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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

ALBERT A. PASSARETTI, JR., Plaintiff and Appellant, v. GMAC MORTGAGE, LLC, et al., Defendants and Respondents.	B234156 (Los Angeles County Super. Ct. No. NC043183)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roy L. Paul, Judge. Affirmed in part and reversed in part.

Albert Passaretti, in pro. per., for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton and Jonathan D. Dykstra for Defendants and Respondents.

Plaintiff Albert A. Passaretti, Jr., appeals judgment in his action for wrongful foreclosure and breach of contract. Plaintiff asserted that defendant GMAC Mortgage, LLC (GMAC) began negotiations with him for a modification of his loan, but conducted a trustee's sale although plaintiff had made payments of nearly $54,000 under a repayment plan. The trial court sustained demurrers to plaintiff's complaint without leave to amend and granted summary judgment on the remaining causes of action. On appeal, plaintiff contends the trial court erred in sustaining demurrers to his causes of action for breach of contract, wrongful foreclosure, violation of "MERS," and violations of Business and Professions Code section 17200 et seq. (the Unfair Competition Law (UCL)), as well as entering summary judgment on his claim for promissory estoppel. We affirm in part and reverse in part.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Factual Background

(a) Plaintiff's Defaults

In August 2006, plaintiff refinanced his residence located at 1609 256th Street in Harbor City,[1] giving GreenPoint Mortgage Funding, Inc. a trust deed in the sum of $620,000.[2] The loan had a monthly payment of $2,310.98 with a variable interest rate. The trust deed provided that the Mortgage Electronic Registration Systems, Inc. (MERS) was a nominee of the lender and lender's successors and assigns, that MERS was the beneficiary under the trust deed, and that Marin Conveyancing Corp. was the trustee.[3]

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[1] The trust deed identified the location of the residence as "1609 256th Street, Lomita, CA 90717." The zip code for Harbor City is 90710.

[2] The property was owned as a tenancy in common with Lirio Vega, who is not a party to this appeal.

[3] We take judicial notice of the fact that on March 17, 2007, MERS recorded a document which states it substituted Executive Trustee Services LLC as the Trustee (ETS). (Evid. Code, §§ 452, subd. (h), 453.) We do not, however, take judicial notice of the facts in such document. (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.)

Plaintiff failed to make the monthly payments due under the trust deed for the period January through June 2007. In July 2007, plaintiff made a payment of $20,366 to cure the default.

In August 2007, plaintiff was again in default under the loan, and failed to make the monthly payments for the period August 2007 through March 2008. In May 2008, plaintiff made a payment of $23,632 to cure this second default.[4]

Plaintiff asserted he had conversations with GMAC representatives in 2007 and 2008 regarding the arrearages, and was told that if he sent in the payments to bring the loan current, GMAC would do a loan modification. Plaintiff told GMAC that the monthly payments were too high, and that the interest rate was too high. He contends he discussed with GMAC during this time period the reduction of his loan to $400,000 and a four percent interest rate.

On December 26, 2008, GMAC recorded a notice of trustee's sale with a sale date of January 20, 2009, listing an outstanding indebtedness of $729,760.53. Plaintiff claimed he never received notice of this sale because the notice was sent to the correct street address, but the wrong city and the wrong zip code.

(b) The Repayment Agreement

In January 2009, plaintiff spoke with several representatives of GMAC and confirmed that the foreclosure sale would be postponed. In reliance thereon, plaintiff did not pursue a refinancing of the property with other lenders.

In January 2009, to cure a third default, plaintiff signed a repayment agreement with GMAC. The repayment agreement provided that "[t]here presently remains an outstanding indebtedness to the Lender pursuant to a note (the 'Note') and mortgage (the 'Mortgage') or equivalent security instrument executed on 08/25/06 in the original principal amount of $620,000.00. [¶] . . . Lender has instituted foreclosure proceedings

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[4]During this time period, GMAC recorded a notice of default and election to sell in the amount of $14,942.05 on January 3, 2008. GMAC recorded another notice of default and election to sell on September 22, 2008, in the amount of $16,431.99.

against the property securing the indebtedness which will continue to be in full force and effect until the default described herein [is] cured except as otherwise provided in this agreement. [¶] . . . Lender agrees to suspend foreclosure activity on the delinquent account provided that you execute and return this Agreement and the initial payment toward the delinquency in the amount of $10[,]000 no later than 01/19/09." If the repayment agreement were cancelled, terminated, or rescinded, funds remitted to Lender would not be refunded and the loan modification would not be processed; further, "the default is not cured or waived by acceptance of any monies paid hereunder."[5]

The repayment agreement required plaintiff to pay $10,000 upon signing the agreement and $4,000 per month from February through May 2009. At the conclusion of the scheduled payments, GMAC would "review [the] situation to determine the best option for resolving the remaining delinquency." The repayment agreement further provided that "[w]e will honor the Agreement if all of the described conditions and requirements are met. If at any time you fail to comply with any of the above-described conditions and requirements, this Agreement will be considered null and void and [we] will resume foreclosure."

