Filed 5/16/12 Lee v. JP Morgan Chase 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

KANG AE LEE, Plaintiff and Appellant, v. JP MORGAN CHASE BANK, N.A., et al., Defendants and Respondents.	B231624 (Los Angeles County Super. Ct. No. PC046357)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed in part and reversed in part.

Zshonette L. Reed for Plaintiff and Appellant.

AlvaradoSmith, John M. Sorich, S. Christopher Yoo and Katherine S. Agbayani for Defendants and Respondents.

Plaintiff Kang Ae Lee appeals from the judgment of dismissal following the trial court's order sustaining without leave to amend the demurrer filed by defendants JP Morgan Chase Bank, N.A. (Chase Bank), and Bank of America, N.A. (collectively respondents). We conclude that appellant sufficiently alleged negligent misrepresentation against Chase Bank and so reverse the judgment as to that claim. We affirm the judgment of dismissal as to the remaining claims.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Appellant purchased real property located at 11313 Dulcet Avenue, Northridge, California (the property) in August 2005. She obtained a $510,000 loan from Washington Mutual Bank, F.A. (Washington Mutual), which was secured by a deed of trust in favor of Washington Mutual that was recorded on August 19, 2005. Chase Bank subsequently acquired the loan when it became the successor in interest to Washington Mutual. On December 13, 2005, a second deed of trust was recorded regarding the property, securing a $34,000 loan to appellant from Wells Fargo Bank, N.A. The property is appellant's primary residence. As of May 2010, the amount of the mortgage exceeded the market value of the property.

In early 2008, appellant became unable to afford the mortgage payments. On December 15, 2008, California Reconveyance Co. recorded a Notice of Default, indicating that appellant was $12,739.44 in arrears.[2]

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[1] The facts are taken from the allegations of appellant's second amended complaint, which we accept as true. (*Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 222 (*Aceves*).)

[2] An Assignment of Deed of Trust also was recorded on that date.

In March 2009, the United States Department of the Treasury established the Home Affordable Modification Program (HAMP), whose purpose was "the modification of first lien mortgage loan obligations and the provision of loan modification and foreclosure prevention services." HAMP was created pursuant to the Emergency Economic Stabilization Act of 2008 as part of an effort to stabilize the housing market. Under HAMP, a loan servicer would enter into an agreement with the Federal National Mortgage Association (Fannie Mae) to postpone foreclosure activity on eligible loans, offer Trial Period Plans, and modify eligible loans if a borrower successfully completed the Trial Period Plan by making three consecutive monthly payments.

On March 24, 2009, Chase Bank entered into a HAMP contract, or Servicer Participation Agreement (agreement), with Fannie Mae. Copies of the HAMP contract, HAMP guidelines, and HAMP Supplemental Directives were attached to appellant's complaint. The contract required Chase Bank to perform services described in Service Schedules, a Financial Instrument, the HAMP guidelines, and the HAMP Supplemental Directives.

Pursuant to the HAMP guidelines, the Treasury Department would "partner with financial institutions to reduce homeowners' monthly mortgage payments." The Supplemental Directives require participating servicers, such as Chase Bank, "to validate the homeowner's eligibility for HAMP and capacity to pay" by collecting the required documents from the homeowner. "Based on the servicer's understanding of the homeowner's ability to pay, a servicer may place a homeowner on a forbearance plan pending its ability to execute a HAMP modification." The Supplemental Directives further provide that "[f]oreclosure actions . . . , including initiation of new foreclosure actions, must be postponed for all borrowers that meet the minimum HAMP eligibility criteria." The qualification

terms included that the home be an owner-occupied, single-family primary residence, and that the first lien loan have an unpaid principal balance equal to or less than $729,750 for a one-unit property.

Appellant satisfied the HAMP eligibility criteria, so she applied for a loan modification pursuant to HAMP on March 15, 2009, faxing the required documents to Chase Bank. Appellant's agent, Paul Cho, was in contact with Rita Khatchadourian, who identified herself as the negotiator assigned by Chase Bank to handle appellant's loan modification request. On April 15, 2009, Chase Bank recorded a Notice of Trustee's Sale, stating that the property would be sold on May 4, 2009. Between March 15 and May 28, 2009, Khatchadourian exchanged emails with Cho, confirming that Chase Bank had received the required documents and advising Cho that the trustee sale would be on hold pending the review of appellant's modification request. Khatchadourian told appellant her file was under review on eight separate dates between April 27 and May 28, 2009.

