Filed 10/18/17 Radoci v. CIT Bank CA2/7

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| MONICA RADOCI,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CIT BANK, N.A.,<br><br>Defendant and Respondent. | B271523<br><br>(Los Angeles County Super. Ct. No. LC101737) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Rick Brown, Judge. Affirmed.

Stephen R. Golden & Associates and Stephen R. Golden for Plaintiff and Appellant.

Allen Matkins Leck Gambell Mallory & Natsis, Michael R. Farrell and Lauren R. Racanelli for Defendant and Respondent CIT Bank, N.A.

## INTRODUCTION

One year after recording a notice of default, CIT Bank, N.A. foreclosed on Monica Radoci's home. At the time of the foreclosure Radoci was behind on her loan payments, and CIT had offered her a loan modification, which she declined. Radoci filed this action for wrongful foreclosure, negligence, unfair competition, and other causes of action against CIT and Fannie Mae. The trial court sustained demurrers by CIT and Fannie Mae to Radoci's second amended complaint without leave to amend. Radoci appeals from the judgment dismissing CIT. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Loan, Default, and Foreclosure*

Radoci lived with her grandmother in a home Radoci owned "free and clear." In October 2007 Radoci borrowed $250,000 from IndyMac Bank,[1] evidenced by a promissory note secured by a deed of trust. The note had a fixed interest rate of 7.125 percent and a 30-year repayment period. Radoci's monthly payments were $1,400.

The deed of trust named IndyMac as the lender, Stewart Title Guaranty as the trustee, and MERS as the nominee beneficiary. On June 19, 2009 MERS recorded an assignment of deed of trust assigning its beneficial interest under the deed of trust to CIT, which was then-known as OneWest Bank. In a substitution of trustee, recorded on July 17, 2009, CIT

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[1] Because CIT later acquired IndyMac, where appropriate we refer to IndyMac as CIT.

substituted NDEx West, LLC as trustee.[2] In May 2012 NDEx, as CIT's agent, recorded a "notice of default and election to sell under deed of trust." Radoci had fallen behind on her loan payments and owed $8,148.79 in arrears.

Radoci applied for a loan modification and, in July 2012, CIT sent her a loan modification agreement and trial period payment plan. Under the agreement, Radoci's monthly payments would be $1,436.09 for the three-month trial period. The last page of the agreement, which Radoci signed, provided, "If your monthly payment did not include escrows for taxes and insurance, you are now required to do so: You agree that any prior waiver that allowed you to pay directly for taxes and insurance is revoked. You agree to establish an escrow account and to pay required escrows into that account."

Along with the agreement, CIT sent a list of frequently asked questions and answers. CIT explained that, once Radoci made the trial period payments, CIT would send a permanent loan modification agreement detailing the terms of the modified loan. The permanent modification could include past-due amounts added to the balance of the loan, but the increase in the balance of the loan "should not significantly change the amount of your modified mortgage payment." CIT also explained that, "[o]nce your loan is modified, your interest rate and monthly principal and interest payment will be fixed for the life of your mortgage. Your new monthly payment will include an escrow for property taxes, hazard insurance and other escrowed expenses.

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[2] "'By statute the Legislature has permitted the beneficiary of a deed of trust to substitute, at any time, a new trustee for the existing trustee.'" (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 39.)

If the cost of your homeowners insurance, property tax assessment or other escrowed expenses increases, your monthly payment will increase as well."

Radoci made the three trial period payments, and CIT offered her a permanent loan modification. At that point, the balance of Radoci's loan was $264,899.86. The permanent loan modification would have been a 40-year, fixed-rate loan with an interest rate of 4.625 percent. In a page summarizing the terms of the loan modification, CIT explained that, "[t]o reduce your mortgage payment, we will extend the term of your mortgage. This means we will spread your payments out over a longer period." The monthly principal and interest payment for the modified loan would have been $1,212.26. The total monthly payment, however, would have been $1,839.45 because it included a monthly escrow payment of $627.19. The escrow payment was CIT's estimate of the amount necessary to pay real estate taxes and insurance premiums and to cover an "escrow shortage" of $4,908.60 over the next five years. Unlike the interest rate, which was fixed, the monthly escrow payment could adjust periodically because it was based on property taxes and insurance premiums, which could change over time.