(c) Discussions re Loan Modification

On January 31, 2009, plaintiff sent GMAC a letter stating he wanted to pay $2,310.98 a month because he could not afford $4,000 per month, and that he was submitting a loan modification application.

During the time period July 2007 through July 2009, plaintiff alleges he attempted to work out a modification of his loan with GMAC. To that end, he spoke with GMAC's representatives, who told him that in exchange for the $23,632 payment on April 28, 2008 and the additional payment of $10,000 in January 2009, GMAC would offer a loan

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[5] As part of the agreement, "Borrower acknowledges that Lender is the legal holder and owner of the Note and Security Instrument and further acknowledges that if Lender transfers the Note, as amended by this Agreement, the transferee shall be the 'Lender' as defined in this Agreement."

modification to plaintiff and not conduct a foreclosure sale of the property; pursuant to the modification, the loan would be modified to a four percent fixed rate and the principal reduced to $400,000. Plaintiff relied on these representations and made total payments to GMAC of approximately $54,000. Plaintiff asserts that during this time period, GMAC increased the principal amount of the loan to $729,760 and failed to provide an explanation of the increase when plaintiff asked for one.

However, from January through May 2009, although plaintiff made the initial $10,000 payment, he did not make the required $4,000 payments; instead, he sent in checks for $2,310.98 beginning in February 2009; one check was accepted and the others were returned. Plaintiff asserted that GMAC unlawfully raised the mortgage payments during this time period from $2,310 per month to $5,346 per month, but failed to explain to plaintiff its reason for doing so.

On April 30, 2009, plaintiff informed GMAC he could not afford the payments, and sent in a loan modification request. Plaintiff requested an interest rate of four percent and "no negative amortization." Plaintiff again wrote GMAC on May 11, 2009, requesting a loan modification and sending in the application.

On May 19, 2009, GMAC sent plaintiff a computer-generated letter regarding an interest rate change on his loan, and stating the amount due was $5,346.77, and advised him, "If you are in default at the time this notice is delivered to you, GMAC Mortgage, LLC will continue with the default process even though the interest rate and payment amount are being adjusted." (All caps. omitted.)

(d) The Trustee's Sale

On May 22, 2009, GMAC conducted a trustee's sale of the property and sold the property for $374,400. Plaintiff asserted he never received notice of the trustee's sale.

2. Procedural History

Plaintiff filed his complaint against GMAC and ETS in August 2009. Defendants demurred, and plaintiff filed a First Amended Complaint on February 1, 2010, alleging claims for (1) breach of contract (failure to modify loan in accordance with the Home

Affordable Mortgage Program) (HAMP), under which GMAC was a party to a Service Provider Agreement (SPA);[6] (2) breach of contract (GMAC's failure to comply with terms of HAMP); (3) equitable estoppel; (4) wrongful foreclosure; (5) violation of MERS; (6) violation of Business and Professions Code section 17200; and (7) an accounting. The First Amended Complaint solely sought damages.

Defendants demurred to the First Amended Complaint. The trial court sustained the demurrer without leave to amend as to the first, second and fifth cause of action; and sustained with leave to amend as to the third, fourth, sixth, and seventh causes of action.

Plaintiff's Second Amended Complaint alleged claims for (1) equitable estoppel; (2) accounting; and (3) violations of Business and Professions Code section 17200. Defendants demurred. The trial court sustained the demurrer with leave to amend as to the first cause of action; sustained the demurrer without leave to amend on the second cause of action; and overruled the demurrer on the third cause of action.

Plaintiff's Third Amended Complaint filed July 14, 2010 alleged claims for (1) promissory estoppel and (2) an accounting. On September 27, 2010, plaintiff amended the prayer to the Third Amended Complaint, and defendants filed an answer on October 22, 2010.

On January 27, 2011, defendants moved for summary judgment on the remaining two causes of action of plaintiff's complaint. On April 14, 2011, the trial court granted defendants' motion, and sustained numerous evidentiary objections to plaintiff's declaration primarily on the basis of lack of foundation.

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[6] "The United States Department of the Treasury and other federal agencies created HAMP pursuant to authority granted by the Emergency Economic Stabilization Act, title 12 United States Code section 5201 et seq. [Citation.] Mortgage servicers may voluntarily participate in HAMP. [Citation.] Treasury guidelines set forth threshold criteria to define the class of eligible borrowers. [Citation.] The guidelines also set forth accounting steps using a standardized net present value test to determine whether it is more profitable to modify the loan or allow it to proceed to foreclosure. [Citation.]" (*Nungaray v. Litton Loan Servicing, LP* (2011) 200 Cal.App.4th 1499, 1501, fn. 1.)

