Filed 6/26/12 Borazjoni v. JPMorgan Chase 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JOHN BORAZJONI, Plaintiff and Appellant, v. JPMORGAN CHASE BANK, Defendant and Respondent.	B232333 (Los Angeles County Super. Ct. No. LC085518)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Harwin, Judge. Affirmed in part and reversed in part.

John Borazjoni, in pro. per., for Plaintiff and Appellant.

Bryan Cave, Christopher L. Dueringer, Richard P. Steelman, Jr., and Glenn Plattner for Defendant and Respondent.

JPMorgan Chase Bank, N.A. (Chase) foreclosed on John Borazjoni's home through nonjudicial foreclosure, and Borazjoni sued. The trial court granted summary judgment in Chase's favor, and Borazjoni appeals. We affirm the summary adjudication of the breach of contract and negligent misrepresentation claims but otherwise reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Borazjoni purchased a home in Agoura Hills in 2006 that was financed by Washington Mutual Bank, later succeeded by Chase.[1] The Deed of Trust included an adjustable rate rider. Borazjoni began missing payments in February 2008. In April 2008 Chase's agent recorded a Notice of Default and Election to Sell in the Los Angeles County Recorder's Office. Borazjoni and Chase entered into a Special Forbearance Agreement in July 2008 under which Chase agreed to forbear its right to foreclose on the property for a period of time. Although Borazjoni contends in the summary judgment documents that no sale of the property ever took place, in the Second Amended Verified Complaint he acknowledged that Chase had foreclosed on the property and that it had been sold. On May 5, 2009, the substituted trustee recorded a Trustee's Deed Upon Sale. Borazjoni subsequently sued Chase, proceeding on causes of action for breach of contract, unfair business practices (Bus. & Prof. Code, § 17200), fraud, negligent misrepresentation, and a common count for money had and received.

A. Factual Allegations in the Complaint

Borazjoni alleged that Chase engaged in a wrongful course of action as follows: When Borazjoni experienced financial difficulty and could not make payments on his million-dollar loan in early 2008, Chase promised that it would provide him with a loss

[1] Although the change of institution took place during the course of events set forth here, for convenience we adopt the parties' convention of referring to the bank as Chase.

mitigation program to prevent the possible loss of the home. While in the assistance process, however, Chase's agent recorded a notice of default on the home that listed an excessive sum as the amount of the default. In July 2008, Borazjoni entered into a written special forbearance agreement with Chase. Borazjoni contends that by this agreement, which he designates as "Agreement One," Chase agreed to: "(a) to forebear its right to foreclose on the [property], (b) to relie[ve Borazjoni] from making monthly payments until October 2008, and **(c) to make 'permanent' loan workout plan on [the] loan after October 2008.**" Borazjoni complied with Agreement One.

In November 2008, Borazjoni contended, Chase sent him Agreement Two. Agreement Two is a notice of a new rate and payment amount under the adjustable rate mortgage. Borazjoni alleged that this notice was actually the permanent work-out plan contemplated by Agreement One and that it set a monthly payment of $2,977 for the duration of the loan. The representation of the payment amount was false, Borazjoni alleged, because when he attempted to tender a payment in the amount of $2,977, Chase refused to accept it. Chase scheduled a foreclosure sale of the property for January 28, 2009.

In January 2009, Borazjoni alleged, Chase orally agreed (Agreement Three) that it would provide Borazjoni with even lower payments than previously arranged, and that it would cancel the foreclosure sale. On January 15, 2009, during a telephone call Chase "modified" the loan to start with a monthly payment of $934.87 based on a 1 percent interest rate, increasing yearly until it reached 5 percent, then remaining fixed for the duration of the loan. Chase also accepted a payment of $2,169.59 as an initial payment. Chase allegedly promised to prepare paperwork memorializing this agreement but failed to do so.

In early March 2009, Chase allegedly entered into Agreement Four orally with Borazjoni, by which Borazjoni would pay $4,000 in exchange for a more favorable loan modification, with 10 years of monthly payments at a 2 percent interest rate, followed by a fixed interest rate of 4.5 percent for the remaining duration of the loan thereafter. Borazjoni paid $2,000 toward that $4,000, and Chase promised to prepare the paperwork.

Borazjoni alleged that over March and April 2009, various Chase employees represented that his paperwork was being prepared and that the foreclosure had been cancelled.