Radoci did not accept the terms of the modified loan. Instead, she tried to convince CIT to accept $10,000 in lieu of the $13,000 she owed in arrears and to reinstate her original loan. In December 2012 CIT refused to accept a partial payment and to reinstate the original loan, and Radoci filed for bankruptcy under Chapter 13. The bankruptcy court dismissed the case because Radoci's attorney did not file the required plans. In January 2013 Radoci again filed for bankruptcy under Chapter 13, and the bankruptcy court again dismissed the case because Radoci's

attorney either did not file the required plans or did not appear at the confirmation hearing.

That same month, January 2013, Radoci applied again for a loan modification. On January 16, 2013 Radoci received a letter stating that her application was complete except for her paystubs. Although Radoci "promptly" submitted her paystubs, her loan modification application was denied "purportedly due to failure to receive the requisite documents 37 days prior to the [foreclosure] sale then scheduled for February 21, 2013."

In March 2013 Radoci tried to obtain a new loan from other lenders to pay the arrears she owed CIT, but she could not qualify for another loan because her credit score was too low. On April 29, 2013 Radoci filed for bankruptcy under Chapter 13 for a third time. This time her attorney filed the requisite plans. Radoci sent a notice of the bankruptcy filing by fax to the foreclosure trustees between 7:00 a.m. and 8:00 a.m. Three hours later, however, her property was sold at foreclosure to a third-party investor. The trustee's deed showed a balance due of $275,126.57, and that the property sold for $401,000. Radoci received approximately $124,766.39 from the sale.[3]

The bankruptcy court dismissed Radoci's third bankruptcy case in June 2013. In July 2013 the property was resold to another investor for $499,000. The new owner demolished the home Radoci had lived in with her grandmother and built a new home on the property.

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[3] Although she owed less than the property was worth, there is no indication that Radoci ever considered selling the property.

B. *The Operative Complaint and Demurrer*

Radoci's operative second amended complaint alleged eight causes of action against CIT: "lack of authority to foreclose," wrongful foreclosure, "foreclosing with complete loan modification application pending," violation of the unfair competition law, breach of contract, breach of the implied covenant of good faith and fair dealing, "negligent loan administration," and account stated. CIT and Fannie Mae demurred and asked the court to take judicial notice of eight recorded documents relating to the property and two Federal Deposit Insurance Corporation (FDIC) documents with information about IndyMac and OneWest. The court granted CIT's request for judicial notice of the eight recorded documents and denied CIT's request for judicial notice of the two FDIC documents, which the court held were "background information" not properly the subject of judicial notice.

The trial court sustained both the demurrers without leave to amend. The court entered judgment for Fannie Mae on February 10, 2016, and for CIT on February 16, 2016. Radoci appeals the judgment in favor of CIT.[4]

## DISCUSSION

A. *Standard of Review*

"We review an order sustaining a demurrer de novo, exercising our independent judgment to determine whether a cause of action has been stated under any legal theory." (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505,

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[4] Radoci does not appeal from the judgment dismissing Fannie Mae.

509.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice." (*Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 924.)[5] "'[F]acts 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.'" (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 767; see *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 726 ["[w]e liberally construe the pleading with a view to substantial justice between the parties [citations]; 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"'"].)

We review whether the court erred in refusing to allow a plaintiff to amend the complaint for abuse of discretion. (*Debrunner v. Deutsche Bank Nat. Trust Co.* (2012) 204 Cal.App.4th 433, 439.) "'If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. . . . If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. . . . The plaintiff has the burden of proving that an amendment would cure the defect.'" (*Ibid.*; see *Ivanoff*, *supra*, 9 Cal.App.5th at p. 726 ["[w]e determine whether the plaintiff has shown 'in what

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[5] We take judicial notice of the same eight documents that the trial court properly noticed. (See *Yvanova v. New Century Mortg. Corp.*, *supra*, 62 Cal.4th at p. 924, fn. 1.)

manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading"'].) Radoci does not argue she can amend the complaint to cure any defect.