DISCUSSION

I. Summary Judgment

Plaintiff argues that he relied on GMAC's representations that it would not conduct a trustee's sale of his home and was ignorant of the fact that GMAC intended to conduct the trustee's sale; as a result, plaintiff was induced to make payments of $54,000 to GMAC and reasonably believed that GMAC would modify his loan. Defendants argue that (1) the repayment is an integrated written agreement and cannot be modified by an oral modification agreement, and (2) plaintiff could not reasonably rely on the oral modification statements made to him.

A. Factual Background

Defendants moved for summary judgment, arguing the repayment agreement was just that—a repayment agreement, not a loan modification, and the parole evidence rule precluded introduction of evidence to the contrary. Further, any oral agreement the parties made to postpone the foreclosure was not enforceable unless detrimental reliance was shown; the sale could not be set aside without a tender of the delinquent payments; and plaintiff could not have reasonably relied on any statements GMAC made. GMAC submitted its account notes with respect to plaintiff's loan which showed that it had no record of any pending loan modification; rather, plaintiff was interested merely in reinstating his loan.[7]

Plaintiff's opposition argued that he had detrimentally relied on GMAC's promises to modify his loan, that GMAC failed to consistently respond to plaintiff's request for a loan modification, and failed to modify the loan as promised. Further, under HAMP,[8]

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[7] However, the account notes show that plaintiff was sent a "Home Affordable Modification Plan" on April 9, 2009.

[8] Mortgage servicers may voluntarily participate in HAMP. (Williams & Geithner (D.Minn. Nov. 9, 2009 Civil No. 09-1959 ADM/JJG) [2009 U.S. Dist. Lexis 104096, *6, fn. 1].) Treasury guidelines set forth threshold criteria to define the class of eligible borrowers. (*Id*. at pp. *6–*7.) The guidelines also set forth accounting steps using a standardized net present value test to determine whether it is more profitable to modify

GMAC was prevented from proceeding with the foreclosure sale once it agreed to a loan modification. Plaintiff asserted there was a material factual dispute concerning the amount of payments plaintiff made and GMAC's application of those amounts.

In response, GMAC asserted that plaintiff's factual statements in his declaration concerning his conversations with GMAC about a loan modification and his reliance thereon, as well as GMAC's failure to provide a response to his query why his mortgage balance had increased to $729,870, lacked foundation, were speculative, and constituted legal conclusions. GMAC offered no evidence to refute plaintiff's assertions.

At the hearing, the court noted that GMAC's evidence established that the three payments plaintiff made were to bring defaults current, and were not made in reliance on any promise to modify plaintiff's loan. After the first two defaults were cured, plaintiff and GMAC entered into the repayment agreement, but plaintiff immediately fell behind. The court found this evidence established that there was never a promise to enter into a modification agreement, but instead there was a repayment plan, at the end of which if plaintiff complied, GMAC would consider a modification. Plaintiff's evidence[9] did not rebut defendants' showing, and as a consequence, plaintiff failed to raise a triable issue of fact. The court denied plaintiff's discovery motion because all of the discovery sought related to whether GMAC was the beneficial owner of the security interest and was not relevant to the claim for promissory estoppel.

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the loan or to allow it to proceed to foreclosure. (*Id*. at pp. *8–*9.) Calculations under HAMP involve assigning values to certain variables that are largely within the servicers' discretion, thus precluding any entitlement to loan modifications. (*Id*. at pp. *20–*21.) Under HAMP, GMAC is a party to a "Servicer Participation Agreement" (SPA) dated April 13, 2009, pursuant to which GMAC agreed with the Federal National Mortgage Association (Fannie Mae) to perform loan modification and foreclosure prevention services.

[9] GMAC objected to plaintiff's declaration on the grounds of lack of foundation, lack of personal knowledge, speculation, legal opinion, and relevance. The trial court sustained objections to paragraphs 1, 3, 4, 5, 7, 8, 10, 12, and 13, and overruled objections to paragraphs 2, 6, 9, and 11.

B. Standard of Review

"'"'The purpose of a summary judgment proceeding is to permit a party to show that material factual claims arising from the pleadings need not be tried because they are not in dispute.'"'" (*Affholder, Inc. v. Mitchell Engineering, Inc.* (2007) 153 Cal.App.4th 510, 516.) A defendant moving for summary judgment bears the initial burden to show the plaintiff's action has no merit. (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 168–169.) The defendant can meet that burden by either showing the plaintiff cannot establish one or more elements of his or her cause of action or there is a complete defense to the claim. (*Id*. at p. 169; Code Civ. Proc., § 437c, subd. (p)(2).) To meet this burden, the defendant must present evidence sufficient to show he or she is entitled to judgment as a matter of law. (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 847–848.)

