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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ISAIAS R. BARCARSE et al., Plaintiffs and Appellants, v. ARVEST CENTRAL MORTGAGE CORPORATION, Defendant and Respondent.	2d Civ. No. B290707 (Super. Ct. No. 56-2017-00493763-CU-OR-VTA) (Ventura County)

Appellants Isaias and Clarita Barcarse borrowed money to purchase a home. When they defaulted on the loan, respondent Arvest Central Mortgage Corporation (Arvest) began nonjudicial foreclosure proceedings. Appellants contested Arvest's authority to foreclose in federal court. After losing their federal case, appellants filed this lawsuit. No foreclosure sale has occurred.

Appellants claim violations of the Homeowner Bill of Rights; breach of the trust deed; unfair business and debt collection practices; and seek declaratory relief. The trial court gave them several opportunities to amend, then dismissed their lawsuit on demurrer. Upon de novo review, we conclude that appellants have

not stated a claim for relief. We affirm the judgment in favor of Arvest.

FACTS AND PROCEDURAL HISTORY[1]

Appellants' Default on Their Purchase Money Loan

Appellants purchased a home in Moorpark in 2005, signing a note for $547,500 (Note) secured by a deed of trust (DOT). The lender assigned the Note and DOT to Mortgage Electronic Registration Systems (MERS) as nominee for Arvest, then known as Central Mortgage Company; the assignment was recorded in January 2006.

After appellants failed to make loan payments, MERS transferred the DOT to Arvest. A recorded notice of default showed appellants were $21,603 in arrears. In June 2012, Arvest's foreclosure trustee recorded a notice of trustee's sale.

The Lawsuit and Judgment in Federal Court

Soon after the foreclosure trustee recorded the notice of sale, appellants filed suit in federal court, challenging Arvest's right to foreclose. Before the hearing on Arvest's motion to dismiss the complaint, appellants voluntarily dismissed their lawsuit on October 14, 2012. Four days later, they filed suit in Ventura County Superior Court, asserting the same claims they advanced in federal court; the case was removed to federal court based on diversity jurisdiction.

Back in federal court, Arvest renewed its motion to dismiss the complaint. The district court granted the motion and dismissed appellants' lawsuit with prejudice. The court concluded that

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[1] The facts are derived from pleadings, exhibits, and recorded documents whose existence, contents, and legal effect are subject to judicial notice. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1; *Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1101.)

appellants lack standing to sue because they did not tender the debt. Further, appellants lack standing to challenge Arvest's right to foreclose or the securitization of their loan. Their "robo-signing" claims were dismissed. The Ninth Circuit affirmed the judgment in September 2016 and awarded Arvest $18,040 in attorney fees.

Appellants' 2017 Lawsuit

In March 2017, appellants filed the first of four complaints. They allege that Arvest improperly added to their debt $54,684 in attorney fees and costs. Appellants applied to Arvest for a loan modification in October 2016. When Arvest denied a modification, it allegedly failed to consider all of appellants' income sources. In denying their appeal, Arvest informed them that monthly rental income from property they own in Simi Valley ($2,200) is less than the mortgage for that property ($2,270) and did not assist them in qualifying for a modification. Appellants claim that Arvest did not consider their monthly income of $1,500 from a part-time job. We describe and analyze appellants' causes of action in the Discussion section.

Arvest demurred to appellants' pleadings. The court sustained demurrers to the third amended complaint without leave to amend and dismissed the case.

