

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 12/10/2015

TIME: 11:25:00 AM

DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown

CLERK: K. Pratchen

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **34-2014-00160873-CU-OR-GDS** CASE INIT.DATE: 03/27/2014

CASE TITLE: **Potocki vs. Wells Fargo Bank NA**

CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP

APPEARANCES

Nature of Proceeding: Ruling On Submitted Matter (Hearing on Demurrer to the 3rd Amended Complaint) Taken Under Submission 12/9/2015

TENTATIVE RULING

Defendants Wells Fargo Bank, N.A. and U.S. Bank National Association's demurrer to Plaintiffs Thaddeus Potocki and Kelly Davenport's Third Amended Complaint ("TAC") is ruled upon as follows.

The parties' requests for judicial notice is granted. (*See Poseidon Devel., Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-18; see also *Startford Irrig. Dist. v. Empire Water Co.* (1941) 44 Cal.App.2d 61, 68 [recorded land documents, not contracts, are the subject of judicial notice on demurrer].) The court, however, does not accept the truth of any facts within the judicially noticed documents except to the extent such facts are beyond reasonable dispute. (*See Poseidon Devel.*, 152 Cal.App.4th at 1117-18.) *see also Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265 ("[A] court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in the recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity.")

The TAC asserts causes of action for breach of contract, violations of Bus. & Prof. Code § 17200, negligence, violation of Civil Code § 2923.6 and IIED arising out of allegations that Defendants failed to offer a permanent loan modification as allegedly promised in connection with a 2009 forbearance agreement after they had fallen behind on their mortgage payments. Plaintiffs also allege that submitted two loan modifications in late 2014 which were ultimately denied.

First Cause of Action (Breach of Contract)

Defendants' demurrer is sustained without leave to amend for failure to state facts sufficient to constitute a cause of action.

As they did in the previous version of the complaint, Plaintiffs allege that "[i]n connection with the subject

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mortgage loan, Plaintiffs and defendant USBank and Wells Fargo entered into a written contract whereby defendants agreed to modify the subject mortgage loan in exchange for Plaintiffs' three trial payments." (TAC ¶ 32.) The Court previously sustained the demurrer to this cause of action on the basis that Plaintiffs failed to adequately allege the terms of the contract or attach a copy of the contract.

In the TAC, Plaintiffs have attached a special forbearance agreement dated August 12, 2009. However, that agreement states that it was "an agreement to temporarily accept reduced payments...during the plan specified below...Upon successful completion of the three regular payments as outlined in this plan, your loan will be reviewed for a Loan Modification, based on investor approval..." (TAC Exh. A.) "The lender is under no obligation to enter into any further agreement, and this forbearance shall not constitute a waiver of the lender's right to insist upon strict performance in the future." (Id.)

The very terms of the purported contract make clear that alleged contract did not contain any promise to modify the loan. The attached forbearance agreement was an agreement to temporarily reduce payments and a promise to review the loan for modification if the reduced payments were made. Facts appearing in exhibits to a complaint, like well-pleaded allegations in the complaint, are taken as true on demurrer. (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.) When the facts in exhibits are contrary to the facts alleged in the complaint, however, the exhibits take precedence. (Ibid.)

Plaintiff's reliance upon *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780 is misplaced. That authority dealt with the situation where a lender offered a borrower a TPP pursuant to HAMP. The Court there held that in the event that the borrower completes the required payments under the TPP, the lender is obligated under HAMP to offer a permanent loan modification even if the TPP does not expressly provide that a permanent loan modification would be offered. (*Id.* at 797-798.) But that finding is based on the purposes and requirements of HAMP, specifically a HAMP supplemental directive issued by the US Department of the Treasury in April 2009 stating that if a lender approves a TPP it must offer a permanent loan modification. (*Id.* at 797.) The forbearance agreement, however, is not alleged to have been a TTP pursuant to HAMP and thus there is no occasion to read into the agreement an obligation for Defendants to offer a permanent modification.

The demurrer is sustained on this basis alone. The Court need not and does reach Defendants' arguments based upon judicial estoppel based on a failure to list the claim regarding the 2009 forbearance agreement in Plaintiffs' bankruptcy schedules.

The Court however rejects the statute of limitations argument. The Court rejected Defendants' statute of limitations arguments as to this and all causes of action in ruling on the prior demurrer.

Second Cause of Action (Bus. & Prof. Code § 17200)

Defendants' demurrer is sustained without leave to amend for failure to state facts sufficient to state a cause of action. Plaintiffs simply incorporate all of their previous allegations into this cause of action without specifying what conduct is unfair, unlawful and/or fraudulent. (TAC ¶¶ 35-37.) However, UCL causes of action must be "state[d] with reasonable particularity." (*Koury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.) The instant cause of action is pled with no particularity and does not even identify what prong of the UCL is at issue much less the conduct that allegedly violates that prong. To the extent that Plaintiffs seek to rely upon their other causes of action as the factual underpinning for this claim they cannot do so as each cause of action as alleged in the TAC is deficiently pled.

Third Cause of Action (Negligence)

Defendants' demurrer is sustained without leave to amend for failure to state facts sufficient to constitute a cause of action. Plaintiffs allege that Defendants owed a "general duty of care." (TAC ¶ 39.) They

allege that Defendants did not honor the contract to modify the loan and that Defendants negligently made false representations in promising a permanent loan modification in exchange for three trial payments. (Id. ¶ 40.) These allegations are insufficient.

