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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

PAULETTE JOHANSEN, Plaintiff and Appellant, v. PHH MORTGAGE CORPORATION et al., Defendants and Respondents.	B283616 (Los Angeles County Super. Ct. No. BC608637)

APPEAL from judgments of the Superior Court of Los Angeles County, Michael Johnson, Judge, Joseph R. Kalin, Judge, and Alan S. Rosenfield, Judge. Affirmed in part, reversed in part and remanded.

James T. Ryan for Plaintiff and Appellant.

The Law Offices of Michelle Ghidotti, Stephen T. Hicklin and Shannon C. Williams for Defendants and Respondents PHH Mortgage Corporation and Wells Fargo Bank, N.A.

Barrett Daffin Frappier Treder & Weiss and Edward A. Treder, for Defendant and Respondent NDeX West, LLC.

Paulette Johansen defaulted on a home loan secured by a deed of trust on her property. Following a notice of foreclosure, her house was sold at a trustee's sale. Two weeks after the trustee's sale, but before the trustee's deed had been recorded, Johansen sued PHH Mortgage Corporation, Wells Fargo Bank, N.A.[1] and NDeX West, LLC, alleging the commencement of foreclosure proceedings was in violation of a loan modification agreement executed by the parties. The matter settled, and the lawsuit was dismissed with prejudice. Johansen remained in her home.

Two years later Johansen again sued PHH, Wells Fargo and NDeX, alleging they had breached the settlement agreement by failing to consider Johansen for a loan modification. Johansen also alleged statutory violations and wrongful foreclosure claims, seeking damages and/or cancellation of the trustee's deed. The trial court sustained without leave to amend the demurrer of PHH and Wells Fargo, granted NDeX's motion for judgment on the pleadings and dismissed the action with prejudice. We reverse the judgment against PHH and Wells Fargo and remand the matter to the trial court with directions to permit Johansen to file a second amended complaint against PHH and Wells Fargo only. We affirm the judgment against NDeX.

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[1] In prior litigation brought by Johansen, as well as the current case, Wells Fargo was sued in its capacity as trustee for the Lehman Mortgage Trust Mortgage Pass-Through Certificates, Series 2007-5 (the Lehman Mortgage Trust).

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Loan and Trustee's Sale*

In June 2006 Johansen executed a promissory note and deed of trust encumbering real property located at 3323 Stevens Street, Glendale, to obtain a home loan in the principal amount of $504,000. The deed of trust named Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary and First American Title as the trustee. The deed of trust was recorded with the Los Angeles County Recorder's Office on June 9, 2006. At some point prior to November 2009, NDeX was substituted as the trustee under the deed of trust.

On November 19, 2009 NDeX initiated nonjudicial foreclosure proceedings pursuant to Civil Code section 2923.5 et seq.[2] and issued and recorded a notice of default. On December 7, 2009 MERS assigned its rights in the deed of trust to PHH. On February 22, 2010 NDeX recorded a notice of trustee's sale. Three weeks later Johansen filed for bankruptcy protection under chapter 13 of the Bankruptcy Code (11 U.S.C. §§ 1301-1330), which automatically stayed the foreclosure proceedings.

On February 6, 2012, after PHH had obtained relief from the automatic bankruptcy stay, NDeX recorded another notice of trustee's sale. The property was sold on August 15, 2012 for $366,275 to the highest bidder at the trustee's sale. Johansen's first amended complaint alleges the purchaser at the trustee's sale was PHH. However, the settlement agreement attached to

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[2] Statutory references are to the Civil Code unless otherwise stated.

the first amended complaint states the purchaser was Wells Fargo as trustee for the Lehman Mortgage Trust.

2. *The First Lawsuit, the Assignment and the Settlement Agreement*

On August 28, 2012, before the trustee's deed upon sale had been recorded, Johansen sued PHH, Wells Fargo and NDeX for breach of contract, promissory estoppel, negligent and intentional misrepresentation and unfair business practices. Her claims were based on the allegation the foreclosure sale had been conducted in violation of a loan modification agreement entered by the parties.

