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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CHARLENE ANDERSON, Plaintiff and Appellant, v. COUNTRYWIDE HOME LOANS, INC., et al., Defendants and Respondents.	B226873 (Los Angeles County Super. Ct. No. TC022665)

APPEAL from a judgment of the Superior Court of Los Angeles County, William Barry, Judge. Affirmed.

B. Kwaku Duren & Associates and Nana Gyamfi for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton, Andrew W. Noble and M. Elizabeth Holt for Defendants and Respondents.

In this action for breach of contract and fraud, Charlene Anderson appeals from a judgment of dismissal entered on June 25, 2010, after the trial court sustained a demurrer of defendants and respondents Countrywide Home Loans, Bank of New York for the certificate holders, and Recon Trust Company to the second amended complaint (SAC) without leave to amend. Anderson contends the SAC sufficiently alleges a cause of action against Countrywide for breach of contract. We affirm.[1]

PROCEDURAL BACKGROUND

Allegations of the SAC

Anderson and Reginald R. Anderson[2] owned a home (the property) in Compton. On February 26, 2006, they obtained a $412,250.00 mortgage loan from Countrywide. Recon Trust was the trustee of the deed of trust. The monthly payment on the note was $3,724.86.

On October 2, 2006, the Andersons defaulted on the loan. The Andersons and Countrywide discussed refinancing the loan and concluded refinancing was not a viable option. On February 15, 2007, Recon Trust recorded a Notice of Default and Election to Sell.

On May 1, 2007, the Andersons entered into a written repayment plan (Repayment Plan Agreement) to repay the delinquent amounts. In exchange for Countrywide's agreement to postpone foreclosure, the Andersons agreed to a five-month schedule of payments, consisting of past due amounts plus the current monthly note payments, which would bring the Andersons current on the loan. After paying $7,500 on April 30, 2007,

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[1] As Anderson makes no contention of error regarding the judgment against Bank of New York or Recon Trust, she is deemed to have abandoned her appeal as to those respondents. (*In re Sade C.* (1996) 13 Cal.4th 952, 994.)

[2] Reginald was a plaintiff but did not appeal.

the Andersons were to pay $4,600 on the 30th of every month from May through August 2007 and a final amount of $35,931.67 on September 30, 2007.[3] A failure by the Andersons to comply would give Countrywide the option to immediately terminate the Repayment Plan Agreement. "In such cases, all amounts that are owing under [the] Loan shall become immediately due and payable, and Countrywide shall commence or continue, as the case may be, foreclosure proceedings[.]" "Countrywide's acceptance of any payments from you which, individually or collectively, are less than the total amount due to cure your default shall in no way prevent Countrywide from continuing with foreclosure action[.]"

Simultaneously with entering into the Repayment Plan Agreement, the parties entered into an oral agreement, which was not reduced to writing, under which Countrywide and the Andersons "agreed that [Countrywide] would modify [the Andersons'] loan at the conclusion of the repayment process if [the Andersons] abided by the conditions of the Repayment [Plan] Agreement."[4]

On May 18, 2007, Recon Trust recorded a notice of trustee's sale, with a sale date of June 6, 2007. "[The Andersons] satisfied all of the conditions of the Repayment [Plan] Agreement." The Andersons made payments pursuant to the Repayment Plan Agreement through the August 30, 2007 payment, but Countrywide failed to offer the Andersons a loan modification proposal before September 30, 2007.

In September 2007, the Andersons received a notice that the entire past due balance was due. Until June 5, 2008, Countrywide reassured the Andersons, who knew a trustee's sale was scheduled, that they could ignore the notice of sale because the loan was in the process of being modified. On June 5, 2008, the property was sold at a

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[3] This is the schedule set forth in the Repayment Plan Agreement, which was attached to the complaint, but not to the SAC, and which the trial court and the parties relied on in the demurrer proceedings.

[4] The SAC referred to the Repayment Plan Agreement, modified by the oral agreement, as the "Repayment to Modification Plan."

trustee's sale to Bank of New York, who then evicted the Andersons. The Andersons were still in possession of the property at the time the complaint was filed.[5]

A. First Cause of Action

In the first cause of action for breach of written contract, the Andersons alleged that Countrywide orally promised that prior to September 30, 2007, Countrywide would offer the Andersons a loan modification proposal and postpone the previously noticed trustee's sale. The Andersons' agreement to make payments under the Repayment Plan Agreement was the consideration for Countrywide's oral promise. The Andersons began making the payments. Countrywide reassured the Andersons the loan modification agreement was forthcoming. Countrywide breached the oral agreement by failing to offer a loan modification agreement to the Andersons, causing damage to the Andersons in the amount of $412,250.