Once the defendant meets that burden, the burden shifts to the plaintiff to present evidence establishing a triable issue exists on one or more material facts. (*Teselle, supra,* 173 Cal.App.4th at pp. 168–169; Code Civ. Proc., § 437c, subd. (p)(2).) The plaintiff opposing the motion has no burden to present any evidence until the defendant satisfies his or her initial burden. (*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 940.) We review a trial court's ruling on a summary judgment motion de novo. (*Id.* at pp. 939–940.) "'Our review of the summary judgment motion requires that we apply the same three-step process required of the trial court.'" (*Eriksson v. Nunnink, supra,* 191 Cal.App.4th at p. 848.)

"'A different analysis is required for our review of the trial court's . . . rulings on evidentiary objections. Although it is often said that an appellate court reviews a summary judgment motion "de novo," the weight of authority holds that an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard. [Citations.]' [Citation.]" (*Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335.)

C. Evidentiary Objections

Plaintiff's declaration contained numerous statements that were based upon his personal knowledge, yet GMAC contended that there was no basis for plaintiff's personal knowledge and thus the statements were speculative. We have reviewed plaintiff's declaration and conclude that the primary basis for GMAC's objection is that plaintiff's characterization of the facts differs from GMAC's characterization. This is not speculation or lack of foundation; rather, the dispute evidences that triable issues of fact exist. We therefore find the trial court abused its discretion in sustaining GMAC's objections to plaintiff's declaration.

D. Merits

"In California, under the doctrine of promissory estoppel, 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . .' [Citations.] Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.'" (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310; see *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672.)

The elements of a promissory estoppel claim are (1) a clear promise, (2) reasonable and foreseeable reliance, (3) substantial detriment and (4) damages measured by the extent of the obligation assumed and not performed. (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692; *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 225.) Although equitable in nature, promissory estoppel is akin to a cause of action based on contract except the consideration needed to form an enforceable contract is provided by detrimental reliance. (*Toscano*, at pp. 692–693; *Aceves*, at pp. 230–231.) Courts therefore "have characterized promissory estoppel claims as being basically the same as contract actions, but only missing the consideration element . . . ." (*US Ecology, Inc. v.*

State of California (2005) 129 Cal.App.4th 887, 903.) The fact that the promises made upon which the plaintiff relies are oral promises is no bar to a claim for promissory estoppel. (*Sutherland v. Barclays American/Mortgage Corp.* (1997) 53 Cal.App.4th 299, 312, fn. 8.)

In *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031 (*Garcia*), an action for wrongful foreclosure based in part upon a theory of promissory estoppel, the plaintiffs' property was in foreclosure, but they arranged an extension of the trustee's sale with their lender based upon their representation they would cure the default with proceeds of a refinance of another property owned by the plaintiffs. (*Id*. at p. 1035.) The lender represented the foreclosure sale would be postponed to August 30 and that the parties would "'see where [they] were after that'" and that the property would not go to foreclosure. (*Ibid*.) Nonetheless, the bank foreclosed on the property on August 30, although the plaintiffs had received the proceeds of their refinance and attempted to advise the lender of the imminent funding of their loan. (*Id*. at pp. 1035–1036.) *Garcia* found the plaintiffs presented sufficient evidence of reliance to create issues of fact whether the bank was promissorily estopped from proceeding with the foreclosure sale. (*Id*. at pp. 1038–1044.) "Appellants' actions in securing a high cost, high interest loan by using other property they owned as security were sufficient to support detrimental reliance, although the actions provided no particular benefit to [the lender]." (*Id.* at p. 1041.)

In *Aceves v. U.S. Bank N.A.*, *supra*, 192 Cal.App.4th 218, the plaintiff filed for chapter 7 bankruptcy proceedings after falling behind on her mortgage payments. She intended to convert her case to chapter 13 in order to save her home, but agreed with her lender that she would not convert her bankruptcy proceedings to chapter 13 in exchange for a reinstatement and loan modification. (*Id.* at pp. 223–224.) The bank, however, did not negotiate a modification with the plaintiff and sold the home at a trustee's sale after moving in bankruptcy court to lift the stay of proceedings. (*Id*. at p. 223.) The plaintiff in *Aceves* filed an action against the bank for claims including promissory estoppel. The

Court of Appeal reversed the trial court's order dismissing the action after sustaining the bank's demurrer without leave to amend, holding the plaintiff had stated a claim for promissory estoppel. The appellate court concluded it was both reasonable and foreseeable for the plaintiff to have relied on the bank's representations when she refrained from converting her chapter 7 proceeding and did not oppose the bank's motion to lift the bankruptcy stay. (*Id.* at pp. 227–228 ["By promising to work with Aceves to *modify* the loan in addition to reinstating it, U.S. Bank presented Aceves with a compelling reason to opt for negotiations with the bank instead of seeking bankruptcy relief"].)