On August 31, 2012 PHH, without Johansen's knowledge, allegedly executed an assignment of deed of trust assigning its rights in the deed of trust to Wells Fargo as trustee for the Lehman Mortgage Trust. The assignment was not recorded.

On February 24, 2014 Johansen, Wells Fargo in its capacity as trustee for the Lehman Mortgage Trust, PHH and NDeX settled the pending litigation. The settlement agreement, entitled "Settlement Agreement & General Release of All Claims," identified Johansen as the "record owner" of the subject property and stated the Lehman Mortgage Trust "holds a first priority Deed of Trust against the Property." PHH was identified as the loan servicer, and NDeX was identified as the entity "hired [by PHH] to progress a non-judicial foreclosure against the Property . . . ."

After reciting the events leading up to, and occurring since the filing of Johansen's lawsuit, the agreement stated its purpose was "to avoid the burden, expense, time, delay and uncertainty of continued litigation and to finally and forever resolve any and all claims, whether known or unknown, arising from the foregoing

events and occurrences . . . ." The agreement provided Johansen would immediately dismiss with prejudice the pending litigation against PHH, Wells Fargo and NDeX. The agreement further stated, "Johansen has recently submitted updated financial information for a loan modification review. PHH will review the package, determine if any additional information or documents are needed, and make a final decision on whether there are any viable loan modification offers that can be made according to investor guidelines and requirements." If a loan modification agreement could be reached, then "PHH and NDeX shall rescind the Foreclosure." If, on the other hand, "a permanent loan modification is not offered and accepted . . . then, Lehman Mortgage Trust, PHH and NDeX may immediately record a Trustee's Deed Upon Sale without further notice and initiate a post-sale eviction proceeding."

The agreement contained a general release, which stated, "As additional consideration for the covenants and promises contained herein, and except as otherwise provided herein, each undersigned party permanently releases and forever discharges every other undersigned party . . . from any and all rights, claims, demands, causes of action, liabilities and obligations of every kind and nature whatsoever, whether known or unknown, past or present, which each party possesses or may hereafter discover or acquire as a result of or in connection with or relating to the Property, the Loan, the Foreclosure, and the claims alleged in the Civil Action, including any and all unasserted claims . . . ." The release also included a waiver of the provisions of section 1542.[3] The release further stated it should not be

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[3] Section 1542 provides, "A general release does not extend to claims which the creditor does not know or suspect to exist in his

construed to apply to any claims arising under the agreement or any subsequent loan modification agreement.

After the settlement agreement was reached, Johansen dismissed her lawsuit with prejudice.

3. *Recording of the Trustee's Deed Upon Sale*

PHH did not offer a loan modification to Johansen after the settlement agreement. On December 24, 2015 the law firm Barrett Daffin Frappier Treder & Weiss LLP (Barrett Daffin), as the purported trustee, recorded with the Los Angeles County Recorder's Office a trustee's deed upon sale reflecting the August 15, 2012 foreclosure sale.[4] On January 7, 2016 a Notice of Rescission of Trustee's Deed Upon Sale was filed, stating, "NDeX West, L.L.C. as substituted trustee has been instructed to rescind said Trustee's Deed Upon Sale solely to correct an error in the name of the trustee." The same day, NDeX recorded a new trustee's deed upon sale, which listed NDeX as the trustee and Wells Fargo, as trustee for the Lehman Mortgage Trust, as the grantee. The trustee's deed stated Wells Fargo had been the foreclosing beneficiary and had purchased the property for $366,275 as the highest bidder at the foreclosure sale.

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or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

[4] Barrett Daffin represents NDeX on appeal, as it did in the trial court. The first amended complaint alleges NDeX "is owned and managed by Barrett Daffin . . . and/or one of its related affiliates."