Nonetheless, on June 3, 2009, appellant discovered that Chase Bank had foreclosed on the property on the scheduled date of May 4, 2009. A Trustee's Deed Upon Sale in favor of Bank of America was executed and recorded on May 5, 2009. Cho called Chase Bank to ask why the sale had occurred despite Khatchadourian's assurances that it would not take place while the loan modification request was under review, but his repeated phone calls were not returned.

In late June 2009, appellant was served with a Summons and Complaint in Unlawful Detainer, and on July 31, 2009, Bank of America obtained a judgment for possession of the property. On August 25, 2009, appellant was locked out of the property, but she and her family were allowed to enter to reclaim their personal property.

In May 2010, appellant filed the second amended complaint, which is the operative pleading. Appellant purported to allege causes of action for breach of written contract and negligent misrepresentation against Chase Bank, and cancellation of deed and an injunction against Bank of America. The claims were supported by the allegations set forth above.

Respondents filed a demurrer and a request for judicial notice, asking the trial court to take notice of the two deeds of trust, the Assignment of Deed of Trust, the Notice of Default, the Notice of Trustee's Sale, and the Trustee's Deed Upon Sale. Respondents argued that appellant's breach of contract claim failed because she was not an intended third party beneficiary of the HAMP contract. They also argued that her negligent misrepresentation claim failed because Khatchadourian's alleged misrepresentation that the foreclosure would be postponed was an unenforceable oral agreement that lacked consideration.

At the hearing on the demurrer, appellant's counsel argued that appellant was an intended third party beneficiary to the HAMP agreement and that the agreement required the bank to modify loans for homeowners who met the HAMP criteria. She further argued that Khatchadourian's emails established that Khatchadourian had authority to speak on Chase Bank's behalf, and that Khatchadourian repeatedly told appellant she qualified for the loan modification. Appellant's counsel disagreed that the oral postponement was invalid for lack of consideration, arguing that HAMP required homeowners to perform certain duties, but did not require tender.

The trial court sustained the demurrer without leave to amend as to all the causes of action and dismissed the action with prejudice. The court reasoned that appellant was not an intended beneficiary of the agreement and that the lender was not required to modify the loan. As to the negligent misrepresentation claim, the

court reasoned that Khatchadourian did not have authority to agree to postpone the foreclosure, and, even if she did, this was an oral agreement, not a written agreement. The court also reasoned that, as to the cancellation of the deed, tender was required. Appellant timely appealed.

DISCUSSION

"On appeal from an order dismissing a complaint after the sustaining of a demurrer, we independently review the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. [Citations.] We give the complaint a reasonable interpretation, 'treat[ing] the demurrer as admitting all material facts properly pleaded,' but do not 'assume the truth of contentions, deductions or conclusions of law.' [Citation.] We liberally construe the pleading with a view to substantial justice between the parties. [Citations.]" (*Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1467.)

I. Breach of Contract

The HAMP agreement provides that it "shall be governed by and construed under Federal law and not the law of any state or locality, without reference to or application of the conflicts of law principles." Although appellant alleges that Chase Bank breached the HAMP contract, she is not a party to the contract between Chase Bank and Fannie Mae. Appellant accordingly must establish that she is an intended third party beneficiary of the contract. (*GECCMC 2005-C1 Plummer Street Office Ltd. Partnership v. JP Morgan Chase Bank, N.A.* (9th Cir. 2012) 671 F.3d 1027, 1033.) "Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary. [Citation.] 'Government contracts often

benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested.' [Citation.]" (*Klamath Water Users Protective Ass'n v. Patterson* (9th Cir. 2000) 204 F.3d 1206, 1211.)

"'California law permits third party beneficiaries to enforce the terms of a contract made for their benefit.' [Citation.] That authority is codified in Civil Code section 1559, which states: 'A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.' . . . [¶] Third parties claiming the right to performance under an agreement made by others are classified as either intended or incidental beneficiaries of the contract." (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1021-1022.) "'"'The fact that . . . the contract, if carried out to its terms, would inure to the third party's benefit is insufficient to entitle him or her to demand enforcement.'"' [Citation.] Rather, '"'"[i]t must appear to have been the intention of *the parties* to secure to him personally the benefit of its provisions."'"' [Citation.]" (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 51.)