B. *Radoci Did Not State a Cause of Action for Wrongful Foreclosure Based on "Lack of Authority to Foreclose"*

When "a homeowner . . . has been foreclosed on by one with no right to do so," that homeowner may bring an action for wrongful foreclosure. (*Sciarratta v. U.S. Bank National Association* (2016) 247 Cal.App.4th 552, 555; see *Yvanova*, *supra*, 62 Cal.4th at p. 928 ["only the entity currently entitled to enforce a debt may foreclose on the mortgage or deed of trust securing that debt"].) "'[M]ere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case.'" (*Sciarratta*, at p. 555.) "The elements of a wrongful foreclosure cause of action are: "'(1) [T]he 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.'"" (*Id.* at pp. 561-562.) When the plaintiff's cause of action is based on the wrong party foreclosing, the second and third elements are satisfied. (*Sciarratta*, at p. 565 & fn. 10.)

Radoci alleged the promissory note she executed was transferred to the Fannie Mae REMIC Trust Series 2007-2015, but the transfer "did not comply with federal and/or state law

and/or other laws and statutes." She claims "the Promissory Note was securitized and split from the Deed of Trust." Thus, according to Radoci, "[t]he alleged holder of the Note is not the beneficiary of the Deed of Trust," which makes the transfer of the debt a legal nullity. In an affidavit attached as an exhibit to the second amended complaint, Radoci's expert opines that, because of irregularities in the transfer and securitization of the mortgage, "no one can claim the right to enforce the Radoci note," and the deed of trust is an unenforceable contract.

CIT argued in its demurrer that, even if the loan was securitized, Radoci did not identify any error in the securitization process, and, "even if the loan was improperly securitized, there is no legal support for Radoci's claim that an improper securitization entitles her to free money." The trial court ruled that Radoci could not "sustain her first cause of action for 'Lack of Title and Standing' because she has not alleged any error in the assignment of the loan and the borrower does not have standing to challenge an assignment to which she is not a party."

In her opening brief, Radoci quotes seven paragraphs of allegations from her complaint, but her entire argument related to whether she has alleged error in the assignment of the loan is a single sentence that follows those seven paragraphs of quoted material: "Clearly Radoci has alleged error in the assignment of the loan and the trial court erred in holding that 'Plaintiff cannot sustain her first cause of action . . . because she has not alleged any error in the assignment of the loan.'" By making no argument (aside from the conclusory sentence above) and citing no authority, Radoci has forfeited this argument. (See *Okorie v. Los Angeles Unified School District* (2017) 14 Cal.App.5th 574, 600 ["[m]atters not properly raised or that are lacking in

adequate legal discussion will be deemed forfeited"]; *Orange County Water District v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal.App.5th 252, 360 [appellant forfeited an argument by failing to identify the elements of its legal claims and explain how it had satisfied those elements].)

Even if Radoci had preserved her argument on appeal, it fails on the merits. She does not cite or discuss *Yvanova*, *supra*, 62 Cal.4th 919 or explain why it does not foreclose her claim based on the allegation that the note was separated from the deed of trust. (See *Yvanova*, *supra*, 62 Cal.4th at p. 927 ["[t]he deed of trust . . . is inseparable from the note it secures, and follows it even without a separate assignment"]; *Yhudai v. Impac Funding Corporation* (2016) 1 Cal.App.5th 1252, 1259, fn. 6 [it is a "legal fact" that if the note is conveyed to a trust, so is the deed of trust and the right to foreclose].)

### C. *Radoci Did Not State a Cause of Action for Wrongful Foreclosure Based on Violation of a Bankruptcy Stay Because There Was No Bankruptcy Stay*

Radoci alleged that, because she filed for bankruptcy at 2:35 a.m. on the date of the foreclosure, "[a] bankruptcy stay pursuant to 11 U.S.C. § 362 was therefore in place as of the moment of the filing." (Emphasis omitted.) The trial court ruled that, because Radoci admittedly had two prior bankruptcy cases pending and dismissed within the past year, federal bankruptcy law did not provide for an automatic stay when she filed her third bankruptcy petition. Radoci admits that she filed for bankruptcy in December 2012 and January 2013, and again on April 29, 2013, but argues that, because on April 29, 2013 she "faxed notice of the bankruptcy filing to the foreclosure trustee," "[a]

bankruptcy stay was therefore in place as of the moment of [her] bankruptcy filing."