DISCUSSION

Appeal and Review

Appeal lies from the judgment of dismissal. (Code Civ. Proc., §§ 581d, 904.1, subd. (a)(1); *Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 667.) We review the pleadings de novo to determine if a cause of action has been stated and assume the truth of properly pleaded material facts. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

Homeowner Bill of Rights (HBOR) Claims

Borrowers may enjoin a trustee's sale to stop "a material violation" of HBOR, or recover actual damages for material violations after foreclosure. (Civ. Code, § 2924.12, subds. (a)(1), (b).)[2] Appellants contend they are entitled to a pre-foreclosure injunction because Arvest (1) sent them a "vague" letter denying their request for a loan modification; (2) failed to designate a "single point of contact"; and (3) did not rely on competent evidence giving it the right to foreclose.

a. Appellants Did Not Allege that HBOR Applies to Arvest

Appellants assert that section 2924.12 gives them a private right of action against Arvest. The section authorizes HBOR claims, but does not offer relief to every borrower because it does not apply to every loan servicer: specifically, it "shall not apply" to servicers who "foreclosed on 175 or fewer residential real properties, containing no more than four dwelling units, that are located in California" in the previous year. (*Id*., subd. (i); former § 2924.12, subd. (j) [same provision]; § 2924.18, subd. (b).)

Appellants neither allege in their pleadings nor argue in their brief that Arvest foreclosed on more than 175 residential properties in California during the pertinent time frame of 2016-2017. Arvest asked the trial court to take judicial notice that it does not appear on California's list of loan servicers that have foreclosed on more than 175 homes; it asserts that it is exempt from HBOR as a "small servicer." Appellants have not demonstrated that section 2924.12 applies to Arvest; they simply assume that Arvest is a servicer who must comply with HBOR. Section 2924.12, subdivision (i) does not allow courts to make that assumption.

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[2] Unlabeled statutory references are to the Civil Code.

b. Appellants Did Not Allege a Section 2923.6 Violation

HBOR requires loan servicers to give "specific reasons" for denying a modification. (§ 2923.6, subd. (f)(2).) Appellants argue that Arvest's "vague [and] incomprehensible" denial letter, sent in December 2016, did not satisfy the specificity requirement. The letter is attached to the pleadings. It states, "Based on income documentation provided, the verified gross monthly income is too low to cover a payment of principal, interest, property taxes, and insurance on the mortgage." Appellants were eligible for other alternatives, including a short sale. They appealed, to persuade Arvest that its determination was erroneous. (*Id.*, subd. (d).) They wrote that Arvest underestimated their income by failing to include Mrs. Barcarse's $1,500 gross monthly salary from her work as a loan processor. The appeal was denied.

HBOR provides procedural protections, to foster alternatives to foreclosure. (*Penermon v. Wells Fargo Bank, N.A.* (N.D. Cal. 2014) 47 F.Supp.3d 982, 993.) But section 2923.6 "does not grant a right to a loan modification. To the contrary, it 'merely expresses the hope that lenders will offer loan modification on certain terms' and 'conspicuously does not require lenders to take any action.' [Citation]." (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1056; *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1617 [lender has no duty to agree to a modification].) Though borrowers must be considered for a loan modification, the statutory scheme does not require a particular result. (§ 2923.4; *Davenport v. Litton Loan Servicing, LP* (N.D. Cal. 2010) 725 F.Supp.2d 862, 877 [HBOR merely requires "contact and some analysis of the borrower's financial situation"].)

Arvest analyzed appellants' application but denied them a loan modification because they lack financial resources to qualify. This is a plausible business reason. The denial letter was not

incomprehensible or vague. They appealed the denial. They have received the procedural protections that HBOR provides.

c. Appellants Did Not Allege a Section 2923.7 Violation

Appellants contend that they "were prejudiced by being deprived of working with any individual (or group of individuals) who has personal working knowledge and authority to assist [appellants] with the [loan] modification." HBOR requires servicers to establish a "single point of contact" (SPOC) for borrowers who request help to avert foreclosure. The SPOC describes the process and deadlines; coordinates the receipt of documents; provides updates; and ensures that the borrowers are considered. (§ 2923.7, subds. (a)-(c).) Arvest's "SPOC Team C" handled appellants' modification request. The SPOC may be an individual or team. (*Id.*, subd. (e).)