Whether homeowners are intended third party beneficiaries of HAMP contracts has been addressed by numerous federal district courts, the majority of which have held that homeowners are not intended third party beneficiaries.[3] (See *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 559, fn. 4 [citing cases]; see also, e.g., *Picini v. Chase Home Finance LLC* (E.D.N.Y. 2012) __

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[3] "Although they are not binding, decisions of the lower federal courts are entitled to great weight on questions of federal law. [Citation.]" (*Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd.* (1997) 58 Cal.App.4th 200, 206.) In addition, "[u]npublished federal cases are not binding authority but they may be cited as persuasive. [Citations.]" (*Hall v. Goodwill Industries of Southern California* (2011) 193 Cal.App.4th 718, 727, fn. 2.)

F.Supp.2d __ [2012 U.S. Dist. Lexis 22502, at pp. *9-*11] (*Picini*); *Thomas v. JP Morgan Chase & Co.* (S.D.N.Y. 2011) 811 F.Supp.2d 781, 797 (*Thomas*); *Lucia v. Wells Fargo Bank, N.A.* (N.D. Cal. 2011) 798 F.Supp.2d 1059, 1070-1071; *Speleos v. BAC Home Loans Servicing, L.P.* (D. Mass. 2010) 755 F.Supp.2d 304, 310 (*Speleos*); *Tran v. Bank of America Corporation* (S.D. Cal. 2012) 2012 U.S. Dist. Lexis 32947, at pp. *4-*6; *Escobedo v. Countrywide Home Loans, Inc.* (S.D. Cal. 2009) 2009 U.S. Dist. Lexis 117017, at pp. *4-*7 (*Escobedo*). Contra *Reyes v. Saxon Mortgage Services, Inc.* (S.D. Cal. 2009) 2009 U.S. Dist. Lexis 25235, at pp. *5-*6.)

In concluding that homeowners are incidental rather than intended beneficiaries of HAMP agreements, courts have acknowledged that the HAMP program certainly is intended to benefit eligible homeowners. (*Picini, supra,* __ F.Supp.2d __, 2012 U.S. Dist. Lexis 22502, at p. *10 [stating that "'it is difficult to discern any substantial purpose other than to provide loan modification services to eligible borrowers'"]; *Speleos, supra,* 755 F.Supp.2d at p. 309 [quoting HAMP guidelines and a Fannie Mae announcement and concluding that "the HAMP program is clearly intended to benefit qualified borrowers"].)

Despite the stated intent of the HAMP program to aid eligible homeowners, courts have concluded that homeowners do not have enforceable rights under the HAMP agreement because affording them such rights would conflict with the express language of the agreement. (*Speleos, supra,* 755 F.Supp.2d at p. 310; *Albert v. Wells Fargo Bank, N.A.* (N.D. Cal. 2012) 2012 U.S. Dist. Lexis 51057, at p. *8.) Specifically, courts have relied on paragraph 11.E. of the HAMP agreement,[4] which states: "The Agreement shall inure to the benefit of and be

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[4] The agreement at issue here apparently is a standard form used by Fannie Mae with all servicers participating in HAMP.

binding upon the parties to the Agreement and their permitted successors-in-interest." (See, e.g., *Thomas*, *supra*, 811 F.Supp.2d at p. 797; *Grill v. BAC Home Loans Servicing LP* (E.D. Cal. 2011) 2011 U.S. Dist. Lexis 3771, at p. *16; *Hoffman v. Bank of America, N.A.* (N.D. Cal. 2010) 2010 U.S. Dist. Lexis 70455, at pp. *10-*11 (*Hoffman*); *Escobedo*, *supra*, 2009 U.S. Dist. Lexis 117017, at p. *6.)

In addition, courts have pointed out that HAMP agreements do not *require* lenders to modify eligible loans, but only to consider eligible loans. (See, e.g., *Escobedo*, *supra*, 2009 U.S. Dist. Lexis 117017, at pp. *6-*7; *Hoffman*, *supra*, 2010 U.S. Dist. Lexis 70455, at p. *10 [stating that "it would be unreasonable for a qualified borrower seeking a loan modification to rely on the HAMP servicer's agreement as granting him enforceable rights since the agreement does not actually require that the servicer modify all eligible loans"].)

