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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

BRUCE WINSTROM,

Plaintiff and Appellant,

v.

BANK OF AMERICA, N.A. et
al.,

Defendants and
Respondents.

2d Civil No.B266680
(Super. Ct. No. 1469094)
(Santa Barbara County)

Borrower on a loan secured by a deed of trust was in default. He applied to the loan servicer for a modification of his loan. The servicer contracted with borrower to modify the loan if borrower fulfilled certain conditions. Borrower alleges he fulfilled the contract conditions, but servicer refused to modify the loan. Borrower brought this action against the present and former loan servicers, alleging causes of action for intentional and negligent misrepresentation, breach of contract, promissory estoppel, breach of covenant of good faith and fair dealing,

negligence, violation of Business and Professions Code section 17200¹ and intentional infliction of emotional distress.

The trial court granted both defendants judgment on the pleadings. We reverse as to the present loan servicer and affirm as to the former loan servicer.

FACTS

Bruce Winstrom's first amended complaint alleges as follows:

In April 2003, Winstrom obtained a loan in the amount of \$490,000 from Bank of America (B of A) secured by a trust deed on his residence in Goleta, California. The loan was pooled into a trust. B of A continued to be the loan servicer until November 11, 2013, when B of A transferred servicing rights to Nationstar Mortgage LLC (Nationstar).

Winstrom applied to Nationstar for a loan modification. On February 8, 2014, Winstrom received a trial plan notice package from Nationstar. The package included a letter stating he is entering the Home Affordable Modification Program (HAMP) and is approved to enter into a trial period plan (TPP).

The TPP required Winstrom to make three payments, each in the amount of \$2,070.99, by the first day of March, April, and May of 2014. The TPP states "After all trial period payments are timely made and you have submitted all the required documents, your mortgage would then be permanently modified. (Your existing loan and loan requirements remain in effect and unchanged during the trial period.)"

¹ All statutory references are to the Business and Professions Code.

Winstrom tendered the first two payments required by the TPP and Nationstar accepted the payments. He tendered the third payment in a timely manner, but Nationstar returned his check. A letter from Nationstar stated it was returning the \$2,070.99 because the amount is insufficient to bring his account current. The letter stated the amount required to bring the account current is \$99,424.63. Winstrom's repeated efforts to successfully tender the May payment proved unavailing.

On August 5, 2014, Nationstar sent Winstrom a letter informing him that he was being denied a loan modification for one of the following reasons: He did not make the first payment on his TPP, he did not timely return the modification agreement or he withdrew his request for modification. None of the reasons applied.

As of September 19, 2014, Nationstar demanded \$114,669.56 to bring the loan current. While the appeal was pending, Nationstar recorded a notice of default and a notice of trustee's sale.²

DISCUSSION

I

A motion for judgment on the pleadings is the equivalent of a general demurrer. (*Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal.App.3d 457, 468.)

The function of a demurrer is to test whether, as a matter of law, the facts alleged in the complaint state a cause of action under any legal theory. (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.) We assume the truth of all facts properly pleaded, as well as facts of which the

² We grant Winstrom's request to take judicial notice of these documents.

trial court properly took judicial notice. (*Ibid.*) But we do not assume the truth of contentions, deductions or conclusions of law. (*Ibid.*) Our review of the trial court's decision is de novo. (*Ibid.*)

We review the trial court's decision to allow an amendment to the complaint for an abuse of discretion. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 273.) Where there is no reasonable possibility that plaintiff can cure the defect with an amendment, sustaining a demurrer without leave to amend is not an abuse of discretion. (*Id.* at p. 274.)

II

NATIONSTAR

(a) *Breach of Contract*

A cause of action for breach of contract requires a contract, plaintiff's performance or excuse for nonperformance, defendant's breach and resulting damages. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

Nationstar argues the TPP is not a contract because it is missing essential terms such as interest rate, number of payments and duration of the loan. The argument was rejected in *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915 (*Bushell*). There, the court read the TPP in light of HAMP regulations. The court concluded that the TPP constituted a valid contract such that if the borrower complied with its terms, the lender must offer the borrower a good faith permanent loan modification. (*Id.* at 928; see *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 565 [although lender may have some discretion to set the precise terms of the loan modification, the lender is certainly required to offer some sort of good faith loan modification].)