B. Second Cause of Action

In the second cause of action for fraud and deceit under Civil Code sections 1567 and 1572, the Andersons alleged that Countrywide's oral representation it would offer the Andersons a loan modification agreement prior to September 30, 2007, was made with knowledge of the representation's falsity and intent to induce the Andersons to sign the Repayment Plan Agreement. Believing the representation to be true, the Andersons signed the Repayment Plan Agreement and made payments pursuant to the Repayment Plan Agreement.

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5 The complaint was filed January 9, 2009.

C. Third through Tenth Causes of Action

In the third through fifth, seventh, eighth, and tenth causes of action, the Andersons alleged that defendants' breach of the oral agreement to offer a loan modification agreement and sale of the property were unfair and fraudulent under Business and Professions Code section 17200, breached the implied covenant of good faith and fair dealing and the duty of care, and warranted the relief of constructive trust, quiet title, and set aside of the trustee's sale. In the sixth cause of action for promissory estoppel, the Andersons alleged they reasonably relied on defendants' oral promise to offer a modification agreement by making the payments required by the Repayment Plan Agreement. In the ninth cause of action for wrongful foreclosure, the Andersons alleged that defendants failed to give notice of the impending foreclosure sale of the property as required by Civil Code section 2924f.

Pleadings on Defendants' Demurrer to the SAC

In a demurrer to the SAC, filed on November 19, 2009, defendants contended that each cause of action failed to state facts sufficient to constitute a cause of action.[6] All causes of action, except the ninth cause of action, were predicated on an allegation that Countrywide breached an oral promise to offer a loan modification agreement. Defendants contended the oral promise was unenforceable because it was a precatory "agreement to agree" which lacked consideration and violated the statute of frauds and the parol evidence rule. The ninth cause of action for wrongful foreclosure failed because no specific violation of the rules applicable to the trustee's sale was alleged.

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[6] We have taken judicial notice of the notice of demurrer and demurrer to the SAC, filed November 19, 2009.

In opposition, the Andersons contended the statute of frauds did not apply, the Andersons' performance of the Repayment Plan Agreement took Countrywide's promise out of the statute of frauds, and Countrywide is estopped to assert the statute of frauds.

Trial Court's Ruling, the Andersons' Motion for Reconsideration, and Judgment of Dismissal

At a hearing on April 20, 2010, the trial court sustained the demurrer to the SAC without leave to amend.

The Andersons filed a motion for reconsideration under Code of Civil Procedure section 1008, contending the market value and the Andersons' equity in the property were sufficient for them to have refinanced the loan, which supported a finding of detrimental reliance on Countrywide's oral promise to provide a loan modification package. On June 11, 2010, the trial court denied the motion, finding no new facts were presented and there was no detrimental reliance on the alleged oral agreement. The "alleged oral modification agreement was not an enforceable contract[.] . . . [I]t was[,] at best, an agreement to make an offer that the plaintiffs might or might not accept; and I don't think that's an enforceable contract." The trial court signed an order sustaining the demurrer to the SAC.

On June 25, 2010, the action was dismissed with prejudice.

DISCUSSION

Standard of Review

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.]

Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"The well-pled allegations that we accept as true necessarily include the contents of any exhibits attached to the complaint. Indeed, the contents of an incorporated document (in this case, the agreement) will take precedence over and supercede any inconsistent or contrary allegations set out in the pleading. In the case of such a conflict, we will look solely to the attached exhibit." (*Building Permit Consultants, Inc. v. Mazur* (2004) 122 Cal.App.4th 1400, 1409.)

The SAC Did Not Allege an Enforceable Oral Agreement

Anderson contends the SAC states facts sufficient to establish defendants and the Andersons entered into a binding agreement for defendants to forbear from foreclosing on the property and to offer the Andersons a mortgage loan modification package if Anderson complied with the terms of the Repayment Plan Agreement. As the SAC did not allege the oral agreement was supported by consideration, we disagree with the contention.

An agreement that is not supported by consideration is unenforceable. (E.g., *Holcomb v. Long Beach Inv. Co.* (1933) 129 Cal.App. 285, 291.) Moreover, a "supplemental agreement either adding to or varying the terms of the original contract, so as to impose new and onerous burdens upon one of the parties, requires a consideration to support it." (*Krobitzsch v. Middleton* (1946) 72 Cal.App.2d 804, 808; see also Civ. Code, § 1698, subd. (c) ["Unless the contract otherwise expressly provides, a contract in writing

may be modified by an oral agreement supported by new consideration."].) An obligation already owed by the promisee to the promisor is not consideration. (Civ. Code, § 1605 [**"**Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."].)