We agree with the majority view that, although the purpose of the HAMP program is to benefit eligible borrowers, the HAMP agreement does not indicate an intent to grant such borrowers the right to enforce the agreement.[5] We therefore conclude that appellant is not an intended third party beneficiary of the HAMP contract and so cannot bring a claim against Chase Bank for breach of the contract. The trial court did not err in sustaining the demurrer as to appellant's breach of contract claim.

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[5] Appellant relies primarily on *County of Santa Clara v. Astra USA, Inc.* (9th Cir. 2009) 588 F.3d 1237, but that case was reversed by the United States Supreme Court in *Astra USA, Inc. v. Santa Clara County, California* (2011) 131 S.Ct. 1342.

II. Negligent Misrepresentation

The trial court sustained the demurrer to appellant's negligent misrepresentation claim on two grounds: first, that Khatchadourian was a "negotiator" and so did not have authority to postpone the foreclosure; second, if Khatchadourian did have authority, her assurance that the foreclosure would be postponed pending the review of appellant's loan modification request was only an oral agreement.

"The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. [Citation.]" (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.) "The tort of negligent misrepresentation does not require scienter or intent to defraud. [Citation.] It encompasses '[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true' (Civ. Code, § 1710, subd. 2), and '[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true' (Civ. Code, § 1572, subd. 2; see *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962 [describing elements of the tort])." (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173-174 (*Small*).)

Appellant's complaint contains allegations sufficient to state a cause of action for negligent misrepresentation. First, as to the misrepresentation of a past or existing material fact, the complaint alleges that Chase Bank, through Khatchadourian, fraudulently stated that the trustee sale would be postponed pending review of appellant's loan modification request and that her file was on review on eight dates in 2009: April 27, May 6, May 7, May 11, May 17, May 21,

May 26, and May 28. The allegation that Khatchadourian identified herself as the negotiator assigned to handle appellant's modification request is adequate to establish, for purposes of demurrer, that she had authority to speak for Chase. The complaint alleges that the representation that the trustee sale was postponed pending review of appellant's loan modification request was not true because the sale in fact was not postponed. Nor was it true that appellant's loan modification request was under review on May 6, 7, 11, 17, 21, 26, and 28, 2009, because the property already had been sold at the May 4 sale.

Second, the complaint alleges that Chase Bank had no reasonable ground to believe the trustee sale was postponed or that appellant's loan modification request was under review because the property was sold on May 4. Third, appellant alleges that Chase Bank made the misrepresentations with the intent to induce her to rely on them to take no action to stop the sale, such as by filing a Chapter 13 bankruptcy petition to save her home. (See *Aceves*, *supra*, 192 Cal.App.4th at p. 228 ["'Chapter 13's greatest significance for debtors is its use as a weapon to avoid foreclosure on their homes.'"].)

The complaint also sufficiently alleges the fourth element, justifiable reliance on the misrepresentations. Actual reliance on the alleged misrepresentations is an element of negligent misrepresentation. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1256.) "'"It is not . . . necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision."' [Citation.]" (*Ibid.*)

The complaint alleges that Khatchadourian identified herself as the negotiator assigned by Chase Bank to handle appellant's loan modification request. Khatchadourian also communicated to Cho that Chase Bank had received the documents it requested, that her loan modification request was under review, and that the trustee sale would be on hold pending the review. Because we accept these allegations as true (*Aceves, supra,* 192 Cal.App.4th at p. 222), it was justifiable for appellant to believe Khatchadourian had the authority to make the representation that the trustee sale would be postponed while Chase Bank reviewed her loan modification request.

The complaint also alleges actual reliance by stating that appellant was induced by the misrepresentations to take no steps to stop the foreclosure. Appellant alleges that, in reliance on Khatchadourian's assurances, she took no judicial action, such as filing a Chapter 13 bankruptcy petition, to stop the sale. Had she known the foreclosure was not being postponed, she could have filed a Chapter 13 bankruptcy petition to save her home. It was thus alleged that Khatchadourian's alleged misrepresentations were a substantial factor in influencing appellant's decision not to try to stop the sale.