4. *Johansen's Complaint and First Amended Complaint*

On January 29, 2016 Johansen sued PHH, Wells Fargo in its capacity as trustee for the Lehman Mortgage Trust and NDeX. On August 31, 2016 Johansen filed the operative first amended complaint alleging six causes of action: (1) breach of the settlement agreement; (2) breach of the implied covenant of good faith and fair dealing; (3) violation of section 2923.6; (4) wrongful foreclosure/cancellation of the trustee's deed (against Wells Fargo only); (5) wrongful foreclosure (tort) (against Wells Fargo only); and (6) violation of Business and Professions Code section 17200 et seq. Johansen alleged PHH, Wells Fargo and NDeX had breached the settlement agreement and the implied covenant of good faith by not considering her for a loan modification. She further alleged the recording of the trustee's deed without prior notice violated section 2923.6. As to the wrongful foreclosure claims, Johansen alleged the trustee's deed was void because the foreclosure sale and assignment were void. Thus, she averred, the trustee's deed must be cancelled pursuant to section 3412. In the alternative, Johansen alleged Wells Fargo was liable for tort damages.

5. *The Demurrer and Motion for Judgment on the Pleadings*

PHH and Wells Fargo demurred to the first amended complaint, arguing Johansen had failed to allege she made a credible tender of the full amount due under the note and failed to allege facts demonstrating an exception to the tender rule applied. They also argued the settlement agreement barred

Johansen from making certain claims and Johansen failed to allege facts sufficient to state a cause of action.[5]

The trial court sustained the demurrer without leave to amend. The court agreed Johansen had failed to allege she tendered the amount due on the note and had failed to allege facts sufficient to constitute an exception to the tender rule. The court also ruled the first amended complaint failed to state a legally cognizable claim.

After the trial court sustained the demurrer, NDeX moved for judgment on the pleadings. NDeX argued the release in the settlement agreement barred all claims related to the foreclosure and the assignment. NDeX also argued Johansen had failed to allege facts sufficient to state a claim for breach of contract, breach of the implied covenant or the alleged statutory violations. Finally, NDeX argued the dismissal of PHH and Wells Fargo required dismissal of the intertwined and identical claims against NDeX. The trial court granted the motion for judgment on the pleadings without leave to amend and dismissed the lawsuit with prejudice as to all parties.[6]

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[5] The record reflects that, in connection with their demurrer, PHH and Wells Fargo requested judicial notice of recorded documents and documents filed in Johansen's 2012 lawsuit. The trial court granted the request for judicial notice. The judicially noticed documents have not been included in the record on appeal.

[6] The record does not include an order from the trial court articulating its reasons for granting the motion.

DISCUSSION

1. *Standard of Review*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the trial court's ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action or discloses a complete defense. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100; *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) However, we are not required to accept the truth of the legal conclusions pleaded in the complaint. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1257.) We liberally construe the pleading with a view to substantial justice between the parties (Code Civ. Proc., § 452; *Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336, 1340; see *Schifando*, at p. 1081 [complaint must be read in context and given a reasonable interpretation]); but, "[u]nder the doctrine of truthful pleading, the courts 'will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed.'" (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400; see *Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 767 ["[w]hile the 'allegations [of a complaint] must be accepted as true for purposes of demurer,' the 'facts appearing in exhibits attached to

the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence'"]; *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83 ["[i]f the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits"].)

Although a general demurrer does not ordinarily reach affirmative defenses, it "will lie where the complaint 'has included allegations that *clearly* disclose some defense or bar to recovery.'" (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 183; accord, *Nolte v. Cedars-Sinai Medical Center* (2015) 236 Cal.App.4th 1401, 1406; *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 224.) "Thus, a demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense." (*Casterson,* at p. 183; accord, *Favila,* at p. 224.)

2. *The Causes of Action for Wrongful Foreclosure Are Barred by the Settlement Agreement and General Release*

Johansen alleges two wrongful foreclosure claims against Wells Fargo. One, characterized as in tort, seeks damages resulting from the sale. The other, as equitable, seeks cancellation of the trustee's deed. Both claims are barred.

To plead a common law tort claim for wrongful foreclosure, a plaintiff must allege "'(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused

from tendering.'" (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408.)

Johansen's equitable wrongful foreclosure claim seeks cancellation of a written instrument (the trustee's deed) pursuant to section 3412, which provides a "written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his [or her] application, be so adjudged and ordered to be delivered up or canceled." Thus, to plead a right to cancellation under this section, a plaintiff must allege the instrument is "void or voidable" and would cause "serious injury" if not cancelled. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 818-819.)