Appellants have not shown that they were deprived of assistance from an SPOC with knowledge and authority. Contrary to their allegations, the letter from Arvest's SPOC lists a toll-free phone number and an email address. Though appellants assert that they did not have "a meaningful conversation" with the SPOC, they do not allege that they ever called.

Only material violations of section 2923.7 are actionable. (*Shupe v. Nationstar Mortgage, LLC* (E.D. Cal. 2017) 231 F.Supp.3d 597, 603.) "Here, Plaintiffs' application was processed and Plaintiffs were given an opportunity to appeal its denial . . . . Plaintiffs have not explained how the alleged denial of their right to a SPOC in any way affected their loan obligations or the modification process." (*Ibid.*) Appellants' pleadings do not demonstrate a material violation of section 2923.7.

d. Appellants Did Not Allege a Section 2924.17 Violation

Appellants cite section 2924.17 of HBOR, which requires a servicer, trustee, and creditor to rely upon competent and reliable

evidence to support all recorded instruments or foreclosure notices. Appellants question the reliability of the assignment of the Note and DOT recorded in 2006, and the notices of default and trustee's sale recorded in 2012.

Their claim is barred as a matter of law. First, section 2924.17 does not apply to documents recorded before its effective date of January 1, 2013. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 818.) All of the questioned documents were recorded before HBOR took effect. Second, the effect of the assignment on Arvest's authority to foreclose is an issue litigated to final judgment in federal district court and affirmed by the Ninth Circuit. Appellants are estopped from relitigating "issues argued and decided in a previous case, even if the second suit raises different causes of action." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.)

Breach of Trust Deed

Appellants argue that Arvest breached the DOT by adding attorney fees and costs of $54,684.94 to their debt. Out of the total disputed charge, appellants concede the legitimacy of $18,040 in attorney fees awarded to Arvest in 2016 by the Ninth Circuit.

Appellants' pleadings acknowledge that the DOT gives Arvest a contractual right to collect attorney fees and charges. DOT Paragraph 9 allows Arvest to take protective measures if appellants default or "there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights" under the DOT. Arvest "may do and pay for whatever is reasonable or appropriate" to protect its interests, including appearing in court and expending attorneys' fees, and "[a]ny amounts disbursed . . . shall become additional debt of Borrower secured by this Security Instrument." Paragraph 22 of the DOT states that the borrowers' breach of their obligations allows the lender to invoke the power of sale and

entitles it to collect all expenses associated with pursuing its remedies, including attorney fees and costs. Interpreting identical DOT language, Division Five of this District recently held that a lender that incurs attorney fees to protect its interest in a trust deed is entitled to add those fees to the borrower's loan obligation. (*Chacker v. JPMorgan Chase Bank, N.A.* (2018) 27 Cal.App.5th 351, 356-357.)

Appellants did not heed the trial court's order to allege their claim "with specificity" in light of Arvest's contractual right under the DOT to augment appellants' debt with attorney fees. In any event, appellants cannot enjoin a trustee's sale by objecting to Arvest's charges. Nonjudicial foreclosure is designed to be a quick, inexpensive, and efficient remedy against defaulting debtors. (*Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090, 1096.) Despite their default, appellants have thwarted the system by repeatedly suing Arvest, which had to expend attorney fees in state and federal courts to protect its rights and interest in the DOT. Appellants are limited to a post-foreclosure action for damages if there was an irregularity during foreclosure. (*South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 Cal.App.4th 1111, 1121.)

Unfair Competition Law (UCL) Claim

The UCL addresses unlawful, unfair, or fraudulent business practices. (Bus. & Prof. Code, § 17200.) A business practice is "unlawful" if forbidden by any law and may be "unfair or fraudulent" without violating any law. (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827.) Appellants assert that Arvest violated the UCL by adding attorney fees and costs to their obligation on the Note. As discussed in the preceding section, the DOT authorizes Arvest to add the cost of protecting its security interest to

appellants' debt. (*Chacker v. JPMorgan Chase Bank, N.A.*, *supra*, 27 Cal.App.5th at pp. 356-357.)