Anderson contends the allegation that the Andersons agreed to comply with the Repayment Plan Agreement sufficiently alleged consideration for Countrywide's oral promise to forbear from foreclosure and offer the Andersons a loan modification package. Anderson is mistaken. The Andersons were bound under the Repayment Plan Agreement to comply with its terms. Countrywide was lawfully entitled to the Andersons' performance. As no new consideration was alleged for the oral agreement, the oral agreement lacked consideration. *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 673, cited by Anderson for the proposition that an oral promise to postpone foreclosure is rendered enforceable by the borrower's promise to pay or do something, is inapposite, because the borrower's promise in *Raedeke* was a new undertaking.

Promissory Estoppel

Anderson contends Countrywide is estopped to argue the oral agreement lacked consideration, because the SAC sufficiently alleges the Andersons detrimentally relied on Countrywide's promise. We disagree with the contention.

"'Under [the doctrine of promissory estoppel,] a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement. [Citations.]' [Citation.]" (*Raedeke v. Gibraltar Sav. & Loan Assn.*, *supra*, 10 Cal.3d at p. 672, fn. 1.) "[T]he doctrine of promissory estoppel is used to provide a substitute for the

consideration which ordinarily is required to create an enforceable promise." (*Id*. at p. 672.)

Anderson contends the doctrine of promissory estoppel applies because the SAC alleged that, during the period of several months the Andersons were paying more than their normal mortgage payments, Countrywide assured them the modification package was being worked on. These allegations do not state promissory estoppel. As the SAC alleged, the higher-than-normal payments were required under the Repayment Plan Agreement and, thus, did not amount to a substantial change of position.

Anderson further contends the Andersons substantially changed their position in reliance on Countrywide's oral promise, in that they stopped looking for other ways to avoid foreclosure once Countrywide promised to offer them a remodification package. This contention, too, fails. The SAC contains no factual allegations that other opportunities existed for the Andersons to retain their home, which they could have successfully pursued but which they forebore from securing.

We conclude the SAC did not sufficiently allege that promissory estoppel required the oral agreement's enforcement.

Anderson's Other Contentions

As we conclude the oral agreement is unenforceable for lack of consideration, we need not address Anderson's contentions that the statute of frauds and the parol evidence rule do not render the oral agreement invalid. To the extent Anderson contends the SAC sufficiently alleges the Andersons' other causes of action, she abandoned the contention by failing to make any appellate contention supported by argument and citation to authority.[7] (*In re Sade C.* (1995) 13 Cal.4th 952, 994.)

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[7] Our dissenting colleague would reverse the judgment on grounds never raised by Anderson on appeal which respondents have never had an opportunity to brief, in violation of Government Code section 68081. (*People v. Alice* (2007) 41 Cal.4th 668,

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

KRIEGLER, J.

I concur:

TURNER, P. J.

677-679.) Moreover, our dissenting colleague does not indicate how an amendment would state a cause of action against Bank of New York and Recon Trust.

MOSK, J., Dissenting

I respectfully dissent.

According to material submitted by defendant Countrywide Home Loans, Inc., plaintiffs signed a promissory note for $412,250 in favor of Countrywide with an interest rate of 10.350% in 2008, to finance the purchase of a house in Compton, California. The loan was adjustable to above that rate. Plaintiffs have alleged in an earlier complaint they paid $85,000 cash as the initial payment for the house and thereafter spent more than $150,000 for improvements.

Plaintiffs allege that when they fell behind in payments, and received a notice of default, Countrywide offered to modify the loan so long as plaintiffs made certain monthly payments. Plaintiffs allege they made those payments, but the loan was not modified. According to plaintiffs, when Countrywide sent plaintiffs a notice that the entire past due balance was due, Countrywide told plaintiffs to ignore the notice because Countrywide was in the process of modifying the loan; when plaintiffs continued to ask about the loan modifications, Countrywide assured them that a trustee sale was being postponed because plaintiffs "were in the modification process"; suddenly, the property was sold at a trustee sale; and plaintiffs were evicted.

At oral argument, plaintiffs' attorney asserted plaintiffs could amend to plead detrimental reliance on the promises, including available sources of funding had Countrywide not made the promises to modify the loan. Defendant had the opportunity to address this contention, but did not do so and did not request to file anything further. Plaintiffs have indicated enough to justify giving them an opportunity to amend to state a cause of action. (See, e.g., Civ. Code, § 2923.5.) Under those circumstances and in the interest of justice, I would reverse in order to allow plaintiffs to amend the second

amended complaint. (See Code Civ. Proc., § 472c, subd. (a); *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 861 [plaintiff may make a request to amend for the first time on appeal].)

MOSK, J.