On April 27, 2009, Chase foreclosed on the home. Borazjoni contended that the sale was improperly conducted "in a private sales (*sic*) controlled by CHASE, but disguised as a public auction sales (*sic*), in which CHASE reported [the property's] sales price as $786,000, and [Borazjoni's] unpaid debt as $1,183,587." Borazjoni contended that his actual balance was $1,044,011 and that the fair market value of the home was more than $1,180,000.

Chase allegedly told Borazjoni in May and June 2009 that the foreclosure had been inadvertent and would be rescinded, and that the loan modification upon which they had agreed would be honored and memorialized with documents to arrive shortly. Chase did not honor these representations.

A fifth agreement was alleged to have been made during litigation. Borazjoni claimed that in mid-October 2009, Chase through its counsel made a loan modification agreement (Agreement Five), in writing, setting forth a monthly payment of $3,351.81 that included inflated impound payments for property tax and insurance. Chase agreed that it would adjust the monthly payment if Borazjoni demonstrated lower tax and insurance costs, which he did. Borazjoni "informed CHASE[']s] counsel that he does accept terms of agreement-five, and is willing, ready, and able to start making monthly payments on above agreed loan modification." But in November 2009 Chase began eviction proceedings, thereby breaching Agreement Five.

Finally, in January 2010, Chase reported to the Internal Revenue Service correct figures for the unpaid debt and the sales value of the property, essentially admitting that Borazjoni had equity in the property of $139,483. Chase, however, refused to return that money to Borazjoni, and it also did not return the $4,169.59 that it accepted pursuant to Agreements Three and Four.

Based on these alleged facts, Borazjoni alleged that Chase breached Agreements One through Five. He also alleged that Chase engaged in unfair business practices by: declaring an unlawful default on the loan; demanding a "false large amount" to cure the

default; falsely representing that the foreclosure process had been canceled; demanding a "false amount" to satisfy the deed; and entering into loan modification agreements but subsequently breaching them by foreclosing on the property. Borazjoni alleged intentional misrepresentation of material facts when Chase offered him a loss mitigation program; when it agreed to make a "permanent loan workout plan" but did not; when it stated that the foreclosure had been cancelled; and when it "verified, confirmed, and re-confirmed cancellation of foreclosure process and loan modification agreements" but instead foreclosed on the property. He alleged further fraud in Chase's false "promises to Plaintiff that [it had] cancelled foreclosure process on [the property], and modified his loan based on certain terms, and would mail new loan documents to Plaintiff on [*sic*] timely manner." Chase allegedly committed negligent misrepresentations of material fact when it declared a default on the loan and demanded $12,818.10 as a default amount; when it later declared an unpaid debt of $1,183,587; and when it declared the sales value of the property. Finally, Borazjoni contended that Chase owed him $4,169.59 in money had and received.

B. Course of the Litigation

Chase moved for summary judgment. Chase contended that it was entitled to summary judgment because Borazjoni lacked the ability to tender the outstanding balance as of the time of sale; Chase had complied with the first alleged contract; the second alleged contract was not a contract at all; the third and fourth alleged contracts were oral promises not made in writing; the undisputed material facts showed no fraud or unfair business practices; there were no material misrepresentations of fact, no false promises, and no justifiable reliance; and Chase owed Borazjoni nothing. Borazjoni opposed the summary judgment motion.

The trial court granted summary judgment but stayed the ruling for 10 days to permit Borazjoni to pay the total amount owed to Chase. Chase informed Borazjoni that the amount due to pay off the loan was $1,309,046.96. Borazjoni offered Chase

$500,000 and petitioned the court for additional time to negotiate a settlement. The court entered judgment in Chase's favor.

DISCUSSION

I. Standard of Review

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc.,[2] § 437c, subd. (c).) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material fact exists as to that cause of action or a defense thereto." (§ 437c, subd. (p)(2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 850.)

We review the trial court's ruling granting summary judgment de novo and independently examine the record to determine whether there is a triable issue of material fact. (*Aguilar, supra,* 25 Cal.4th at p. 860.) In performing our de novo review, we consider all evidence presented by the parties in connection with the motion (except that which the trial court properly excluded) and all uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where the papers and pleadings show that there is no triable

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[2] Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

issue of material fact and the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c).)