A plaintiff must have "suffered injury in fact" and "lost money or property as a result of the unfair competition" to have standing to assert a UCL claim. (Bus. & Prof. Code, § 17204.) Appellants did not allege the loss of their property, their money, or an injury in fact. No foreclosure sale has occurred. Appellants still have their home and their money because they did not tender the debt.

No economic injury arises under the UCL merely because interest, penalties, and fees continue to accumulate as a result of appellants' default. (*Shupe v. Nationstar Mortgage, LLC*, *supra*, 231 F.Supp.3d at pp. 605-606.) A borrower's potential loss does not create a UCL claim because "his prospect of losing the home to foreclosure is the result of default, not the alleged conduct of defendants." (*Graham v. Bank of America* (2014) 226 Cal.App.4th 594, 614.) At most, appellants speculate that Arvest overstated fees and costs incurred in protecting its interest in the DOT. Appellants cannot enjoin a foreclosure sale by asserting a possible future loss of property or money.

Rosenthal Fair Debt Collection Practices Act (RFDCPA)

Appellants argue that Arvest is a debt collector falling within RFDCPA. (§ 1788 et seq.) RFDCPA prohibits debt collectors "from engaging in unfair or deceptive acts or practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring such debts . . . ." (§1788.1, subd. (b).) Banned practices include threats of physical violence, harassment, use of profane language, calls to third parties in attempts to collect a debt, and false representations about the identity of the debt collector. (§§ 1788.10-1788.13.) It allows debtors to recover actual damages plus a penalty for intentional unfair debt collection practices. (§1788.30.)

Appellants allege no facts showing conduct in violation of specific RFDCPA sections. They assert in their brief that Arvest denied them a modification; added attorney fees and costs to their debt; and might not be the true creditor of the Note and DOT. None of these acts constitutes a claim under RFDCPA. Arvest has no duty to modify the Note and DOT appellants signed; Arvest has a contractual right to add attorney fees and costs to appellants' debt pursuant to the DOT; and Arvest prevailed in federal court on the issue of its authority to foreclose under the DOT.

The nonjudicial foreclosure scheme would be eviscerated if a borrower undisputedly in default could allege that foreclosure is an unfair debt collection practice under RFDCPA. "'The object of a non-judicial foreclosure is to retake and resell the security, not to collect money from the borrower.' [Citation]." (*Randall v. Ditech Financial, LLC* (2018) 23 Cal.App.5th 804, 810; *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1264 [statutory notice of a foreclosure sale given to a borrower is not debt collection activity].) Federal courts have held that foreclosure is not actionable under RFDCPA. (*Izenberg v. ETS Services, LLC* (C.D. Cal. 2008) 589 F.Supp.2d 1193, 1199; *Altman v. PNC Mortg.* (E.D. Cal. 2012) 850 F.Supp.2d 1057, 1071; *Saldate v. Wilshire Credit Corp.* (E.D. Cal. 2010) 711 F.Supp.2d 1126, 1132.) The demurrer to their RFDCPA claim was properly sustained.

Declaratory Relief

Relief is available to persons seeking a declaration of their contractual rights or duties, or with respect to property, where there is an "actual controversy." (Code Civ. Proc., § 1060.) Appellants repeat their argument that Arvest improperly added fees and costs to their debt. However, the DOT authorizes Arvest to incur fees and costs to protect its interests and add them to the loan balance. Appellants have not shown why contractual attorney fees

are unauthorized, nor can they stop foreclosure without alleging that they tendered the full amount of the outstanding debt on the Note. There is no actual controversy between the parties requiring judicial intervention.

DISPOSITION

The judgment is affirmed. Respondent is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Vincent J. O'Neill, Judge

Superior Court County of Ventura

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