Filed 9/1/16 Guardia v. Wells Fargo Home Mortg. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

EDWIN I. GUARDIA, Plaintiff and Appellant, v. WELLS FARGO HOME MORTGAGE, Defendant and Respondent.	B261287 (Los Angeles County Super. Ct. No. PC054985)

APPEAL from a judgment of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Affirmed.

Law Office of Richard L. Antognini, Richard L. Antognini for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton, Jonah S. Van Zandt, Kerry W. Franich for Defendant and Respondent.

Plaintiff Edwin I. Guardia appeals from a judgment entered after the trial court sustained without leave to amend a demurrer to his first amended complaint by defendant Wells Fargo Bank, N.A., erroneously sued as Wells Fargo Home Mortgage (Wells Fargo). We affirm.

BACKGROUND

In June 2013, Guardia filed this action against Wells Fargo. After the trial court sustained with leave to amend Wells Fargo's demurrer to the complaint, Guardia filed a first amended complaint on March 18, 2014.[1]

In 2005, Guardia obtained a $560,000 adjustable rate home loan from Wells Fargo, secured by a deed of trust on the house where he lived in Chatsworth (the property). In February 2009, after Guardia defaulted on the loan, Wells Fargo's agent recorded a notice of default and election to sell the property. As of January 22, 2010, the unpaid principal balance of the loan was $614,307.72. In February 2010, Guardia and Wells Fargo entered into a loan modification agreement.

Guardia lost his job in the middle of 2010. He continued to make his loan payments through the end of the year. In January 2011, when the payments increased from $1,930.84 to $3,338.61 per month under the modification agreement, he defaulted.

Guardia contacted Wells Fargo to discuss "mortgage assistance options." As alleged in the first amended complaint, "Wells Fargo, through its representative, informed [Guardia] that he 'pre-qualified' for available workout options, and promised [Guardia] that if he submitted a complete application, then no foreclosure activity would initiate while his application for a workout option was in review. This representation led [Guardia] to believe that he would qualify for a workout arrangement, that he would secure a new affordable monthly mortgage payment, that he would become current on the

[1] In accordance with the standard of review set forth below, we take the background facts from the operative first amended complaint and matters subject to judicial notice.

Loan, and that he would retain the Subject Property." In late January 2011, Guardia submitted to Wells Fargo an application for a loan modification.

On or about February 24, 2011, Wells Fargo offered Guardia a special forbearance agreement (SFA) under which he would make three monthly payments at a reduced amount (approximately $2,431), while Wells Fargo reviewed his account for a loan modification. Under the terms of the SFA, Wells Fargo was not obligated to enter into a loan modification or any further agreement with Guardia, but agreed to review his "outstanding payments and fees . . . for a loan modification, based on investor guidelines." In the SFA, Wells Fargo informed Guardia that "successful completion of the [SFA]" would not bring his loan "contractually current."

In a cover letter accompanying the SFA, Wells Fargo instructed Guardia to mail each of the three installment payments to a specific address in Los Angeles listed in the letter. The letter also explained: "If your loan is in foreclosure, we will instruct our foreclosure counsel to suspend foreclosure proceedings once the initial installment has been received, and to continue to suspend the action as long as you keep to the terms of the Agreement."

Guardia accepted the SFA, signing it and remitting the March installment payment to Wells Fargo. The other two installments under the SFA were due April 21, 2011 and May 21, 2011, respectively. On April 20, 2011, one day before the second installment was due, Wells Fargo contacted Guardia by telephone "to collect" the payment. Guardia made a payment over the telephone, providing his bank account number and receiving a confirmation number for the transaction.

Five days later, on April 25, 2011, Wells Fargo contacted Guardia by telephone to inform him that his "payment was returned due to an invalid bank account number" and "as a result, the SFA was rendered null and void." Guardia provided his "confirmation number as proof of payment." The bank representative "apologized to [Guardia] and stated that there was likely a clerical error made by the Wells Fargo representative who input [Guardia]'s bank account numbers." She "advised [Guardia] that he 'qualified' for

a Home Affordable Modification Program ('HAMP'), and that he should submit a new and complete application for loan modification."

On or about May 14, 2011, Guardia submitted to Wells Fargo another loan modification application. "Over the next few months, [Guardia] consistently received letters from . . . Wells Fargo representatives, requesting updated financial documents that [Guardia] had already submitted. As requested, [Guardia] continued to submit and resubmit the financial documents and followed up weekly with Wells Fargo." On or about August 3, 2011, Guardia submitted the last of the requested documents supporting his most recent application.