II. The Tender Rule and the Summary Judgment

Chase argued to the trial court and argues here that all of Borazjoni's claims were subject to summary judgment because Borazjoni did not demonstrate that he could tender the outstanding balance on the loan.[3] When asserting a cause of action for irregularity in the sale procedure, a plaintiff generally must allege tender of the amount of the secured debt. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109 (*Abdallah*).) The rationale behind the tender rule is that if the borrower could not have redeemed the property had the sale procedures been proper, whatever irregularities may have occurred during the process of the sale did not damage the borrower. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112.) The tender rule applies, too, to causes of action that are "implicitly integrated" with the challenge to the sale. (*Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 120-121 [cause of action for breach of oral agreement to postpone trustee's sale was implicitly integrated with the voidable sale and therefore subject to the tender rule] (*Karlsen*).)

Borazjoni, however, did not allege a cause of action for common law wrongful foreclosure. Certainly Borazjoni contended that the sale was illegitimate; at one point in the general allegations he described himself as being "forced to bring this legal action in order to rectify the matter, and to either recover his primary residence . . . and/or his money and damages," and he mentioned the loss of the property as being among the

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[3] As it appears from the record submitted on appeal that the trial court made no record of the reason for granting summary judgment, merely stating at argument that "I adopt the arguments of the moving party," the basis for the trial court's grant of summary judgment cannot be ascertained from the record. It appears, however, that the court may have accepted the idea that the suit was a challenge to the foreclosure itself, for the court stayed its ruling to give Borazjoni time to pay off the entire loan and remain in possession of the property.

damages for which he sought compensation in the breach of contract cause of action. But Borazjoni claimed that Chase breached five separate agreements modifying his 2006 loan; that Chase committed fraud over the course of its negotiations with him and with respect to the modification agreements he alleged; that Chase made fraudulent false promises by promising him that written loan modification agreements would be generated corresponding to terms orally agreed to by the parties, without the intent of ever creating a written contract and with the intent to cause Borazjoni to forego other options to save his home; that Chase made multiple negligent misrepresentations of material fact relating to the amount of the indebtedness, the intent to foreclose, and the declared amount of the default, the amount of the debt, and the value of the property, as a means of converting Borazjoni's investment and equity; and that Chase received money from Borazjoni but neither used it as agreed nor returned it to him.

We need not consider the applicability of the tender rule to the cause of action for breach of contract because that claim fails for reasons unrelated to tender, as will be discussed further below. Examining the remaining claims, although they encompass allegations that would also provide a basis for a common law wrongful foreclosure action (see *Munger v. Moore* (1970) 11 Cal.App.3d 1, 7), Borazjoni has alleged a long-term course of fraud and unfair business practices far beyond a challenge to the foreclosure sale predicated on "irregularity in the sale procedure" (*Abdallah*, *supra*, 43 Cal.App.4th at p. 1109) or claims "implicitly integrated" with such a challenge. (*Karlsen*, *supra*, 15 Cal.App.3d at p. 121.) We therefore conclude that the tender rule is inapplicable here with respect to Borazjoni's causes of action for unfair business practices, fraud, negligent misrepresentation, and money had and received.

III. Breach of Contract

A. Agreement One

Agreement One was the written Special Forbearance Agreement entered into by the parties in July 2008 that was attached to the operative complaint. By the terms of this document, Chase agreed to a forbearance period from August 1, 2008, to October 1, 2008. Chase agreed that if Borazjoni provided updated financial information before the expiration of the agreement, it would "reevaluate [his] application for assistance and determine if [Chase is] able to offer [Borazjoni] a permanent workout solution to bring [his] loan to a current status."

At summary judgment, Chase acknowledged that Borazjoni entered into the agreement on July 21, 2008; admitted that Borazjoni had complied with the agreement; and demonstrated that it had complied with the agreement by subsequently contacting Borazjoni to reevaluate his financial situation. To demonstrate compliance, Chase relied upon Borazjoni's statement at deposition that after he entered into the agreement, Chase contacted him to discuss his financial situation by sending him a document; there were also, Borazjoni admitted, a "few more conversations." This was sufficient to demonstrate that Chase worked further with Borazjoni on the issue of whether a "workout solution" could be reached, and it shifted the burden to Borazjoni to demonstrate a triable issue of material fact existed as to the alleged breach of Agreement One.