Defendants are correct that the allegations do not establish a duty. "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as [20] a mere lender of money." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096 [817] .) A loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution's conventional role as a lender of money. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 67.)

However, as recent cases have recognized, *Nymark* is but a general rule, as a "lender owes a duty to a borrower not to make material misrepresentations about the status of an application for a loan modification...It is foreseeable that a borrower might be harmed by an inaccurate or untimely communication about a foreclosure sale or about the status of a loan modification application, and the connection between the misrepresentation and the injury suffered could be close." (*Lueras, supra*, 221 Cal. App.4th at 68-69.) In addition, a financial institution owes a duty of reasonable care in processing a loan modification at least where it was alleged that the defendants agreed to consider loan modifications. (*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 949-951.)

Here Plaintiffs allege only that they had a contract with Defendants which was not honored and that Defendants negligently misrepresented that they would permanently modify the loan. But as seen above, there was no contract pursuant to which Defendants agreed to permanently modify the loan and thus no representations that they would do so. While Plaintiff cites to *Alvarez* in opposition, the TAC does not contain any allegations regarding any duty of care that was owed and/or breached in connection with processing a loan modification. They refer vaguely to Defendants denying a loan modification in bad faith but there are no facts to suggest that Defendants breached any duty that was owed in connection with any loan modification review. Rather the cause action is premised on the theory that Defendants owed a duty which was breached when they failed to honor the alleged contract to permanently modify the loan. (TAC ¶¶ 40, 41.)

Plaintiff's opposition also refers to purported violations of the HOBR. However, the third cause of action contains no reference to any such violations and in any event, as seen below the HOBR cause of action is defectively pled.

Fourth Cause of Action (Violation of Civil Code § 2923.6)

Defendants' demurrer is sustained without leave to amend for failure to state facts sufficient Civil Code § 2923.6(f) requires the servicer to send written notice to the borrower following denial of a loan modification identifying the reasons for denial, including: (1) the time to appeal and how to appeal; (2) a specific reason for investor disallowance if the denial was based on investor disallowance; (3) income and property value used to calculate net present value if the denial was a result of a net present value calculation; (4) if applicable, a finding that the borrower was previously offered a modification and failed to make payments; (5) if applicable, a description of foreclosure prevention alternatives for which the borrower may be eligible.

Plaintiffs allege that they submitted complete loan modifications and that they "received two written denials, both of which were insufficiently detailed to comply with the statute." (TAC ¶ 45.) In the introductory paragraphs, they alleged that they received a denial on February 3, 2015 of their HAMP modification which states that Defendants could not modify the loan because they "do not have the contractual authority to modify your loan because of limitations in our servicing agreement." (TAC ¶ 20.) The allegations are insufficient. Statutory claims must be plead with particularity. (*Covenant Care, Inc.*

v. Superior Court (2004) 32 Cal.4th 771, 790.) The instant cause of action is not. There are no facts demonstrating how the denial letters failed to comply with § 2923.6(f) other than the vague allegation that the denials were insufficiently detailed. There are no allegations as to what specific detail was missing that should have been included in the denial. While the opposition complains that the denial did not specify the servicing agreement which Defendants indicated precluded them from modifying the loan, Plaintiffs do not provide any authority that anything more was required.

Fifth Cause of Action (IIED)

Defendants' demurrer is sustained without leave to amend for failure to state facts sufficient to constitute a cause of action. Here Plaintiffs simply incorporate all of the allegations in the TAC and allege that the "conduct above is intentionally intrusive and outrageous....Defendants' irrational refusal to offer Plaintiffs help is extreme and outrageous..." (TAC ¶¶ 47, 48.) These allegations are insufficient.

"A cause of action for [IIED] exists where there is '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.'" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051.) Conduct is only "extreme and outrageous" when it is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminster*, (1982) 32 Cal. 3d 197.) The Court may, as a threshold matter, determine whether the alleged conduct rises to the level of "extreme and outrageous." It is well-established that creditors enjoy a qualified privilege to pursue and protect their own economic interests by asserting their legal rights "even though [there may be a] substantially certain that in so doing emotional distress will be caused." (*Fletcher v. Western Nat'l Life Ins. Co.* (1970) 10 Cal. App. 3d 376, 395.) "An assertion of legal rights in pursuit of one's own economic interests does not qualify as 'outrageous' under this standard." (*Yu v. Signet Bank/Virginia* (1999) 69 Cal. App. 4th 1377, 1398.)

In opposition Plaintiffs claim that the IIED cause of action is supported by the allegation that the final offer of assistance from Defendants regarding loan modification required them to make three trial payments, the first of which was \$171,745.78. (TAC ¶ 22.) They alleged that this was in effect a requirement that the pay all past due arrearages. (Id.) This is insufficient. At most this simply shows that Plaintiffs disagreed with Defendants' decisions in connection with the modification process. It "simply is not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid...[A] commercial lender is privileged to pursue its own economic interests and may properly assert its contractual rights." (*Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 528.) There are simply no facts that could amount to any conduct which could be deemed "extreme and outrageous."

In sum, the demurrer is sustained to all causes of action without leave to amend. While Plaintiffs requested leave to amend, they made no showing as to how they could cure any of the defects identified above. Further, this is the fourth version of the complaint. Additional leave is not appropriate.

Given the above, the Court need not address any additional arguments asserted by Defendants in support of the demurrer.

Pursuant to CRC 3.1312, Defendants shall submit an order and judgment of dismissal.

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

SUBMITTED MATTER RULING

Having taken the matter under submission on 12/9/2015, the Court now rules as follows:

The Court affirms the tentative ruling.