Nationstar argues that if the TPP is a contract, HAMP regulations require a modification only if all the

borrower's financial representations remain true and correct. Nationstar points out that Winstrom does not allege his financial representations remain true and correct. But Winstrom alleges that he complied with the TPP. Because the HAMP regulations and the TPP are read together, he sufficiently alleged he complied with the HAMP regulations.

The trial court concluded that Winstrom sufficiently alleged a contract, but that he suffered no damages as a result of the breach. The only damages Winstrom alleged to have suffered were the two payments Nationstar accepted under the TPP.

But here the TPP expressly states that the existing loan will remain in effect and unchanged during the trial period. Winstrom was under a preexisting obligation to make payments under the original loan. He is not damaged by paying money he was already obligated to pay.

Winstrom's reliance on *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150 (*Daniels*), is misplaced. There, plaintiffs alleged that they were making their mortgage payments in full. When they applied for a modification, the loan servicer's employees told them they needed to miss three payments to qualify. They missed three payments at the behest of the servicer. The servicer refused to modify the loan. Plaintiffs sued alleging, among other causes of action, breach of contract and negligence. The trial court sustained the servicer's demurrer. In reversing, the Court of Appeal determined plaintiffs stated a negligence cause of action. The court stated plaintiffs were damaged by, among other factors, falling into arrears on the servicer's instruction. (*Id.* at p. 1182.)

Daniels is distinguishable. There, plaintiffs were making full payments until, on the servicer's instructions, they stopped paying, thus falling further behind. Here, Winstrom had

been making no payments for years when he made a few partial payments. Winstrom's payments did not place him further behind, they placed him further ahead. If anything, *Daniels* illustrates why Winstrom suffered no damages by making two payments under the TPP.

That is not to say, however, that Winstrom suffered no damages. In *Bushell* plaintiffs alleged they fulfilled the terms of the TPP by making all the required payments thereunder. They claimed the bank breached the TPP contract by refusing to modify their loan. The Court of Appeal rejected the same argument Nationstar makes here, stating: "Chase argues that plaintiffs cannot allege damages, because all plaintiffs did was make monthly mortgage payments they were already obligated to make. Plaintiffs allege they were damaged by the considerable time they spent repeatedly contacting Chase and repeatedly preparing documents at Chase's request; by discontinuing efforts to pursue a refinance from other financial institutions or to pursue other means of avoiding foreclosure (such as bankruptcy restructuring, or selling or renting their home); by having their credit reports further damaged; and by losing their home and making it unlikely they could purchase another one. We conclude plaintiffs have adequately alleged damages." (*Bushell, supra*, 220 Cal.App.4th at p. 928.)

Winstrom claims he can amend his complaint to allege similar damages. Of course he cannot allege he lost his home, as plaintiff did in *Bushell*, unless the foreclosure sale has taken place. Nevertheless, Winstrom may amend his complaint to allege other damages similar to those suggested by *Bushell*. It is the policy of the courts to liberally grant leave to amend. (*Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412.)

Winstrom also argues he should be granted leave to amend his complaint to allege specific performance. Specific performance requires a contract sufficiently definite to be enforced. (*Blackburn v. Charnley* (2004) 117 Cal.App.4th 758, 766.)

It is one thing to say the TPP is sufficiently definite to support an award of damages. None of the damages suggested by *Bushell* are related to any specific loan modification. It is quite another to say the TPP is sufficiently certain for specific performance. The borrower's compliance with the TPP requires the lender to offer "some sort of good-faith permanent modification." (*Wigod v. Wells Fargo Bank, N.A.*, *supra*, 673 F.3d at p. 565, italics omitted.) Winstrom's TPP states some of the terms that might be included in a modification, but not all of the material terms, such as the length of the loan. Nor does Winstrom point out how HAMP regulations supply the material terms. Winstrom cites no case in which the TPP has been specifically enforced. This is not such a case.

