasonable expected from the relationship. (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786.)

Here, defendant argues that plaintiff did not plead any relationship with a third party or any wrongful conduct on defendant's part. On the contrary, plaintiff pleaded, directly or inferentially, that defendant had a duty to provide accurate payoff information,[3] knew of plaintiff's pending sale, and defendant breached that duty by failing to provide accurate information regarding the payoff amount on her loan. (See *Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1080 [bank's

[3] See Civil Code section 2943, subdivision (c), which provides that the beneficiary is required to prepare a payoff demand statement.

failure to give timely beneficiary statement that caused cancellation of property sale entitled planitff to instruction on theory of negligent interference with contract].)

4. Unfair Business Practices.

Business & Professions Code section 17200 prohibits unlawful, unfair and fraudulent business acts. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) The UCL embraces any conduct that can properly be called a business practice and that is at the same time forbidden by law. By so doing, it borrows violations of other laws and makes them independently actionable. (*Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1153.) A business practice may be "unfair" under the UCL even if it is not unlawful; it is enough if the conduct in question offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. (*Id.* at p. 1165.) Under the fraud prong, "[a] violation can be shown even if no one was actually deceived, relied on the fraudulent practice, or sustained any damage. Instead, it is only necessary to show that members of the public are likely to be deceived.' [Citations.]" (*Id.* at p. 1167.)

While the scope of conduct covered by the UCL is broad, its remedies are limited to injunctions and restitution. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179.)

Plaintiff contends the trial court improperly focused on the remedy sought and found that the SAC sought injunctive relief, "but not within the scope of the statute enjoining the practice [because] [p]laintiff believes she can seek an injunction compelling an accounting and to prevent interference with the

use and enjoyment of her property. Plaintiff has not brought an action for an accounting and the Court cannot order prior restraint." Defendant contends that plaintiff failed to specify which prong (unlawful, unfair, or fraudulent) under which she brought her claim, and in any event she did not allege an unfair act nor did she plead reliance, instead asserting she knew the payout amounts were false.

We disagree with defendant's analysis. Plaintiff here has pleaded that defendant's conduct in deliberately providing inflated and false loan payoff information and capriciously increasing the sums demanded constituted unfair acts under the UCL. In particular, plaintiff alleges that "[d]efendants have deliberately engaged in the aforementioned activity, all of which runs afoul under the Unfair Competition Law, as unfair actions. As to the refusal of defendants to timely provide Plaintiff accurate information as to her loan balance on the Note for the Property, such actions and omissions were both unfair and contrary to law." Further, that plaintiff knew the payoff amounts were false does not defeat her claim; rather, it supports it because the failure to give an accurate payoff amount constituted unfair conduct.

We reject defendant's arguments that plaintiff cannot allege a UCL claim because it did not receive any "ill-gotten gains" as a result of its inaccurate payoff demands. Aside from the fact that plaintiff's UCL claim is sufficient because she has alleged defendant's conduct was unfair, under the UCL, plaintiffs are limited to injunctive relief and restitution. (See *Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 393 [damages unavailable under UCL].) However, this limitation does not mean a plaintiff is required to seek restitution to recoup

ill-gotten gains or that the existence of such gains is an essential part of the cause of action.

Finally, to the extent plaintiff's prayer for relief seeks an accounting, or to enjoin defendant from interfering with her use of the property, such superfluous allegations do not detract from her right to seek injunctive relief to compel an accurate payoff demand.

C. Plaintiff's Additional Claims.

1. Plaintiff's Superseded Claims Are Reinstated.

Plaintiff's second amended complaint did not reallege the claims for an accounting and intentional infliction of emotional distress as to which demurrers were sustained in regard to the first amended complaint. She challenges those rulings now. While the general rule prohibits her from doing so (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1372), we will consider her challenges under the theory that it would be fruitless to require her to have repleaded those "dead" causes of action. (*National Union Fire Ins. Co. of Pittsburgh, PA. v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 45.)

(a) *Claim for An Accounting.*

A claim for an accounting may be brought to compel the defendant to account to the plaintiff for money or property (1) where a fiduciary relationship exists between the parties, or (2) where, even though no fiduciary relationship exists, the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable. (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 910.) The relationship between a lender and a borrower is not fiduciary in nature as a

matter of law (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1093, fn.1), and plaintiff has pleaded no facts indicating that the second ground for an accounting, complicated accounts, applies to the situation here, where the defendant refuses to correct in its books the proper amount due on her loan. As a result, the demurrer to this cause of action was properly sustained.

(b) *Intentional Infliction of Emotional Distress.*

The elements of a claim for intentional infliction of emotional distress are (1) extreme and outrageous conduct with the intent to cause, or with reckless disregard for the probability of causing, emotional distress; (2) the plaintiff suffered extreme or severe emotional distress; and (3) the defendant's extreme and outrageous conduct was the actual and proximate cause of the plaintiff's extreme or severe emotional distress. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) Outrageous conduct is conduct that is so extreme as to exceed all bounds of decency in a civilized community. (*Ibid.*) Generally, the bare conduct of a bank in instituting and consummating foreclosure proceedings will not support a claim of damages, and hence a claim of intentional infliction of emotional distress.