Radoci's argument is forfeited and meritless. Radoci forfeited her argument because in the trial court she did not argue in opposition to CIT's demurrer there was a bankruptcy stay in effect when the foreclosure sale occurred. In fact, her attorney conceded in an email to opposing counsel that, "[u]pon researching the bankruptcy issue further, . . . there would have been no stay in effect upon the third filing the day of the sale." Radoci forfeited her argument again on appeal because she has not cited any relevant authority. Finally, her argument is meritless because, under 11 United States Code section 362(c)(4)(A)(i), "if a . . . case is filed by . . . a debtor who is an individual under this title, and if 2 or more . . . cases of the debtor were pending within the previous year but were dismissed, . . . the [automatic] stay . . . shall not go into effect upon the filing of the later case." (See *In re Zarnel* (2d Cir. 2010) 619 F.3d 156, 165 [if debtor has two or more cases pending and dismissed within the previous year, a later case does not impose a stay unless the debtor "is able to demonstrate that the filing of the later case is in good faith"]; *In re Nelson* (BAP 9th Cir. 2008) 391 B.R. 437, 446-447 [postpetition foreclosure sale was not invalid where debtors had "two joint chapter 13 cases pending, both of which were dismissed, in the year before they filed their third chapter 13 petition"].) Radoci admits she had two bankruptcy cases dismissed in the year before her April 29, 2013 filing. Therefore, the April 29, 2013 filing did not trigger an automatic stay under 11 United States Code section 362(c)(4)(A)(i).

D. *Radoci Did Not State a Cause of Action for Violation of Civil Code Section 2923.6*

Radoci alleged CIT violated Civil Code section 2923.6, subdivisions (b) and (c)[6]—provisions of the California Homeowner Bill of Rights (HBOR) relating to loan modification applications—by refusing to review her second application for a loan modification in January 2013.[7] CIT argues section 2923.6 is preempted by 12 Code of Federal Regulations section 560.2(a)-(b)(4) and, even if it is not preempted, section 2923.6 generally applies only to a borrower's first loan modification application. (See § 2923.6, subd. (g).)

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6 Undesignated statutory references are to the Civil Code.

7 Section 2923.6, subdivision (b), provides, "It is the intent of the Legislature that the mortgage servicer offer the borrower a loan modification or workout plan if such a modification or plan is consistent with its contractual or other authority." Section 2923.6, subdivision (c), provides, "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 . . . conduct a trustee's sale, while the complete first lien loan modification application is pending. A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not . . . conduct a trustee's sale until any of the following occurs:

"(1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired.

"(2) The borrower does not accept an offered first lien loan modification within 14 days of the offer.

"(3) The borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification."

Under section 2923.6, subdivision (g), "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 . . . for a first lien loan modification prior to January 1, 2013, . . . 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." This provision applies to Radoci because CIT not only evaluated Radoci for a loan modification prior to January 1, 2013, CIT actually offered her a loan modification in October 2012.

Regarding her second application in January 2013, Radoci did not allege that there was a "material change in [her] financial circumstances since the date of [her] previous application" or that she documented that change and submitted it to the mortgage servicer, as required by section 2923.6, subdivision (g). Radoci argues, based on her deposition testimony, that her income decreased between her two loan modification applications, and that this decrease constitutes a material change in her financial circumstances. Even if she had alleged such a change in financial circumstances in her complaint, or even if she could amend her complaint to make that allegation, she would still not have stated a cause of action under section 2923.6 because she did not and cannot allege she documented that change and submitted it to her mortgage servicer.

E. *Radoci Did Not State a Cause of Action for Breach of Contract or Breach of the Implied Covenant of Good Faith and Fair Dealing*

Radoci alleged that CIT breached two contracts: the promissory note/deed of trust and the trial period plan. Radoci alleged CIT breached the deed of trust by failing to include in the notice of default (1) a statement that Radoci had the right to bring a court action, (2) the date by which she had to cure the default, and (3) a warning that failure to cure the default could result in acceleration of the due date for her payments. She alleged CIT breached the trial period plan by offering her a permanent loan modification with materially different terms than the terms of the trial period plan.