Borazjoni disputed Chase's compliance with Agreement One, stating, "Chase never complied with Agreement-1, and on 4/27/2009 converted Plaintiff's home." Borazjoni submitted evidence that Chase recorded a notice of sale on the property on July 25, 2008. He claimed that a group of approximately 180 pages of documents in the record showed that Chase did not comply with the requirements of Civil Code section 2924 et seq. and gave no notice to him, and that Chase foreclosed on the property but was unable to sell it, but his explanation of the evidence to support this statement does not identify any evidence supporting the assertion that Chase attempted to sell the property

but was unable to do so. The Special Forbearance Agreement, by its own terms, covered the period from August 1, 2008 through October 1, 2008. A notice of sale of the property filed and recorded before the effective date of the agreement does not evidence a breach of that agreement, and Borazjoni has not shown Chase made any effort to foreclose on the property during the forbearance period. Although Borazjoni alleged other wrongful conduct, including the alleged breach of Agreement Two and the ultimate 2009 foreclosure, none of this conduct demonstrates any violation of the terms of the Special Forbearance Agreement, Agreement One.

On appeal, Borazjoni contends that Chase breached Agreement One by filing the July notice of sale that specified a sale date falling within the forbearance period; by failing to comply with statutory requirements for nonjudicial foreclosure with respect to the notice of sale; by failing to make a permanent workout plan for the loan; and by ultimately foreclosing on the house in April 2009. As we have already discussed, the notice of sale, filed before the forbearance went into effect, is not a breach of the forbearance agreement, and there was no evidence of any efforts to foreclose on the property during the three-month forbearance period, so the absence of compliance with statutory requirements concerning notice is not relevant. Because by its own terms the agreement did not bind Chase to agree to a loan modification, the failure to reach an agreement on modification does not establish any breach of Agreement One. Finally, the ultimate foreclosure occurred well after the forbearance period ended and does not constitute a breach of Agreement One. There is no triable issue of material fact as to whether Agreement One was breached.

B. Agreement Two

At summary judgment, Chase demonstrated that Agreement Two is the November 2008 contractually-required notice of a new monthly payment based on the adjustment of the interest rate for the loan as contemplated by the adjustable rate rider on the deed of trust. Borazjoni's briefing, declaration, responses to the separate statement, and his own

separate statement, as well as his briefing on appeal, assert that this was in fact a permanent lowering of the interest rate on the loan and that it "changed [the] monthly payment to $2,977 permanently for 456 months on [the] loan . . . ." The document, however, includes no representation that the monthly payment was lowered permanently; in fact, the notice sets forth the next dates that the loan would be adjusted and reviewed and states that any new payment amount after the next review would be due January 1, 2010. Borazjoni has not demonstrated that this document is a modification to the deed of trust that converted the adjustable rate loan to a fixed rate loan. There was no triable issue of material fact as to whether Agreement Two was a valid and enforceable contract.

C. Agreements Three and Four

It was undisputed that claimed Agreements Three and Four were modifications of a real estate contract. Chase submitted evidence, by means of Borazjoni's deposition testimony, that neither agreement was reduced to writing.

Mortgages and deeds of trust come within the statute of frauds, and agreements to modify contracts that fall within the statute of frauds are themselves subject to the statute of frauds. (Civ. Code, § § 1624, 1698, subd. (a); *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 552 (*Secrest*).) Pursuant to Civil Code section 1624, a contract coming within the statute of frauds is invalid unless it is memorialized by a writing subscribed by the party to be charged or by the party's agent. Because modifications of a real estate contract are subject to the statute of frauds, Chase's showing was sufficient to meet its initial burden of demonstrating that there was no triable issue of material fact as to whether Agreement Three or Agreement Four was an enforceable modification of the deed of trust.

Borazjoni identified his confirmation letter to Chase concerning the first of these two modifications as Agreement Three. Although Borazjoni wrote a confirmation letter concerning the purported Agreement Three, Borazjoni did not provide any evidence that his letter setting forth his understanding of the agreement was subscribed by Chase.

Because the statute of frauds invalidates contracts within its scope if they are not memorialized by a writing subscribed by the party to be charged, Borazjoni's confirmation letter is insufficient to establish a binding contract to modify the terms of the deed of trust or to demonstrate a triable issue of material fact as to the existence of an enforceable contract as Agreement Three. (See *Secrest, supra*, 167 Cal.App.4th at p. 553.) Although Borazjoni also disputed the statement of material fact that Agreement Four was not reduced to writing, his dispute is not that the statement was not memorialized but that it was supposed to be: "Chase promise[d] to mail loan documents [i]n timely manner." Moreover, the passage in Borazjoni's declaration that was supposed to support his assertion that this fact was disputed made no reference to a writing or a promise of a writing whatsoever. Borazjoni's alleged payment of money pursuant to these contracts does not create an exception to the statute of frauds. (*Secrest*, at pp. 555-557 [rejecting argument that homeowners' payment of money pursuant to forbearance agreement fit within estoppel or performance exceptions to the statute of frauds].) Borazjoni failed to meet his burden of showing that there existed any disputed material facts as to the existence of a valid contract with respect to Agreements Three and Four.