In some circumstances, a bank's conduct may support an intentional infliction of emotional distress cause of action. In *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, the plaintiff claimed she had applied for a fixed-rate loan, and the loan documents reflecting an adjustable mortgage were forged. (*Id.* at pp. 187–188.) Plaintiff nonetheless made the monthly payments called for by the loan, and was current on her payments, but sought an adjustment in her monthly payment due to rising interest rates. The lender agreed to work with her

to modify the loan, and told her not to make the next payment because "'the worst thing that's going to happen is you are going to have a late fee, we will get this done for you.'" (*Id.* at p. 188.) Ultimately, the lender told plaintiff her loan was "in legal" due to her fraud claims and the bank would not collect from her during this time. Plaintiff did not make her loan payment for that month. (*Ibid.*) Several weeks later, plaintiff received a delinquency notice from the bank, but the bank continued to tell her it could not accept loan payments from her during the investigation. (*Id.* at p. 189.)

Several months later, the bank instituted foreclosure proceedings. Plaintiff attempted to make loan payments, but the bank rejected them. (*Ragland v. U.S. Bank National Assn., supra,* 209 Cal.App.4th 182, 189–190.) Although plaintiff attempted to negotiate with the bank to modify her loan and bring it current, plaintiff's home was sold at foreclosure several months later. (*Id.* at pp. 190–191.)

Plaintiff's complaint against the bank sought, among other things, damages for intentional infliction of emotional distress. (*Ragland, supra,* 209 Cal.App.4th at p. 203–204.) Although emotional distress claims are generally not awarded in cases of property damage, *Ragland* observed that recovery of such damages is permitted where there is a preexisting relationship between the parties or an intentional tort. (*Id.* at p. 204.) *Ragland* rejected the bank's argument that it proceeded with a lawful foreclosure and thus that its conduct was not outrageous. Addressing the alleged illegality of the foreclosure as the basis for intentional infliction of emotional distress damages, *Ragland* observed "[t]his argument assumes [the lender] had the right to foreclose, an issue at the heart of the case. . . . Ragland's

treatment by [the lender], if proven, . . . was so extreme as to exceed all bounds of decency in our society." (*Id.* at p. 205.)

Plaintiff cites *Symonds v. Mercury Savings & Loan Assn.* (1990) 225 Cal.App.3d 1458, where the elderly plaintiff deposited a check into her account at the defendant bank and was told the check had cleared, but the bank told her six months later that the check had not cleared and placed a hold on the plaintiff's account. The bank informed plaintiff it would continue to dishonor checks unless she signed a promissory note for the amount previously credited to her for the check. Because of the freeze on her accounts, the plaintiff was required to obtain loans at high interest rates to meet her daily expenses. In addition, the branch manager of the bank repeatedly called the plaintiff to warn her that the bank would attach all of her accounts unless she signed the promissory note. Although the plaintiff hired an attorney, who instructed defendant to direct all further communications to the attorney, the bank continued to call the plaintiff every day until this action was filed. (*Id.* at p. 1462.)

Symonds, supra, 225 Cal.App.3d 1458 held that the plaintiff's complaint sufficiently alleged a claim for intentional infliction of emotional distress. "In determining whether the conduct is sufficiently outrageous or unreasonable to become actionable, it is not enough that the creditor's behavior is rude or insolent. [Citations.]. . . . [C]onduct may rise to the level of outrageous conduct where the creditor knows the debtor is susceptible to emotional distress because of her physical or mental condition. [Citation.] . . . [Defendant] knew appellant was elderly and the charge back placed her into a difficult financial situation. Further, [defendant] was told appellant's health had suffered because of the loss of this money yet [defendant]

allegedly continued to call [the plaintiff] every day to pressure her into signing a promissory note and threatening to attach her funds. . . . Finally, [defendant] continued to place these threatening calls even though [it] had been directed to speak only with appellant's attorney. Under these facts, a jury may reasonably find [defendant's] conduct was outrageous. [Citations.]" (*Id.* at p. 1469.)

Defendant's conduct alleged here, although troubling, does not rise to the level of extreme and outrageous conduct at issue in either *Ragland* or *Symonds.* Plaintiff's general factual allegations of defendant's conduct state that defendant repeatedly misstated the amount due on the loan, caused the cancellation of the sale of her home, and required her to reopen her bankruptcy proceedings in order to set the record straight on the balance of loan. These allegations do not amount to the wrongful foreclosure action taken in *Ragland,* or the persistent targeting and harassment of the plaintiff in *Symonds.* Further, in the seventh cause of action for intentional infliction of emotional distress (in her superseded first amended complaint), plaintiff does no more than make conclusory allegations in reference to her general allegations that defendant's conduct was "extreme and outrageous" and caused her "humiliation" and "anguish." These allegations are insufficient to state a claim for extreme and outrageous conduct beyond the bounds of decent society.

2. Plaintiff's Dismissed Contract Claims.

Defendant did not demur to plaintiff's three contract causes of action in its demurrer to the Second Amended Complaint. As a result, those dismissed claims (for breach of contract, breach of the implied covenant of good faith and fair dealing, and

declaratory relief) are revived by plaintiff's appeal. (See *Flowers v. Prashad, supra,* 238 Cal.App.4th at p. 944 [restoring dismissed cause of action].)

DISPOSITION

The order of the superior court is affirmed with respect to plaintiff's claims for accounting and intentional infliction of emotional distress, and reversed with regard to all of plaintiff's other claims. Plaintiff is to recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MICON, J.*

We concur:

MANELLA, P. J. COLLINS, J.

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