We note that in *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, the court held that an unsigned written forbearance from foreclosure agreement was unenforceable under the statute of frauds because it modified the note and deed of trust by substituting a new monthly payment and altering the lender's ability to exercise its right to foreclose. (*Id.* at p. 553.) However, in *Garcia*, *supra*, 183 Cal.App.4th 1031, the court rejected the lender's argument that the statute of frauds and Civil Code section 1698 precluded enforcement of an alleged oral promise to postpone a foreclosure because "[a] party is estopped to assert the statute of frauds as a defense 'where [the] party, by words or conduct, represents that he will stand by his oral agreement, and the other party, in reliance upon that representation, changes his position, to his detriment.'" (*Garcia*, at p. 1040, fn. 10.)

Here, plaintiff fits squarely within those cases showing reasonable and detrimental reliance and establishing an estoppel. Plaintiff stated in his declaration and in discovery responses that he spoke to several named GMAC representatives who told him that they would work on a loan modification, and after the trustee's sale was noticed, told him that the trustee's sale would be postponed. However, even after making these statements, which would have left a reasonable person believing no foreclosure would take place, GMAC conducted a foreclosure sale. Furthermore, plaintiff has alleged detrimental reliance on GMAC's inconsistent statements and conduct (in accepting some payments

from him and then rejecting payments) in the form of numerous payments made in an effort to bring his loan current and satisfy GMAC's fluctuating demands and conditions.

II. Discovery Orders

Other than setting forth the standard of review for discovery orders, plaintiff makes no argument why the trial court abused its discretion in denying his motions to compel further response to special interrogatories and request for production of documents. "It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and '"'all intendments and presumptions are indulged in favor of its correctness.'" [Citation.]' [Citation.] An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.]" (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) As plaintiff has failed to present cogent appellate arguments supported by legal authority on this discovery issue, we may properly treat any appellate issues as having been forfeited.

III. Demurrers to First and Second Amended Complaint

A. Standard of Review

On appeal from a judgment of dismissal following an order sustaining a demurrer, "we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose." (*McCall v. PacifiCare of California, Inc*. (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that can be reasonably inferred from those pleaded, and facts of which judicial notice can be taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We review the trial court's denial

of leave to amend for an abuse of discretion. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) "When a demurrer is sustained without leave to amend, we determine whether there is a reasonable probability that the defect can be cured by amendment. [Citation.]" (*V.C. v. Los Angeles Unified School Dist*. (2006) 139 Cal.App.4th 499, 506.)

B. First Amended Complaint

1. First and Second Causes of Action (Breach of Contract)

(a) Factual Background

Plaintiff's first amended complaint alleged for the first cause of action that GMAC was a party to an SPA with the Department of Treasury, and GMAC failed to negotiate a loan modification or modify the terms of plaintiff's loan in compliance with the SPA it entered into with the Federal National Mortgage Association, as financial agent of the United States, to participate in HAMP. Plaintiff further alleged he was a [third party] beneficiary of the SPA, and under the SPA, GMAC had a duty to fully comply with HAMP, and GMAC invited him to participate in the HAMP and SPA by virtue of a HAMP brochure attached to plaintiff's first amended complaint. As a result, GMAC invited plaintiff to enter into a loan modification and plaintiff accepted this offer. Plaintiff's first amended complaint alleged for its second cause of action that GMAC failed to treat plaintiff in accordance with the guidelines of HAMP and the SPA, and that public policy considerations required GMAC to treat plaintiff consistent with the provisions of HAMP and the SPA.

The HAMP agreement provides at paragraph 11.E that "[t]he Agreement shall inure to the benefit of and be binding upon the parties to the Agreement and their permitted successors-in-interest."

The trial court found that neither the SPA or HAMP had been incorporated into the note or deed of trust; and plaintiff cited no legal authority to support his contention that a violation of either the state or federal statutory schemes could be the basis of a breach of contact claim, even where the violation of such statutory schemes violated public policy.

Finally, the court noted that plaintiff did not allege the trust deed violated public policy, but rather defendants' alleged breach violated public policy, and thus was seeking to reform the contract by enforcing the contract on terms other than those set forth in it. The court sustained defendants' demurrer with leave to amend to the first, second, and fourth cause of action and overruled demurrer to the third cause of action for accounting.