A Wells Fargo representative contacted Guardia by telephone on or about August 6, 2011 to inform him "the investor rejected [his] request for a HAMP modification and that [he] did not qualify for HAMP because the amount [he] owed was too high." The following day, Guardia received a letter from Wells Fargo, dated August 4, 2011, explaining his application was denied because Wells Fargo was "unable to create an affordable payment equal to 31% of [his] reported monthly gross income without changing the terms of [his] loan beyond the requirements of the program [HAMP]." In its calculation, Wells Fargo used a monthly gross income figure of $5,808.10. The letter invited Guardia to contact Wells Fargo within 30 days to discuss "other options that may be available" and further stated: "During this 30 day period a foreclosure sale on your home will not be scheduled if permitted by state law. Please understand that you may continue to receive letters and phone calls related to foreclosure during this time."

On August 22, 2011, Wells Fargo sent Guardia a letter, notifying him it had referred his loan to its attorney "with instructions to begin foreclosure proceedings." On September 1, 2011, Wells Fargo's agent recorded a notice of default and election to sell the property.

Also on September 1, 2011, Guardia contacted Wells Fargo by telephone and requested a second review of the denial of his loan modification application. A Wells Fargo representative informed him the notice of default "would be held in 'suspense' while this review was pending." She also represented Wells Fargo would "review [his]

account for all other available workout options." On September 12, 2011, Wells Fargo sent Guardia a letter, stating it had reached the same conclusion on its second review of the denial of the loan modification application—that "Wells Fargo was unable to approve HAMP for the Loan based upon [Guardia]'s financial information."

On September 20, 2011, Wells Fargo notified Guardia by letter that it "was unable to offer a workout option because it had not received all the required information within the timeframe to complete the review." Therefore, his "case was closed" and his property "was in active foreclosure." Earlier in the month, Wells Fargo had assured Guardia his file already was complete. Guardia contacted Wells Fargo and a representative reviewed with him the information he needed to submit in order to reopen his file. Guardia submitted the requested information. Over the next four months he complied with several additional requests from Wells Fargo for further information.

On or about March 29, 2012, Wells Fargo's agent recorded a notice of trustee's sale of the property. Guardia contacted Wells Fargo and a representative advised him that his account was under review and "no foreclosure sale would occur while the review was pending." Guardia continued to submit "updated financial documents" in response to Wells Fargo's requests. The foreclosure sale was postponed.

On or about May 7, 2012, Wells Fargo notified Guardia it "was unable to modify [his] mortgage under HAMP based on the results of [his] negative net present value." In its calculation Wells Fargo used a monthly gross income figure of $6,303 and a property value figure of $369,000. Guardia believed these figures were inaccurate. Accordingly, in or around June 2012, he submitted to Wells Fargo "a new application for a loan modification with the correct data input values." In July 2012, he received a letter from the U.S. Department of Justice, responding to a complaint he had made about Wells Fargo to the Attorney General and informing him about the National Mortgage Settlement. In or around August 2012, he submitted to Wells Fargo another application for a loan modification, this time under the National Mortgage Settlement. At Wells Fargo's request, Guardia continued to submit additional documents in support of these applications.

In February 2013, Guardia notified Wells Fargo that his income had decreased because his mother had become disabled and was no longer contributing income to the household. In March 2013, Wells Fargo "releas[ed] the lien on [Guardia]'s secondary mortgage, which had an initial principle of $37,500." Guardia contacted Wells Fargo in April 2013 "to ensure it factored in [his] secondary mortgage forgiveness, the loss of his mother's income as contribution to the household, and [his] loss of rental income, when reviewing [his] application." Wells Fargo advised him to submit a new loan modification application documenting these changes, which he did.

Guardia sought assistance from the Neighborhood Assistance Corporation of America (NACA). In reviewing financial information Guardia provided, NACA calculated Guardia's income to be $5,125 and determined an affordable monthly mortgage payment for Guardia would be $1,588. Guardia forwarded these calculations to Wells Fargo.

Guardia retained an attorney. On May 29, 2013, his attorney sent a letter to Wells Fargo, demanding Wells Fargo reevaluate him for a loan modification and cancel all foreclosure activity based on a material change in Guardia's financial circumstances since he submitted his most recent loan modification application. The letter referenced Guardia's loss of income from his rental property and his mother, and represented that his monthly disposable household income was approximately $5,000.