Johansen has articulated five theories supporting her allegations the foreclosure sale was illegal and/or the trustee's deed is void. First, Johansen argues the foreclosure sale violated the parties' March 2012 loan modification agreement, which was the subject of Johansen's 2012 lawsuit. Second, she argues Wells Fargo, which is listed as the beneficiary in the trustee's deed, would have had no authority to initiate the sale because it was not the beneficiary of the deed of trust at the time, PHH was.[7] Third, Johansen states the August 2012 assignment of the deed of trust from PHH to Wells Fargo, as trustee for the Lehman Mortgage Trust, was void because PHH had already sold the property at the foreclosure sale, thus extinguishing Johansen's obligation under the deed of trust. Fourth, she contends the assignment was void because the Lehman Mortgage Trust closed

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[7] This argument is contradicted by allegations elsewhere in the first amended complaint, which repeatedly state it was PHH, not Wells Fargo, that initiated the foreclosure sale.

in 2007 and could not accept a new loan in 2012. Finally, Johansen argues the assignment was void because it violated a temporary restraining order she had obtained in August 2012, which prohibited any sale, transfer or encumbrance of the property.

As PHH, Wells Fargo and NDeX correctly observe, all of these arguments are based on conduct that occurred before the parties' 2014 settlement agreement.[8] In that agreement Johansen specifically and unambiguously released "any and all rights, claims, demands causes of action, liabilities and obligations of every kind and nature whatsoever . . . in connection with or relating to the Property, the Loan, the Foreclosure, and the claims alleged in the Civil Action." Johansen's theories of liability based on the initiation and conduct of the foreclosure sale and the assignment from PHH to Wells Fargo in 2012 fall

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[8] PHH, Wells Fargo and NDeX characterize their argument as one of res judicata, arguing the settlement and general release of all claims resulted in a voluntary dismissal of the first lawsuit, which had a claim preclusive effect on any subsequent claims related to the foreclosure. While the voluntary dismissal of the first action may indeed preclude Johansen's wrongful foreclosure claims, it is impossible for us to determine whether the same primary right is implicated in this action without scrutiny of the complaint in the prior action, which has not been provided in the record on appeal. (See *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798-799 ["the relevant point for [res judicata] purposes is what plaintiff . . . *alleged* [in the first complaint], because that allegation indicates what primary right was adjudicated as a consequence of the dismissal with prejudice"].) Regardless, we need not reach the issue because the settlement agreement itself unambiguously evidences a release of Johansen's wrongful foreclosure claims.

squarely within this release. As such, Johansen's wrongful foreclosure claims are barred.

Although Johansen attempts to avoid this result by arguing her wrongful foreclosure claims "involve acts or omissions that took place *after* the First Lawsuit was dismissed," she fails to explain how claims relating to an August 2012 foreclosure sale could possibly be based on conduct occurring after the execution of the settlement agreement in February 2014.

To the extent Johansen is attempting to assert that recording the trustee's deed upon sale in 2016 gives rise to a wrongful foreclosure claim, this argument is unavailing. Not only was the recording of the trustee's deed explicitly contemplated by the settlement agreement, but also the foreclosure sale was final upon acceptance of the last and highest bid in 2012. (See § 2924h, subd. (c).) The completion of the sale constituted a final adjudication of the parties' obligations under the deed of trust. (See *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 927 ["[g]enerally speaking, the foreclosure sale extinguishes the borrower's debt; the lender may recover no deficiency"]; *Dreyfuss v. Union Bank of California* (2000) 24 Cal.4th 400, 411 ["properly conducted sale does not require judicial oversight and constitutes 'a final adjudication of the rights of the creditor and debtor'"].) The later recording of the trustee's deed upon sale is a formality intended to put subsequent purchasers on notice of the sale; it has no effect on the validity of the trustee's deed or the foreclosure sale. (See *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 441 ["[a]bsent defects in the foreclosure procedure itself, delivery of the trustee's deed following a foreclosure sale is 'merely a ministerial act'"].) Because recording of the trustee's deed has no effect on the

conduct or validity of the foreclosure sale, it alone cannot be the basis for an argument the sale was conducted illegally, nor can the act of recording itself cause the document to be void. As such, the 2016 recording does not support a wrongful foreclosure claim.