Radoci alleged that, "[b]y making payments on the subject loan, [she] has performed her obligation under the promissory note." But the deed of trust, which Radoci alleged CIT breached, required Radoci to do more than "make payments." She also had to "pay when due the principal of, and interest on, the debt evidenced by the Note." Radoci did not allege she had made all of her required payments when the notice of default was recorded. Because Radoci did not allege she fully performed under the deed of trust, or she had an excuse for nonperformance before CIT's alleged breach, she did not state a cause of action for breach of contract based on the deed of trust. (See *Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1140 [breach of contract requires the plaintiff's full performance or an excuse for nonperformance]; accord, *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1173.)

Radoci's breach of contract cause of action based on the trial period plan fares no better. Radoci alleged "[t]he terms

presented to her" in the trial period plan were "1) monthly payment: $1436.09, 2) interest rate: 2%, 3) Interest Type: Fixed, and 4) Term Length: 30 years." But she attached the trial period plan to her complaint, and it contained no interest rate or term length for the loan. Therefore, Radoci did not state a cause of action for breach of the trial period plan based on a change in interest rate or term length.

The remaining terms Radoci alleged CIT promised but did not deliver are a fixed interest rate and a monthly payment of $1,436.09. But the permanent loan modification agreement offered a fixed interest rate (4.625 percent) and a monthly principal and interest payment of $1,212.26, which was less than the monthly payment during the trial period. The permanent plan also included an "estimated monthly escrow payment amount" of $627.19 to cover taxes and insurance. The document explained, "This amount, and thus your monthly payment, may change if your taxes, insurance premiums or other required payment amounts change." This additional payment was consistent with the explanation in the "Additional Trial Period Plan Information and Legal Notices," which Radoci signed, and which provided, "If your monthly payment did not include escrows for taxes and insurance, you are now required to do so: You agree that any prior waiver that allowed you to pay directly for taxes and insurance is revoked. You agree to establish an escrow account and to pay required escrows into that account." Thus, even if the trial period plan were an enforceable contract,[8]

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[8] If the federal Home Affordable Modification Program does not apply to a trial period plan, and it did not apply to Radoci's trial period plan, the terms of the trial period plan may not be sufficiently definite to form an enforceable contract. (*Daniels v.*

CIT did not breach it because it offered Radoci a permanent modification with terms consistent with those promised in the trial period plan.

Radoci alleged CIT breached the implied covenant of good faith and fair dealing by "failing to comply with the terms of the trial period agreement." As noted, however, the documents attached to Radoci's complaint showed that CIT complied with the terms of the trial period agreement, and Radoci did not allege CIT either engaged in other conduct that frustrated performance of the contract or did not engage in conduct necessary to accomplish its purpose. (See *Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 77 [every contract "includes an implied covenant of good faith and fair dealing that imposes on each party 'not only a duty to refrain from acting in a manner that frustrates performance of the contract "'but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose"'"].)

F. *Radoci Did Not State a Cause of Action for Negligence in the Processing of Her Loan Modification Applications*

Radoci alleged CIT negligently processed her loan modification applications. She argues CIT "agreed to review [her] for a loan modification, requested additional documents, but failed to actually review such documents, causing [her] to lose her home in foreclosure." She appears to have abandoned any cause of action for negligence based on the processing of Radoci's first loan modification application. (See *Pfeifer v. Countrywide Home*

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*Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1176.)

*Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282 [“‘“[i]ssues not raised in an appellant’s brief are deemed waived or abandoned”’”].)