(b) Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing prohibits either party from doing anything that will hinder the right of a party from receiving the contract's benefits. (*Bushell*, *supra*, 220 Cal.App.4th at pp. 928-929.) The covenant is implied in every contract. (*Ibid.*)

Here, Winstrom alleges that he complied with the TPP, but Nationstar refused to offer the loan modification. This is sufficient to allege a breach of the covenant of good faith and fair dealing. (See *Bushell*, *supra*, 220 Cal.App.4th at p. 929.) The damages discussed in *Bushell* under breach of contract are sufficient to support this cause of action. (*Id.* at p. 928.)

(c) Promissory Estoppel

“The elements of promissory estoppel are (1) a clear and unambiguous promise by the promisor, and (2) reasonable, foreseeable and detrimental reliance by the promisee.” (*Bushell, supra*, 220 Cal.App.4th at p. 929.)

Winstrom argues he can amend his complaint to allege he relied on Nationstar’s promise of a loan modification to perform such acts as preparing documents at Nationstar’s request and discontinuing efforts to avoid other means of foreclosure. Assuming he can do so, he will have stated a cause of action for promissory estoppel. (See *Bushell, supra*, 220 Cal.App.4th at p. 930.)

(d) Intentional and Negligent Misrepresentation

The elements of intentional misrepresentation are misrepresentation, knowledge of falsity, intent to induce reliance, justifiable reliance, and resulting damage. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 772, p. 1121.) The elements of negligent misrepresentation are the same as intentional misrepresentation except for the second element. Negligent misrepresentation requires that representation is made without reasonable grounds for believing it to be true. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.) Here, the alleged misrepresentation is that if Winstrom complied with the TPP he would be offered a loan modification.

Nationstar argues the alleged misrepresentation is not one of fact, but of something that might occur in the future. But a statement of what a person intends to do relates to an existing state of mind, and is a statement of fact. (5 Witkin, Summary of Cal. Law, *supra*, Torts, § 781, p. 1131.) Thus a promise made without any intention to perform may constitute fraud. (*Ibid.*) It follows that a promise that Winstrom would be

offered a modification if he complied with the TPP, without reasonable grounds for believing it to be true, can constitute negligent misrepresentation.

Winstrom can state causes of action for intentional and negligent misrepresentation if he can amend his complaint to allege damages similar to those alleged in *Bushell*.

(e) Unfair Business Practices

“Section 17200 prohibits ‘any unlawful, unfair or fraudulent business act or practice’” It is written in the disjunctive and prohibits three varieties of unfair competition. (*Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1303.) For relief under section 17200, it is necessary to show that members of the public are likely to be deceived by the business act or practice. (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211.)

Here, Winstrom alleges fraud in that Nationstar never intended to offer a modification even if Winstrom complied with the TPP. It is easy to see how other members of the public can be similarly misled.

Nationstar points out that only a person who has lost money or property has standing to sue under section 17200. (*Majd v. Bank of America, N.A., supra*, 243 Cal.App.4th at p. 1304.) It argues Winstrom has suffered no damages. But Winstrom claims he can amend his complaint to allege damages similar to those alleged in *Bushell*. He should be given the opportunity to do so.

(f) Negligence

There is a division of authority on the question whether a lender might be liable for negligence in processing an application for a loan modification. *Lueras v. BAC Home Loan Servicing, LP* (2013) 221 Cal.App.4th 49 (*Lueras*) applied the

general rule that a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a lender of money. (*Id.* at p. 63.) The court concluded that a loan modification falls squarely within the scope of a lending institution's conventional role as a lender of money. (*Id.* at p. 67.)

Alvarez v. BAC Home Loan Servicing, LP (2014) 228 Cal.App.4th 941, 948 (*Alvarez*), reached the opposite conclusion by applying the factors stated in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650 (*Biakanja*). But the factors stated in *Biakanja* were not intended to apply to the facts in *Alvarez* or here.