3. *The First Amended Complaint Did Not Allege Facts Sufficient To State a Claim for Violation of Section 2923.6*

The California Homeowner Bill of Rights (§ 2920.5 et seq.) (HBOR),[9] effective January 1, 2013, was enacted "to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure." (§ 2923.4, subd. (a).) "One of the targets of the legislation [was] a practice that [had] come to be known as 'dual tracking.' 'Dual tracking refers to a common bank tactic. When a borrower in default seeks a loan modification, the institution often continues to pursue foreclosure at the same time.' [Citations.] The result is that the borrower does not know where he or she stands, and by the time foreclosure becomes the lender's clear choice, it is too late for the borrower to find options to avoid it." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 904; see also Sen. Floor Analysis of Sen. Bill No. 900 (2011-2012 Reg. Sess.).)

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[9] "Although the Legislature did not give the legislation a title, the Governor in his signing statement, and courts and commentators, have referred to the legislation as the 'California Homeowner Bill of Rights.'" (*Monterossa v. Superior Court* (2015) 237 Cal.App.4th 747, 749, fn. 1.)

Prior to January 1, 2018 the prohibition against dual tracking was found in former section 2923.6,[10] which provided, "If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending." (Former § 2923.6, subd. (c).) Section 2923.6 further prohibited the recording of a notice of default or notice of sale or the conduct of a trustee's sale until either: (1) the servicer had made a written determination the borrower was not eligible for a loan modification and any appeal period had expired; (2) the borrower had rejected the modification offer within 14 days of the offer; or (3) the borrower accepted the written modification offer but defaulted on or otherwise breached his or her obligations under the modification. (Former § 2923.6, subd. (c).)

If the borrower's application for a loan modification was denied, HBOR required the servicer to provide written notice of the denial to the borrower identifying the reasons for the denial and including specific information regarding the reason for denial and information on appealing the decision. (Former § 2923.6, subd. (f).)[11] The borrower then had 30 days to appeal the denial

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[10] Former section 2923.6 contained a sunset clause; its dual tracking provisions expired on January 1, 2018. (See former § 2923.6, subd. (k).) The prohibition on dual tracking now appears in section 2924.11 with somewhat different requirements and restrictions.

[11] Former section 2923.6, subdivision (f), states: "Following the denial of a first lien loan modification application, the

before a notice of default or notice of sale could be recorded or, if a notice of sale had already been recorded, before a trustee's sale could take place. (Former § 2923.6, subds. (d), (e).)[12]

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mortgage servicer shall send a written notice to the borrower identifying the reasons for denial, including the following: [¶] (1) The amount of time from the date of the denial letter in which the borrower may request an appeal of the denial of the first lien loan modification and instructions regarding how to appeal the denial. [¶] (2) If the denial was based on investor disallowance, the specific reasons for the investor disallowance. [¶] (3) If the denial is the result of a net present value calculation, the monthly gross income and property value used to calculate the net present value and a statement that the borrower may obtain all of the inputs used in the net present value calculation upon written request to the mortgage servicer. [¶] (4) If applicable, a finding that the borrower was previously offered a first lien loan modification and failed to successfully make payments under the terms of the modified loan. [¶] (5) If applicable, a description of other foreclosure prevention alternatives for which the borrower may be eligible, and a list of the steps the borrower must take in order to be considered for those options. If the mortgage servicer has already approved the borrower for another foreclosure prevention alternative, information necessary to complete the foreclosure prevention alternative."

[12] Former section 2923.6, subdivisions (d) and (e), state: "(d) If the borrower's application for a first lien loan modification is denied, the borrower shall have at least 30 days from the date of the written denial to appeal the denial and to provide evidence that the mortgage servicer's determination was in error. [¶] (e) If the borrower's application for a first lien loan modification is denied, the mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or, if a notice of default has already been recorded, record a notice of sale or conduct a trustee's sale until the later of: [¶] (1) Thirty-one

HBOR permitted a borrower to pursue injunctive relief for material statutory violations prior to a foreclosure sale or to sue for economic damages if the foreclosure sale had already occurred. (§ 2924.12.)