D. Agreement Five

Alleged Agreement Five is an e-mail chain between the parties' counsel. The initial e-mail is a proposal from Borazjoni's then-attorney to Chase offering 10 years of monthly payments at $1,666.50 and the resumption of "regular payments" thereafter for the duration of the loan. Chase's attorney responded that she had relayed the proposal to her client, and that "before any further steps are taken with this proposal, we would like to confirm that your client understands" that under his proposal, the PITI payment (the sum of payments of the principal, interest, taxes and insurance) would amount to $3,351.81, leaving him with only $1,648.19 for all remaining expenses each month.

The next e-mail is again from Chase's counsel, setting forth her understanding of the insurance and tax payments and stating that "We have asked repeatedly for

documentation indicating that these payments are less, but we will not go on approximated values as listed below by the customer's attorney." She continued, "without documentation indicating that these payments are lower, the payment of $3351.81 stands."

A further e-mail from Chase's counsel discussed the impound feature of the loan and the current status of the home. She concluded, "As you are already aware, unless we get the proper documentation, the original amount proposed stands ($3351.81). Please provide us with that documentation. It is now October 13, and property tax information was available as of September 30. If documentation is not provided soon, we will require your client to accept the terms as they stand." This is the entirety of the documentation submitted by Borazjoni as Agreement Five.

Chase made an evidentiary showing that this was a settlement discussion; that there was no offer of a loan modification, that Borazjoni did not perform under this alleged agreement; and that Borazjoni had no personal knowledge of his former attorney accepting this alleged agreement. At deposition, Borazjoni acknowledged that after these e-mail exchanges between counsel, Chase "never went through [with] it. After that they said no." Borazjoni also acknowledged that Chase never asked him to make the $3,351.81 payment that was contemplated by these e-mail exchanges. He nonetheless maintained that this was a contract: "They gave this contract. They breached it again." Chase's showing was sufficient to establish a prima facie case that there was no breach of contract. "Unless an agreement to restructure a loan embodies definite terms, capable of enforcement, it is not a legally valid contract. 'Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement.'" (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 483.) Borazjoni's showing in opposition to summary judgment was insufficient to demonstrate by admissible evidence that there was a contract and that Chase breached it. He merely asserts that the same documents evidenced a contract and that Chase committed a breach, apparently by seeking Borazjoni's eviction. The trial court properly concluded that there was no triable issue of material fact as to Agreement Five or its purported breach; and, as

Borazjoni failed to demonstrate a triable issue of fact existed on any theory of breach of contract, the court properly granted summary judgment with respect to this cause of action.

IV. Unfair Business Practices

In the operative complaint, Borazjoni alleged a series of unfair business practices under California Business and Professions Code section 17200: "declaring unlawful default on Plaintiff's loan," "demanding [a] false large amount of default to cure default on Plaintiff's loan," "making [a] deliberate false representation that [the] foreclosure process had [been] cancelled," "demanding [a] false amount as Plaintiff's unpaid debt for [the] satisfaction of the [deed]," "entering into loan modification agreements, agreeing not to foreclose upon Plaintiff's property, and representing that [the] foreclosure process has [been] cancelled, thereby knowingly lull[ing] Plaintiff into a false sense of security that everything is in order with his home loan modification, but yet later breaching said agreements and representations by initiating foreclosure proceeding, and without due process of law" foreclosing on the property. Furthermore, Borazjoni alleged, Chase "repeatedly made and broke agreements, gave misrepresentations or misleading statements instead of true statements, made phony bailout deals that never went through or [were] intended to go through, misused or abused [the] non-judicial foreclosure proceeding, and acted in violation of California statutes, in conscious disregard to Plaintiff's rights, money and property."