Fifth, appellant alleges that she suffered damages as a result: the use and enjoyment of her home, humiliation from being locked out of her home, legal fees and costs of over $15,000, and other incidental expenses.

Respondents argue that an oral agreement to postpone a foreclosure sale is unenforceable for lack of consideration. Civil Code section 2924g addresses the conduct of trustee sales and provides, in pertinent part, that the trustee shall postpone the sale proceedings "[b]y mutual agreement, *whether oral or in writing,* of any trustor and any beneficiary or any mortgagor and any mortgagee." (Civ. Code, § 2924g, subd. (c)(1)(C), italics added.)

Although an agreement to modify the terms of a mortgage may be subject to the statute of frauds (see *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 547 (*Secrest*)), the California Supreme Court has held that "[f]orbearance – the decision not to exercise a right or power – is sufficient consideration to support a contract and to overcome the statute of frauds. [Citations.] It is also sufficient to fulfill the element of reliance necessary to sustain a cause of action for fraud or negligent misrepresentation." (*Small*, *supra*, 30 Cal.4th at p. 174.) Appellant's allegation that she decided not to exercise her right to file a Chapter 13 bankruptcy petition accordingly is sufficient to sustain her negligent misrepresentation cause of action.

Respondents rely on *Secrest*, in which the court held that an unsigned written forbearance agreement was unenforceable under the statute of frauds. (*Secrest*, *supra*, 167 Cal.App.4th at p. 547.) *Secrest* is distinguishable. In that case, the plaintiffs sought a declaration that a notice of default was invalid and an injunction to stop foreclosure proceedings on the basis of a proposed written forbearance agreement, which set forth specific terms, including a reinstatement amount, down payment, and monthly payments. The court held that the forbearance agreement was subject to the statute of frauds, reasoning that it modified the note and deed of trust by substituting a new monthly payment and altering the lender's ability to exercise its right to foreclose. (*Id.* at p. 553.)

Here, appellant is not attempting to enforce the terms of an oral agreement to postpone the trustee sale. Rather, her claim is that she relied to her detriment on the negligent misrepresentation that the sale would be postponed during the review of her loan modification request. (Compare *Aceves*, *supra*, 192 Cal.App.4th at pp. 230-231 [holding that a bank's oral promise to negotiate a loan modification was not unenforceable for lack of consideration]; *Garcia v. World Savings, FSB* (2010)

183 Cal.App.4th 1031, 1040, fn. 10 [rejecting the lender's argument that the statute of frauds and Civ. Code, § 1698 precluded enforcement of an alleged oral promise to postpone a foreclosure because "[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.]")

We conclude that appellant has adequately pleaded a claim for negligent misrepresentation against Chase Bank. (See *Aceves*, *supra*, 192 Cal.App.4th at pp. 225, 231 [holding that the plaintiff adequately stated claims for promissory estoppel and fraud based on her bank's promise to work with her on a loan reinstatement and modification if she would forgo further bankruptcy proceedings].) We therefore reverse the judgment of dismissal as to this claim.

III. Cancellation of Deed

"'"It is the general rule that courts have power to vacate a foreclosure sale where there has been fraud in the procurement of the foreclosure decree or where the sale has been improperly, unfairly or unlawfully conducted, or is tainted by fraud, or where there has been such a mistake that to allow it to stand would be inequitable to purchaser and parties."' [Citations.]" (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 103.)

Appellant states, however, that her cause of action for cancellation of the deed is not based in equity, but is based on breach of the HAMP contract. We already have held that appellant cannot bring a claim for breach of the HAMP contract because she is not an intended third party beneficiary of the contract. We therefore affirm the judgment of dismissal as to her cancellation of deed claim against Bank of America.

IV. Injunction

In appellant's fourth cause of action, she asks for an injunction but, as respondents point out, "[i]njunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted. [Citation.]" (*Shell Oil Co. v. Richter* (1942) 52 Cal.App.2d 164, 168; accord *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 618.)

DISPOSITION

The judgment on the order sustaining respondents' demurrer to the second amended complaint is reversed to the extent it dismisses appellant's negligent misrepresentation cause of action against Chase Bank. In all other respects the judgment is affirmed. Appellant is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J. SUZUKAWA, J.