Johansen alleged PHH, Wells Fargo and NDeX violated former section 2923.6, subdivisions (d) and (f), by not providing written notice of the loan modification denial in 2015 and by not providing her with 30 days to appeal the denial before recording the trustee's deed in 2016. PHH, Wells Fargo and NDeX contend HBOR does not apply in this case because the recording of the notice of default and notice of trustee's sale and the trustee's sale all occurred before HBOR's effective date. In addition, they contend the parties' settlement agreement allowed them to "immediately" record the trustee's deed "without further notice" to Johansen.

PHH, Wells Fargo and NDeX are correct that HBOR is not retroactive and therefore does not apply to actions taken prior to 2013. (See *Saterbak v. JPMorgan Chase Bank, N.A., supra*, 245 Cal.App.4th at p. 818; *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1303; see also *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 ["California courts comply with the legal principle that unless there is an 'express retroactivity provision, a statute will *not* be applied retroactively

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days after the borrower is notified in writing of the denial. [¶] (2) If the borrower appeals the denial pursuant to subdivision (d), the later of 15 days after the denial of the appeal or 14 days after a first lien loan modification is offered after appeal but declined by the borrower, or, if a first lien loan modification is offered and accepted after appeal, the date on which the borrower fails to timely submit the first payment or otherwise breaches the terms of the offer."

unless it is very *clear* from extrinsic sources that the Legislature . . . must have intended a retroactive application'"].) However, that does not necessarily resolve the question whether the notice requirements of former section 2923.6 apply to PHH's decision not to offer a loan modification to Johansen pursuant to the parties' 2012 settlement agreement.

Considering the statute as a whole and in light of the principal legislative intent to prohibit dual tracking (see *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037), the notice provisions of former section 2923.6 do not apply under the circumstances here, where the foreclosure process had commenced prior to HBOR's effective date. The purpose of the requirement of written notice of a denial and the 30-day waiting period was to establish a schedule for when notice of default or notice of sale could be recorded or, if notices had already been recorded, when the trustee's sale could occur. (See former § 2923.6, subd. (c) [servicer "shall not record a notice of default or a notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending"].) In the present case the trustee's sale had already been completed at the time Johansen was denied an additional modification. No purpose would be served by providing her with written notice or time to appeal that decision: The next steps prohibited by the statute absent notice—recording the notice of default or notice of sale and holding the trustee's sale—had already taken place in 2012. Furthermore, application of the statute's notice provisions under the undisputed facts here would not further the intended prohibition on dual tracking because the foreclosure sale had been completed prior to HBOR's enactment. Finally, Johansen has cited no language in HBOR, nor have we

found any, indicating the Legislature intended it to apply to situations where foreclosure proceedings had already been initiated, let alone completed, before the statutes took effect.

4. *Although the First Amended Complaint Did Not Allege Facts Sufficient To State a Claim for Breach of Contract, Johansen Should Be Given Leave To Amend*

As discussed, the parties' settlement agreement stated "PHH will review" the financial information provided by Johansen "and make a final decision on whether there are any viable loan modification offers that can be made." Johansen's breach of contract claim alleges, "Defendants never considered Plaintiff for a permanent loan modification." The first amended complaint does not contain any additional factual allegations regarding the alleged breach of contract or the purported failure to examine Johansen's financial information.

In determining whether a complaint sufficiently states a cause of action, we do not assume the truth of "'"contentions, deductions, or conclusions of fact or law."'" (*Zelig v. County of Los Angeles, supra,* 27 Cal.4th at p. 1126.) Although a plaintiff attempting to plead a cause of action for breach of contract need not satisfy the same heightened pleading standard of specificity required for a claim of fraud (see *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 [fraud must be pleaded with "'*facts* which "show how, when, where, to whom, and by what means the representations were tendered"'"), a plaintiff must nonetheless plead more than general, conclusory allegations of breach. (See *Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 551 (*Baldwin*) [rejecting contention that "plaintiff may rely on general allegations to meet his burden in pleading a claim for breach of contract"]; *Levy v.*

State Farm Mutual Automobile Ins. Co. (2007) 150 Cal.App.4th 1, 6; see also *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491].) While a complaint may include allegations based on information and belief, it "is insufficient if it 'merely assert[s] the facts so alleged without alleging such information that "lead[s] [the plaintiff] to believe that allegations are true."'" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1158-1159.)