Plaintiff is not a party to the SPA agreement and must demonstrate he is a third party beneficiary to proceed under it. "'California law permits third party beneficiaries to enforce the terms of a contract made for their benefit.' [Citation.] . . . Civil Code section 1559 . . . states: 'A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.' . . . [¶] Third parties claiming the right to performance under an agreement made by others are classified as either intended or incidental beneficiaries of the contract." (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1021–1022.) The mere fact that a contract, if carried out to its terms, would inure to the third party's benefit is insufficient to entitle him or her to demand enforcement. Rather, it must appear to have been the intention of the parties to secure to him or her personally the benefit of its provisions. (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc*. (2009) 171 Cal.App.4th 35, 51.)

Whether homeowners are intended third party beneficiaries of HAMP contracts has been addressed by numerous federal district courts, the majority of which have held that homeowners are not intended third party beneficiaries. (See. e.g., *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 559, fn. 4 [citing cases]; *Thomas v. JP Morgan Chase & Co.* (S.D.N.Y. 2011) 811 F.Supp.2d 781, 797; *Lucia v. Wells Fargo Bank, N.A.* (N.D.Cal. 2011) 798 F.Supp.2d 1059, 1070–1071; *Tran v. Bank of America Corporation* (S.D.Cal.2012) 2012 U.S. Dist. Lexis 32947, at pp. *4–*6.)[10] Although

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[10] "Although they are not binding, decisions of the lower federal courts are entitled to great weight on questions of federal law. [Citation.]" (*Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd*. (1997) 58 Cal.App.4th 200, 206.) In addition,

federal courts have recognized that HAMP intends to benefit homeowners, those same courts have recognized that homeowners do not have enforceable rights under HAMP agreements because affording them such rights would conflict with the express language of agreement, which states: "The Agreement shall inure to the benefit of and be binding upon the parties to the Agreement and their permitted successors-in-interest." (See, e.g., *Thomas, supra,* 811 F.Supp.2d at p. 797; *Grill v. BAC Home Loans Servicing LP* (E.D.Cal. 2011) 2011 U.S. Dist. Lexis 3771, *16; *Hoffman v. Bank of America,* N.A. (N.D.Cal. 2010) 2010 U.S. Dist. Lexis 70455, *10–*11.)

Therefore, we conclude the trial court did not err in finding that plaintiff could not, as a matter of law, state a claim for breach of the SPA agreement to which he was not a party.

For this same reason, based on his lack of standing, he cannot state a claim for breach of contract based on public policy. "In determining whether a contract violates public policy, courts essentially engage in a weighing process, balancing the interests of enforcing the contract with those interests against enforcement. [Citation.] But the cases make clear that the judicial power to declare public policy in the context of contract interpretation and enforcement should be exercised with great caution. """"The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."""""" (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1082 (conc. opn. Moreno, J.).) Here, plaintiff would have us extend enforcement of a contract to a party not named in it on grounds of public policy. We decline to do so.

"[u]npublished federal cases are not binding authority but they may be cited as persuasive. [Citation.]" (*Hall v. Goodwill Industries of Southern California* (2011) 193 Cal.App.4th 718, 727, fn. 2.)

2. Fourth Cause of Action (Wrongful Foreclosure)

Plaintiff's First Amended Complaint alleged that defendants violated Civil Code section 2923.6 by failing to offer him a loan modification.[11] Defendants contended this claim failed because plaintiff (1) failed to allege he tendered the amounts due, which was a prerequisite to setting aside the foreclosure sale; and (2) plaintiff had not rebutted the statutory presumption the foreclosure sale had proceeded lawfully as the notice of sale contained the proper legal description and assessor's parcel number; further, plaintiff received it as evidenced by the handwriting on plaintiff's copy attached to the first amended complaint. Plaintiff's opposition asserted that plaintiff did not receive actual notice of sale and the trustee's sale should therefore be vacated.[12]

The trial court found plaintiff's allegations relied solely on the statement of the legislative purpose of Civil Code section 2923.6; the statute only created a duty between a loan servicer and a loan pool member; and nothing in the statute imposed a duty on loan servicers to modify the terms of a loan, and thus section 2923.6 did not create a private right of action. However, the court pointed out with respect to the assertion of wrongful foreclosure, plaintiff needed to establish that the trustee or mortgagee caused an illegal fraudulent or willfully oppressive sale of real property pursuant to a power of sale contained in a mortgage or deed of trust and that the mortgagor sustained damages. Although plaintiff had asserted he did not properly received notice of the sale from GMAC or ETS, which was supported by the fact the city and zip code were wrong on the notice of sale, the court found that the writing on the copies plaintiff attached to the complaint established plaintiff had received actual notice of the sale. The trial court

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[11] Civil Code section 2923.6 provides in relevant part: [¶] (b) 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."

[12] Although plaintiff's complaint only requested damages in its prayers, in this place and others plaintiff requested a set aside of the trustee's sale.

granted leave to amend, but specifically limited leave to the issue of whether the foreclosure trustee had been properly substituted.