Chase argued that summary adjudication of this claim was required because Borazjoni lacked standing to pursue an unfair business practices claim—because he had not sustained any injury. Borazjoni, however, lost his legal interest in and his financial investment in his home through non-judicial foreclosure, a clear injury regardless of the fact that he has not yet been evicted. The remainder of Chase's argument for summary adjudication of this cause of action is that the claim is based on his allegations of breach of contract and falls along with that claim. The recitation above of the allegations of the

operative complaint demonstrates that Borazjoni alleged a course of wrongful conduct amounting to unfair business practices that included, but went well beyond, the allegation that Chase breached contracts. Because Chase made no showing that there existed no triable issue of material fact with respect to these additional allegations, Chase did not satisfy its burden of persuasion, and it was error to summarily adjudicate this cause of action. (See *Aguilar*, 25 Cal.4th at p. 850.)

V. Fraud

Although Borazjoni divided his fraud cause of action into two counts, one entitled "Intentional Misrepresentation of Material Fact" and the other, "False Promises," the claims appear to be alternative statements of the same claim and rest upon the same allegations. Borazjoni alleged a series of misrepresentations by Chase commencing with promises to place him in a loan mitigation program in early 2008 but filing a notice of default; representing in Agreement One that it would work out a permanent modification but failing to do so; representing in Agreement Two that the monthly payment would be $2,977 but refusing to accept that amount when it was offered; accepting Agreement Three, promising documentation to follow, and representing that the foreclosure process had been cancelled when it had not; entering into Agreement Four and confirming that there would be no foreclosure when in fact Chase foreclosed on the property; and "lull[ing] [Borazjoni] into a false sense of security and believing that everything was in order with his home loan modification." Finally, he alleged, in the course of the foreclosure Chase misstated the amount of the debt, the value of the property, and the sales price to convert Borazjoni's equity in the home and cause Borazjoni a loss of his investment. Borazjoni further contended that Chase "intentionally caused Plaintiff to forego[] other options [he] had to save his precious valuable home. Had Plaintiff known [the] true facts, [he] would not have taken these actions."

Chase asserted at summary judgment that it had not made misrepresentations with respect to the default; that any inaccurate amounts in the notice of default were

"irrelevant" because Borazjoni ultimately failed to tender the amount due under the loan; that it had complied with Agreement One; that there was no misrepresentation in Agreement Two; that Borazjoni had not justifiably relied on Agreements Three or Four; that there was no offer and no misrepresentation in Agreement Five; that the 1099-A it filed contained no misrepresentations; and that there was no evidence to rebut the validity of the trustee's sale.

Chase made a prima facie showing that there existed no triable issues of material fact with respect to some aspects of this wide-ranging fraud claim. With respect to Agreement One, Chase demonstrated that there were no misrepresentations and no failure to follow through on the agreement, which only required Chase to assess Borazjoni for a modification and not to deliver a modification. With respect to Agreement Two, Chase demonstrated that this was a contractually-required notice of the periodic change in interest rate and monthly payment required under the loan agreement, and that the new payment was determined based on provisions in the promissory note. On Agreement Five, Chase showed that there was no offer and no contract contained in the settlement negotiations. Similarly, with respect to the alleged misstatement of the debt amount, property value, and proceeds of the sale, Chase demonstrated that the amounts listed on its 1099-A form were correct and that the sale in fact occurred. In opposition to the summary judgment motion, Borazjoni failed to demonstrate that a triable issue of material fact existed as to these contentions. His assertions that the non-contracts were in fact contracts and that no sale of the property actually occurred are not supported by the evidence submitted, and he did not dispute that the 1099-A form listed correct amounts.

With respect to Agreements Three and Four, however, Chase attempted to demonstrate that Borazjoni did not justifiably rely on those agreements. According to Chase, Borazjoni's continued contacts with Chase to confirm the existence of Agreement Three and the cancellation of the foreclosure process, and his meeting with Chase to negotiate Agreement Four, demonstrated that Borazjoni did not rely on any misrepresentations made by Chase with respect to Agreement Three and that he did not believe he had a valid contract. Following up with Chase, seeking to confirm that the

Agreement Three modification was effective despite Chase's failure to deliver the documentation of the allegedly promised agreement, verifying that the foreclosure of his home would not occur, and engaging in further negotiations to see if he could obtain more favorable terms does not establish that there is no triable issue of material fact as to whether Borazjoni believed he and Chase had a deal in Agreement Three. It establishes only that Borazjoni sought to hold Chase to its promises, to confirm that his home would not be foreclosed upon, and to negotiate a better deal if possible. Chase failed to make a prima facie showing that Borazjoni did not justifiably rely on Chase's representations with respect to Agreement Three.