In *Biakanja* defendant agreed to prepare a will for plaintiff's brother. Plaintiff was named sole beneficiary under the will. Defendant was negligent in preparing the attestation and the will was denied probate. Plaintiff received only a one-eighth intestate share. The question was whether the defendant was liable for negligence to a third party to whom the defendant was not in privity of contract. Our Supreme Court stated:

"The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja, supra*, 49 Cal.2d at p. 650.)

Winstrom is not a third party to the loan agreement. He is in privity of contract. Nationstar's obligations to him to process his loan modification derives from contract, not tort.

Applying the *Biakanja* factors to a party who is in privity of contract will almost always lead to the conclusion that a party who breaches a contract is also liable in negligence. There is no reason to turn every contract action into a tort action. Unlike Winstrom, plaintiff in *Biakanja* had no contract with the defendant on which to base a breach of contract action. His sole remedy was in tort. We agree with *Lueras*. Nationstar is not liable for negligence in processing Winstrom's application for a loan modification.

(g) *Intentional Infliction of Emotional Distress*

The elements of a cause of action for intentional infliction of emotional distress are (1) the defendant engages in extreme and outrageous conduct with the intent to cause, or with reckless disregard for the probability of causing, emotional distress; (2) the plaintiff suffers 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.)

Winstrom relies on *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182 (*Ragland*). In *Ragland* plaintiff thought she was getting a fixed rate loan, but in fact she got an adjustable rate mortgage. She informed the lender that her signature had been forged by her loan broker. The lender instructed her not to make payments while it investigated the forgery. She followed the lender's instruction. The loan went into default and the lender foreclosed on her home. She sued alleging, among other causes of action, intentional infliction of emotional distress. The Court of Appeal reversed the trial court's grant of summary judgment in favor of the lender. The court stated that, if proven, the lender's treatment of Ragland was "so

extreme as to exceed all bounds of decency in our society.” (*Id.* at p. 205.)

Winstrom’s reliance on *Ragland* is misplaced. Unlike the plaintiff in *Ragland*, Winstrom did not default because he was following the lender’s instructions. Winstrom’s default is entirely of his own doing. By B of A’s unchallenged calculation, except for the two payments Winstrom made under the TPP, he has not made a loan payment since June 2011. The lender could have foreclosed years before Winstrom even applied for a loan modification, yet he remains in possession to this day. The lender’s treatment of *Ragland* may have exceeded all bounds of decency. That is not the case here. The allegations do not support a damages award for intentional infliction of emotional distress.

III

BANK OF AMERICA

Winstrom’s first amended complaint alleges B of A is Nationstar’s agent. It also alleges B of A was the loan originator, its first servicer and transferred servicing of the loan to Nationstar on November 11, 2013. But the complaint does not allege any wrongdoing by B of A. All of the allegations of wrongdoing were alleged to have been committed by Nationstar.

Assuming Winstrom has adequately alleged agency, Winstrom does not suggest how B of A, as Nationstar’s agent, could be liable for Nationstar’s wrongs. Nor does Winstrom, in his opening brief, suggest how he can amend his complaint to allege a cause of action against B of A.

For the first time in his reply brief, Winstrom argues he can amend his complaint to allege: B of A became the master servicer after transferring its interest to a securitized trust,

Nationstar is a sub-servicer to B of A, and B of A is still the master servicer.

At oral argument, Winstrom's counsel claims he discovered the alleged facts searching the Internet in preparing the reply brief. He did not explain why he could not have discovered the matter earlier.

Points raised for the first time in the reply brief will not be considered unless there is good reason for failure to present them before. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 723, p. 790.) Winstrom presents no such good reason.

DISPOSITION

The judgment in favor of B of A is affirmed. The judgment in favor of Nationstar is reversed and remanded for further proceedings consistent with this opinion. Costs on appeal are awarded to Winstrom against Nationstar and to B of A against Winstrom.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

James E. Herman, Judge

Superior Court County of Santa Barbara

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