On appeal, plaintiff argues that the trial court improperly went beyond the scope of a demurrer when it looked at the handwritten notations on the notice of sale and concluded therefore that plaintiff had actual notice; furthermore, the handwriting was that of his attorney, not plaintiff. Plaintiff also asserts the foreclosure was void because the substitution of trustee was not recorded. Respondent GMAC reiterates that Civil Code section 2923.6 does not provide a basis for an actionable claim; plaintiff cannot allege harm from the allegedly defective notice because he cannot redeem the property; finally, plaintiff failed to allege tender, as required to set aside the foreclosure sale.

Plaintiff cannot state a claim under Civil Code section 2923.6 based upon GMAC's failure to consummate a workout of his loan because that section does not create a duty for a lender to agree to a loan modification. (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1617.)

However, with respect to the irregularities in the notice of sale and plaintiff's contention he never received notice of the sale, or the substitution of trustee was not recorded, those allegations provide a basis for plaintiff to state a claim for wrongful foreclosure. The power of sale in a deed of trust allows a beneficiary recourse to the security without the necessity of a judicial action. (See *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1249.) Absent any evidence to the contrary, a nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly. (Civ. Code, § 2924.) However, irregularities in a nonjudicial trustee's sale may be grounds for setting it aside if they are prejudicial to the party challenging the sale. (See *Lo v. Jensen* (2001) 88 Cal.App.4th 1093, 1097–1098.) Setting aside a nonjudicial foreclosure sale is an equitable remedy. (*Id.* at p. 1098 ["A debtor may apply to a court of equity to set aside a trust deed foreclosure on allegations of unfairness or irregularity that, coupled with the inadequacy of price obtained at the sale, mean that it is appropriate to invalidate the sale"].)

However, "[i]t is settled that an action to set aside a trustee's sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security." (*Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578; see also *FPCI RE–HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1022 [rationale behind tender rule is that irregularities in foreclosure sale do not damage plaintiff where plaintiff could not redeem property had sale procedures been proper].) However, a tender may not be required where it would be inequitable to do so. (See *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424; see also *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 876–878 [when new trustee has been substituted, subsequent sale by former trustee is void, not merely voidable, and no tender needed to set aside sale].) Specifically, "'if the [plaintiff's] action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt.'" (*Onofrio v. Rice*, *supra*, 55 Cal.App.4th at p. 424.)

Here, the handwriting on the notice of sale does not establish conclusively that plaintiff had actual notice of the sale *before* the foreclosure sale. This irregularity in the conduct of the foreclosure proceedings requires set aside of the foreclosure because plaintiff has alleged that if he had received the notice, he would have taken action to avert the sale—as he had been doing all along by contacting GMAC, making defaults current, and attempting to adhere to a payment schedule.[13] Further, in light of the fact that this case is at the demurrer stage, plaintiff should be given the opportunity to amend his complaint to allege that the tender requirement was met or should be excused. Plaintiff has asserted a modification of the original loan; these allegations might arguably provide

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[13] However, we note that plaintiff's assertions that the trustee's sale was void due to the fact the substitution of trustee was not recorded lack merit. Although Civil Code section 2934a, subdivision (a)(1) provides that a trustee "may be substituted by the recording . . . of a substitution executed and acknowledged by . . . all of the beneficiaries under the trust deed, or their successors in interest, and the substitution shall be effective notwithstanding any contrary provision in any trust deed," plaintiff cannot show any prejudice from any purported lack of recordation.

a basis for an attack on the validity of the underlying debt and thus why tender would be excused. (See *Onofrio v. Rice, supra,* 55 Cal.App.4th at p. 424; *Dimock v Emerald Properties, supra,* 81 Cal.App.4th at pp. 876–878.)

3. Fifth Cause of Action (Violation of MERS)

Plaintiff's claim for violation of MERS alleges that the original lender was GreenPoint Mortgage Funding and MERS is identified as the beneficiary of the trust deed, yet there is no record of the assignment of the note and trust deed to GMAC from MERS and the identity of the note holder is unknown, and thus GMAC had no authority to conduct the foreclosure sale. Defendants argued that nothing required the foreclosure trustee to possess the original promissory note, relying on the unpublished federal case *Tina v. Countrywide Home Loans, Inc.* (S.D.Cal. Oct. 30, 2008, No. 08CV1233 JM(NLS)) [2008 WL 4790906, *7–8] (*Tina*).

The trial court, relying on *Tina,* found that plaintiff could not state a claim because Civil Code section 2934 provides that an assignment of a note may be recorded, but it is not mandatory; further, nothing in the statutory foreclosure scheme requires the foreclosure trustee to possess the original note in order to exercise the power of sale. The trial court denied leave to amend.

On appeal, plaintiff contends there was no assignment of the note or trust deed to GMAC.