Guardia filed this action in June 2013. The operative first amended complaint asserts the following causes of action: (1) breach of contract, (2) promissory estoppel, (3) violations of Civil Code section 2923.6 (the Homeowner Bill of Rights), (4) violations of California Business and Professions Code section 17200 (the Unfair Competition Law), (5) negligence, and (6) an accounting. Guardia alleges Wells Fargo did not afford him a full and fair review of his loan modification applications and, if it had, it would have granted him a loan modification. He also alleges, but for Wells Fargo's breach of the SFA, he would have obtained a loan modification.

Wells Fargo demurred to the first amended complaint and Guardia opposed the demurrer. After hearing oral argument, the trial court sustained the demurrer without

leave to amend.[2] On October 21, 2014, the court entered judgment in favor of Wells Fargo.

DISCUSSION

In reviewing the trial court's order sustaining the demurrer, "we examine the complaint de novo." (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415.) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "We also consider matters which may be judicially noticed." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse." (*City of Dinuba v. County of Tulare*, *supra*, 41 Cal.4th at p. 865.) We must construe the allegations liberally, "with a view to substantial justice between the parties." (Code Civ. Proc., § 452.)

Guardia's first amended complaint is based on his claims he would have obtained a loan modification if Wells Fargo (1) had not (wrongfully) declared the SFA null and void based on its own clerical mistake and (2) had fulfilled its obligations to fully and fairly evaluate his numerous loan modification applications. These claims are flawed. The SFA did not require Wells Fargo to offer Guardia a loan modification. The record establishes Wells Fargo denied Guardia's application for a loan modification after determining Guardia did not qualify for a loan modification. When Wells Fargo made the applicable calculation, it found Guardia's income was too low and his loan amount

[2] The trial court also granted Wells Fargo's request for judicial notice of documents relating to Guardia's loan and the potential trustee's sale of the property.

too high to require that Wells Fargo modify his loan.[3] Guardia does not allege Wells Fargo erred in calculating net present value. Rather, he asserts Wells Fargo used the wrong numbers by overstating his monthly income. But overstating his monthly income would have resulted in a calculation *more* favorable to Guardia, not less.

Guardia asserts he demonstrated he qualified for a loan modification "because he proposed a loan payment that was 31% of even his reduced monthly income, as HAMP required." Entitlement to a loan modification under HAMP requires more than a proposal by a borrower to pay 31 percent of his monthly income. A borrower with a $600,000 loan whose monthly income dropped to $50 would not be entitled to a loan modification under HAMP merely because he proposed a monthly payment of $15.50, or 31 percent of his income. Entitlement to a loan modification also requires that it be more profitable for the loan servicer to accept a monthly payment of 31 percent of the borrower's income than to proceed with foreclosure. (*West v. JPMorgan Chase Bank, N.A.*, *supra*, 214 Cal.App.4th at pp. 787-788.) Guardia failed to allege facts demonstrating he qualified for a loan modification and also failed to show he can amend his complaint to include such allegations.

Without allegations demonstrating he qualified for a loan modification, Guardia cannot state a claim for damages, a necessary element of his causes of action for negligence, breach of contract and promissory estoppel.

Guardia argues Wells Fargo violated Civil Code section 2923.6, subdivision (g),[4] by failing to reevaluate his loan modification application after he documented a material

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[3] Under the Net Present Value test, a loan servicer is not required to modify a loan under HAMP where the expected return after foreclosure is higher than the value of a modified mortgage based on a monthly payment that is (not more than) 31 percent of the borrower's monthly income. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 787-788.)

[4] Civil Code section 2923.6, subdivision (g), provides: "In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be

change in his financial circumstances. The decrease in Guardia's income was not a material change necessitating a reevaluation of his loan modification application because Wells Fargo already had determined Guardia's higher income was too low to qualify him for a loan modification.

As stated in his opening brief, Guardia's cause of action under the Unfair Competition Law (UCL) is based on his claims Wells Fargo violated Civil Code section 2923.6 and denied his loan modification even though he qualified under HAMP. We already have rejected these claims.[5]

The trial court did not err in sustaining Wells Fargo's demurrer because, as a matter of law, Guardia has not stated a cause of action. Nor did the trial court abuse its discretion in declining to grant Guardia leave to amend because he has not demonstrated he can cure the defects by amendment, and we do not find a reasonable possibility that he can successfully amend by alleging the necessary facts in good faith.

DISPOSITION

The judgment is affirmed. Wells Fargo is entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

WE CONCUR:

ROTHSCHILD, P. J.

JOHNSON, J.

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evaluated for a first lien loan modification prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer."

[5] On appeal, Guardia does not argue the trial court erred in sustaining Wells Fargo's demurrer to his cause of action for an accounting.