Johansen's breach of contract claim does not meet this standard. The first amended complaint provided no factual allegations to support the conclusory allegation Johansen was not considered for a loan modification. Nor has Johansen alleged any facts supporting her belief that she was not considered for a modification. Absent the necessary supporting factual allegations, Johansen's breach of contract claim fails. (See *Baldwin*, *supra*, 1 Cal.App.5th at p. 551.)

In her reply brief Johansen argues, even if she was considered for a loan modification, it was not until 20 months after the parties had executed the settlement agreement. She contends this delay in reviewing her financial information was a material breach of the settlement agreement. During oral argument Johansen's counsel indicated Johansen had suffered reliance damages as a result of the delay because she incurred expenses fulfilling her own obligations under the settlement agreement that would have been unnecessary had PHH and Wells Fargo determined her eligibility for a loan modification more promptly. Accordingly, there is a reasonable possibility Johansen could amend her pleading to state a viable cause of action for breach of contract against PHH and Wells Fargo based on their alleged delay in reviewing her financial information.

(See *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618.)

Contrary to Johansen's contentions, however, the same cause of action cannot be stated against NDeX. Johansen concedes the settlement agreement did not impose a duty on NDeX to review her modification application. Nevertheless, Johansen argues NDeX breached the agreement because it had an obligation to ensure PHH and Wells Fargo performed their duties under the contract. Johansen relies on the following language in the agreement: "Each party agrees to perform any further acts . . . that may be reasonably necessary to carry out the provisions of the Agreement." This language ensures the parties will cooperate where necessary to further the affirmative duties contained in the agreement; it does not create a separate affirmative duty on NDeX to guarantee PHH's and Wells Fargo's performance. Absent language in the contract affirmatively imposing such a duty on NDeX, or language indemnifying Johansen for PHH's or Wells Fargo's breach, failure to timely review the loan modification application cannot constitute a breach of contract claim against NDeX.

5. *Johansen Should Be Given Leave To Amend To State a Claim for Breach of the Implied Covenant*

Every contract contains an implied covenant of good faith and fair dealing that "'neither party will do anything which will injure the right of the other to receive the benefits of the agreement.'" (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400.) This implied covenant is "read into contracts 'in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.'" (*Carma Developers* (*Cal.*),

Inc. v. Marathon Development California, Inc. (1992) 2 Cal.4th 342, 373 (*Carma Developers)*; see *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1120 ["the implied covenant will only be recognized to further the contract's purpose"].)

"[B]reach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing." (*Schwartz v. State Farm Fire & Casualty Co.* (2001) 88 Cal.App.4th 1329, 1339; accord, *Carma Developers*, *supra*, 2 Cal.4th at p. 373 ["breach of a specific provision of the contract is not a necessary prerequisite" to an action for breach of the implied covenant of good faith; "[w]ere it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract"].) However, a claim for breach of the implied covenant "must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.) "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Ibid.*)

Johansen argues PHH, Wells Fargo and NDeX breached the implied covenant by "not working with Plaintiff in good faith to gather any additional information needed from her in order to consider her for a permanent loan modification" and by not "obtaining any information or documents that Defendants may have needed from Plaintiff to make a determination on Plaintiff's eligibility for a loan modification." However, PHH, Wells Fargo and NDeX were under no contractual duty to obtain additional information from Johansen. The implied covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350.) The settlement agreement required only that PHH "review the package" and "determine if any additional information or documents are needed." The plain language does not require that PHH actually obtain or consider any additional information; and, perhaps more importantly, it does not require that PHH offer Johansen a loan modification. PHH's failure to obtain additional documents did not frustrate Johansen's contractual rights. (See *Guz*, at p. 352 ["[t]o the extent [plaintiff's] implied covenant cause of action seeks to impose limits . . . *beyond* those to which the parties actually agreed, the claim is invalid"].)[13]

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[13] For these reasons Johansen's reliance on *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915 is misplaced. *Bushell* addressed a lender's obligations under a trial modification plan offered pursuant to the federal Home Affordable Modification Program, which is governed by directives of the United States Department of the Treasury and mandates lenders offer a permanent modification to borrowers who comply with the terms of a written trial plan. (*West v. JPMorgan Chase*

However, as discussed, Johansen has shown a reasonable possibility she can amend the complaint to state a claim for breach of the settlement agreement based on the alleged delay in reviewing her financial documents. To the extent Johansen asserts a cause of action for breach of the implied covenant on this basis, she should be given leave to amend.