Moreover, Chase's argument that no person could reasonably rely on statements of a former Chase employee made in a coffee shop established that there was no justifiable reliance on Agreement Four is insufficient to show that the element of reasonable reliance cannot be established because it omits the fact that Borazjoni met with two people at the coffee shop, one of whom Borazjoni understood to be a current Chase employee. Borazjoni testified at deposition that he met with Chase employee Janet Hernandez and her associate Ana Escalante, who claimed to be a former employee of Chase. Escalante had set up the meeting for Borazjoni. Borazjoni understood Hernandez to be "high up in Chase, like in [a] management position involved in loan modification," and they told him that he could qualify for a loan modification with different terms than those previously offered. The cost of the loan would be $4,000, and he paid half of that amount up front during the meeting by handing it to Escalante, who he understood to be Hernandez's associate. The evidence showed that Borazjoni was negotiating with a person he understood to be a highly placed loan modification officer and a current Chase employee, and Chase did not demonstrate that Hernandez was not in fact an employee or that Borazjoni did not believe her to be a current employee. Here too, Chase failed to show that there was no reasonable reliance on promises allegedly made by Chase with respect to Borazjoni's loan.

Chase also failed to establish that no triable issue of material fact existed as to other fraud allegations made in the operative complaint. Borazjoni alleged that when

Chase commenced the default proceedings in 2008, it falsely inflated the amount due to cure the default. Chase did not demonstrate that the amount listed in the notice of default was accurate, contending instead that as a matter of law an error in the original notice of default was "irrelevant" because Borazjoni ultimately did not tender the amount due. We have already dismissed the tender argument, and *Karlsen, supra,* 15 Cal.App.3d 112, upon which Chase relied, does not stand for the proposition that a lender may fraudulently misstate the amount of the debt without consequence provided that years later, in conjunction with a foreclosure that proceeded from a separate notice of default, no tender was made. Chase, moreover, did not demonstrate by evidence that Borazjoni sustained no damage from this allegedly false statement of the amount necessary to cure his default. Ultimately, Borazjoni has alleged that through a multi-year course of conduct, Chase sought to lull him into a sense of security that arrangements were being made or had been made to permit him to keep his home despite his financial difficulties, with the intent of causing him to rely on these representations; when, in fact, Chase intended to and did foreclose on the property. Borazjoni alleged that in reliance on Chase's course of representations, he forewent other options to save his home. Chase did not make any showing that no triable issue of material fact existed with respect to these underlying allegations of the fraud claim. Accordingly, the fraud cause of action was not subject to summary adjudication.

VI. Negligent Misrepresentation of Material Fact

Borazjoni's negligent misrepresentation claim is a hybrid of his breach of contract and his fraud claims. Borazjoni alleged that Chase committed negligent misrepresentation of material facts in the course of breaching the parties' agreements and that its duty of care "arose from its contractual duty," and he confirmed in his opposition to the summary judgment motion that he claimed that the duty of care arose from the contractual duty to avoid harming him "by carefully following terms of agreements and applicable laws." To the extent Borazjoni's negligent misrepresentation cause of action

was based on duties arising from contract, the trial court properly summarily adjudicated this cause of action because an individual may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations. (*Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1041.) To the extent that Borazjoni contends Chase breached other, non-contractual duties to Borazjoni, such as what he described in opposition to the motion for summary judgment as the "unfair, deceptive, and fraudulent actions" of "making many misrepresentations re loan modification, converting [Borazjoni's] home and its $140,000 equity, intentionally abus[ing] and violating law and falsely declaring a public auction that the records prove [] was never conducted," these all appear to be duplicative of Borazjoni's fraud claim. The trial court did not err in summarily adjudicating this cause of action.

VII. Common Counts

Chase argued that the sixth cause of action was subject to summary adjudication because Borazjoni failed to establish the elements necessary for a cause of action in equity for an accounting and/or beneficiary statement. Borazjoni, however, did not seek an accounting or beneficiary statement, but instead alleged a common count for money had and received. Chase did not satisfy the burden of persuasion that there is no triable issue of material fact and that it is entitled to judgment as a matter of law with respect to this cause of action. (See *Aguilar*, 25 Cal.4th at p. 850.)

DISPOSITION

The judgment is affirmed in part and reversed in part, and the matter is remanded to the trial court for further proceedings. Appellant shall receive his costs on appeal.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.