“The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury.” (*Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998.) “To be considered a proximate cause of an injury, the acts of the defendant must have been a ‘substantial factor’ in contributing to the injury. [Citation.] Generally, a defendant’s conduct is a substantial factor if the injury would not have occurred but for the defendant’s conduct. [Citation.] If the injury “‘would have happened anyway, whether the defendant was negligent or not, then his or her negligence was not a cause in fact, and of course cannot be the legal or responsible cause.’”” (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1303.) Radoci admitted CIT offered her a loan modification, which she declined. She did not allege that, had CIT offered her another loan modification, she would have accepted it. Based on the allegations in her complaint, and the reasonable inferences from those allegations, Radoci’s “long-time home was sold” because she was unwilling to accept a loan modification, not because CIT did not properly process her second application. Thus, even if CIT owed Radoci a duty of care and breached that duty in connection with the second loan modification application, any such breach was not the proximate cause of her injury.

G. *Radoci Did Not State a Cause of Action for Violation of the Unfair Competition Law*

Radoci alleged CIT violated California's unfair competition law (Bus. & Prof. Code, § 17200, et seq.) in two ways: by committing "the statutory violation(s) . . . pled in [the] complaint . . . *including and especially the sale in violation of the bankruptcy stay*" (emphasis in original), and by breaching the two contracts identified in Radoci's breach of contract cause of action. The trial court held that Radoci did not state a cause of action for violation of the unfair competition law because it was "derivative of her other failed causes of action." Radoci argues that the court's ruling "does not reflect an accurate reading of the Second Amended Complaint" because her "UCL claims are based both upon [CIT's] statutory violations, and upon [CIT's] breaches of contract." The only statute Radoci specifically cites in her brief is section 2924, subdivision (a)(6), which, although a provision of the HBOR that does have to do with recording a notice of default, was enacted after the recording of Radoci's notice of default, and does not apply retroactively. (See *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 86, fn. 14.) Because Radoci asserts her cause of action is based on statutory violations and contractual breaches, but, as noted, she did not state a claim CIT violated any statute or breached any contract, she did not state a cause of action for violation of the unfair competition law.

H. *Radoci Did Not State a Cause of Action for Account Stated*

Radoci alleged that CIT, in a document attached to her complaint, admitted it owed her an additional $18,070.90 after the foreclosure sale—money that CIT never paid her. Thus,

according to Radoci, CIT "remitted some of the [money from the sale of the home] to her, but not the entire portion owed." CIT argued in the trial court that "the spreadsheet simply references various unexplained transactions involving an account, including transactions by which the amounts identified in Radoci's opposition were offset, leaving an unspecified balance, if any." The trial court ruled that Radoci had "alleged inadequate evidence" for her cause of action for account stated.

"An account stated is 'an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing.'" (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 968.) "'The essential elements of an account stated are: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; [and] (3) a promise by the debtor, express or implied, to pay the amount due.'" (*Leighton v. Forster* (2017) 8 Cal.App.5th 467, 491.) Thus, "'an element essential to render the account stated is that it receive the assent of both parties, but the assent of the party sought to be charged may be implied from his conduct.'" (*Lauron*, at p. 968.) "'The theory of an account stated is that it becomes a contract between the parties for payment of the amount computed to be due without proof of the specific items included therein.' [Citation.] Accordingly, an action on an account stated is not based on the parties' original transactions, but on the new contract under which the parties have agreed to the balance due." (*Ibid.*)

Because the printout attached to Radoci's complaint is indecipherable (and CIT's explanation of the document

incomprehensible), it does not evidence "an agreement between the parties, express or implied, on the amount due." (*Leighton*, *supra*, 8 Cal.App.5th at p. 491.) The one-page document appears to show multiple transactions that occurred more than four months after the April 2013 foreclosure. The transactions have descriptions, but the descriptions are hardly descriptive: "FEE," "Unapplied," "PAYMENT," or "Non-Cash." Some of the transactions listed as "FEE"s are positive numbers, and some are negative numbers. For example, the document has entries for September 10 and 11, 2013, which list $10,088.24 as "unapp[lied] funds after tran[saction]." But on February 12, 2014, there is $0 of "unapp[lied] funds after tran[saction]" and $7,932.53 under "escrow paid." Without explanation, Radoci claims CIT agreed it owes her the sum of those figures ($10,088.24 and $7,932.53). Because there is no evidence of any such agreement, Radoci did not state a cause of action for account stated.

## DISPOSITION

The judgment is affirmed. CIT is to recover its costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J. ZELON, J.