6. *The First Amended Complaint Did Not Allege Facts Sufficient To State a Claim for Violation of Business and Professions Code Section 17200*

California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.) (UCL) prohibits, and provides civil remedies for, unfair competition, which it defines as "any unlawful, unfair or fraudulent business act or practice." (*Id.* at § 17200.) The unlawful prong requires a violation of underlying law or a statutory violation. The fraudulent prong requires a plaintiff to show that """members of the public are likely to be deceived""" by the defendant's practices. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312.) An "unfair" business practice occurs in consumer cases "if (1) the consumer injury is substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) the injury could not reasonably have been avoided by consumers themselves." (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1376.) Where a claim of an unfair practice is predicated on a violation of public policy, the public policy must be "tethered" to specific constitutional, statutory or regulatory provisions. (*Majd v. Bank of America,*

Bank, N.A. (2013) 214 Cal.App.4th 780, 796-798.) Because no such requirements are present here, the case is inapposite.

N.A., *supra*, 243 Cal.App.4th at p. 1303; accord, *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940.)

In 2004 California voters "materially curtailed the universe of those who may enforce" the UCL by enacting Proposition 64. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320.) Proposition 64 limited private standing under the UCL to any "'"person who has suffered injury in fact and has lost money or property" as a result of unfair competition.'" (*Id.* at pp. 320-321, quoting Bus. & Prof. Code, § 17204.) "'The phrase "as a result of" in its plain and ordinary sense means "caused by" and requires a showing of a causal connection or reliance . . . .'" (*Kwikset Corp.*, at p. 326.) Thus, in order to pursue a claim under the UCL, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury,* and (2) show that the economic injury was the result of, i.e., *caused by,* the unfair business practice . . . that is the gravamen of the claim." (*Id.* at p. 322; accord, *Sarun v. Dignity Health* (2014) 232 Cal.App.4th 1159, 1166.)

Johansen alleges PHH, Wells Fargo and NDeX engaged in unlawful business practices by violating former section 2923.6, subdivisions (d) and (f). She further alleges PHH, Wells Fargo and NDeX violated the unfairness prong of the UCL by acting contrary to the public policy underlying HBOR. However, as discussed, Johansen failed to state a claim for violation of HBOR. Thus, she necessarily fails to state a claim for unlawful business practices based on an alleged violation of section 2923.6 or the policies underlying HBOR. (See *Aleksick v. 7–Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1185 ["[w]hen a statutory claim fails, a derivative UCL claim also fails"]; accord, *In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1419.)

Johansen additionally alleges PHH, Wells Fargo and NDeX engaged in unlawful and fraudulent business practices by violating Penal Code section 532f, subdivision (a)(4), which prohibits recording a document in connection with a mortgage loan transaction that the person knows contains a deliberate misstatement or misrepresentation. This UCL theory of liability is based on the same allegations advanced in supporting Johansen's wrongful foreclosure claims—that the trustee's deed misidentified Wells Fargo as the beneficiary and/or purchaser at the trustee's sale. As with the wrongful foreclosure claims, this claim is barred by Johansen's release of all claims related to the 2012 foreclosure sale.

DISPOSITION

The judgment against NDeX is affirmed. The judgment against PHH and Wells Fargo is reversed. The matter is remanded with directions for the trial court to enter an order sustaining PHH and Wells Fargo's demurrer and granting Johansen leave to amend the breach of contract and breach of the implied covenant causes of action only, and to conduct further proceedings not inconsistent with this opinion. NDeX is to recover its costs on appeal. PHH and Wells Fargo shall bear their own costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.