The "MERS System," is a method devised by the mortgage banking industry to facilitate the securitization of real property debt instruments. As described in *Mortgage Electronic Registration Systems v. Nebraska Dept. of Banking & Finance* (2005) 270 Neb. 529 [704 N.W.2d 784], MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records. (*Id*. at p. 785.) "Ordinarily, the owner of a

promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust. (11 Thompson on Real Property (2d ed. 1998) § 94.02(b)(7)(i), p. 346.) Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as 'nominee' for the lender, and granted the authority to exercise legal rights of the lender." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267.)

Plaintiff's claim fails because the foreclosing trustee is not required to possess the note. Civil Code section 2924 outlines the requirements for nonjudicial foreclosures in California, and does not include providing the original note prior to the sale. "'In a nonjudicial foreclosure, also known as a "trustee's sale," the trustee exercises the power of sale given by the deed of trust.'" (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 440.) "'If the trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly.'" (*Id*. at p. 441.) Further, the assignment of the deed of trust, notwithstanding the requirements of Civil Code section 2932.5,[14] need not be recorded because that statute only applies to mortgages, not deeds of trust. (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1509.)

Additionally, a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests. (*Melendrez v. D & I Investment, Inc.*, *supra*, 127 Cal.App.4th at p. 1258; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 86, fn. 4 ["A nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly; one attacking the sale must overcome this common law presumption 'by pleading and proving

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[14] Civil Code section 2932.5 provides, "Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. The power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded."

an improper procedure and the resulting prejudice'"].) "Prejudice is not presumed from 'mere irregularities' in the process." (*Fontenot*, *supra*, 198 Cal.App.4th at p. 272.) Thus, even if GMAC lacked authority because it was not a proper transferee, plaintiff has not shown how he as prejudiced by MERS's purported assignment, and there is no allegation to this effect. Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing his obligations under the note. Plaintiff concedes he was in default, and he does not allege that the transfer to GMAC interfered in any manner with his attempts to renegotiate his loan, or that the original lender would have otherwise refrained from foreclosure under the circumstances presented.

C. Second Amended Complaint: Second Cause of Action (Violation of Bus. & Prof. Code § 17200)

Plaintiff alleged that defendants were required to record with the Los Angeles County Recorder an assignment of the deed of trust to GMAC, and were required to inform plaintiff of the assignment. He further alleged that GMAC's failure to cancel the trustee's sale or offer plaintiff a loan modification was unfair, unlawful, or fraudulent. Defendants contended that nothing in Civil Code section 2932.5 required the assignment of the deed of trust to be recorded; nor did GMAC have a duty to modify the loan under Civil Code section 2923.6, and thus plaintiff could not state a claim under the UCL.

The trial court found that defendants' conduct was not unlawful, and plaintiff's unfair competition claim failed because it was based on plaintiff's claims of statutory violations. In particular, the trial court found failure to record an assignment of the trust deed did not support a statutory violation, and the trustee was not required to possess the original note. Further, the power of sale under a deed of trust was held by the trustee, not the beneficiary. Finally, the failure to offer a loan modification did not support a UCL claim because nothing in the statutory nonjudicial foreclosure scheme requires a loan modification.

On appeal, plaintiff concedes that the success or failure of this cause of action depends on the success or failure of his other claims, and the "trial court's ruling sustaining the demurrer without leave to amend should be reversed as may be appropriate depending on the reversal of" these causes of action.

"The purpose of the UCL 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.'" (*Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal.App.4th 247, 252.) "The California Supreme Court held that the UCL '"establishes three varieties of unfair competition—acts or practices which are [1] unlawful, or [2] unfair, or [3] fraudulent."'" (*Id.* at p. 253.) Since the UCL is written in the disjunctive, a business act or practice may be alleged to be all or any of the three varieties. (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1554.) In order to state a claim under the unlawful prong, a plaintiff must allege facts that show anything that can reasonably be characterized as a business practice is also a violation of law. (*People v. McKale* (1979) 25 Cal.3d 626, 632.) To show a violation under the fraudulent prong, a plaintiff must show that members of the public are likely to be deceived by the practice. (*Weinstat v. Dentsply Internat., Inc*. (2010) 180 Cal.App.4th 1213, 1223, fn. 8.) "A plaintiff's burden thus is to demonstrate that the representations or nondisclosures in question would likely be misleading to a reasonable consumer." (*Ibid.*)

As plaintiff has stated a claim for wrongful foreclosure, he has stated a claim under the UCL.

DISPOSITION

The judgment is reversed as to plaintiff's claims based on promissory estoppel (third amended complaint, first cause of action), wrongful foreclosure (first amended complaint, fourth cause of action), and violations of Business and Professions Code section 17200 (second amended complaint, third cause of action). In all other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

MILLER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.