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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

SVETLANA NERSESYAN,

Plaintiff and Appellant,

v.

BANK OF AMERICA, N.A.

Defendant and Respondent.

C071934

(Super. Ct. No. SCV0030541)

Plaintiff Svetlana Nersesyan filed suit against defendant Bank of America, N.A., after defendant foreclosed on her property, alleging a variety of claims based on defendant's alleged mishandling of her mortgage payments. The trial court sustained defendant's demurrer without leave to amend. Plaintiff appeals, arguing the trial court abused its discretion in denying her leave to amend, and defendant breached the covenant of good faith and fair dealing implied in the loan agreement and violated Business and Professions Code section 17200.

A spate of recent appellate decisions provide guidance on this subject: *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780 (*West*); *Wigod v. Wells Fargo*

Bank, N.A. (7th Cir. 2012) 673 F.3d 547 (*Wigod*); *Corvello v. Wells Fargo Bank, N.A.* (9th Cir. 2013) 728 F.3d 878 (*Corvello*); and this court's decision in *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915 (*Bushell*). These decisions, issued after the trial court ruled in the present case, conclude that when a borrower has alleged that he or she complied with all the terms of a trial modification plan offered under the Home Affordable Modification Program (HAMP), including making required payments and providing requested documents, and if the borrower's representations on which the modification is based remain true and correct, the lender must offer the borrower a good faith permanent modification. If the lender fails to do so, the borrower may bring an action against the lender for breach of contract of the trial modification plan, among other causes of action. Accordingly, we conclude plaintiff should be given the opportunity to amend her complaint to state potential causes of action for breach of the covenant of good faith and fair dealing, promissory estoppel, violation of Business and Professions Code section 17200, and fraud.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's Complaint

In January 2012 plaintiff filed a complaint against defendant and Cydney Sanchez, an individual, for damages and equitable relief for accounting, quiet title, breach of the covenant of good faith and fair dealing, promissory estoppel, fraud, intentional infliction of emotional distress, and violation of Business and Professions Code section 17200. Plaintiff alleges defendant put her in a trial HAMP modification program for 21 months, then denied her application and forced her into default by failing to credit the 21 payments to her account. Plaintiff alleges defendant Sanchez operated a fraudulent loan modification company and tricked plaintiff into signing a grant deed. Plaintiff does not allege any connection between defendant Bank of America and defendant Sanchez, who is not a party to this appeal.

The complaint alleges that in July 2007 plaintiff obtained an interest only adjustable rate note from Countrywide Home Loans, Inc., in the amount of \$580,000 (note). The note was secured by a deed of trust, with ReconTrust Company as trustee. Defendant acquired plaintiff's loan from Countrywide.

Plaintiff met all of her obligations under the terms of the loan through 2008 and then sought a loan modification from defendant. In July 2009, with defendant's assistance, plaintiff applied for a modification and was approved for a HAMP "Trial Period Plan" (TPP). The TPP required plaintiff to make an initial payment of \$3,332.50 on July 21, 2009, and two subsequent monthly payments while defendant evaluated plaintiff's eligibility for a permanent modification. However, defendant failed to mail plaintiff the HAMP trial package and she missed the first payment.

On July 20, 2009, defendant notified plaintiff through a recorded notice of trustee's sale under deed of trust that the property would be sold at an August 2009 foreclosure sale. However, no sale took place at that time.

After receiving the notice, plaintiff was contacted by Ken Griffith, who told her he could help in stopping the pending foreclosure. Plaintiff paid Griffith \$4,000 and signed a stack of documents authorizing Sanchez to communicate on plaintiff's behalf with defendant. According to the complaint, "secreted within these documents was a grant deed which Plaintiff was tricked into signing."¹ On July 29, 2009, the grant deed was recorded. Plaintiff subsequently discovered Sanchez operated a fraudulent loan modification corporation and was being criminally prosecuted.

Plaintiff made the two TPP payments in August and September 2009. Although she "had not received a final determination of her eligibility for a permanent loan

¹ The grant deed is dated December 10, 2008.

modification following the conclusion of the HAMP Trial period,” plaintiff continued paying the TPP payment of \$3,332.50 from October 2009 through December 2009.

In December 2009 defendant denied plaintiff’s loan modification request. However, defendant informed her that if she continued to make her HAMP trial payments the property would not be foreclosed upon. In addition, if plaintiff resubmitted her application materials, defendant would reconsider her modification request. Plaintiff repeatedly submitted her loan modification package for the next year and a half, but defendant “continued to lead Plaintiff on.”

Plaintiff made the HAMP trial amount payment each month, but in January and March 2011 defendant notified plaintiff that she was in default and required to pay the total deficiency of \$80,634.58. In July 2011 defendant informed plaintiff her modification request had been denied, it would no longer accept the HAMP payments, and plaintiff was required to bring her loan current. In October 2011 plaintiff received a loan history statement from defendant that revealed defendant had failed to credit the HAMP trial payments as regular monthly mortgage payments. Instead, defendant listed the payments as “miscellaneous postings,” resulting in a false and inaccurate default on plaintiff’s note.

On January 23, 2012, ReconTrust Company, the trustee under the deed of trust, recorded a second notice of trustee’s sale, indicating plaintiff was \$697,587.25 in arrears on her loan.

Subsequent Events

Defendant filed a demurrer to plaintiff’s complaint. Plaintiff filed an opposition.

The trial court sustained defendant’s demurrer without leave to amend. On the cause of action for an accounting, the court found plaintiff alleged no facts to support the claim that defendant owed any amount to her. The payments she made did not exceed her obligations under the deed of trust. Plaintiff’s cause of action for breach of the covenant of good faith and fair dealing failed to state facts sufficient to constitute a valid

cause of action since defendant did not have a duty to grant plaintiff a loan modification. The court also found the complaint failed to state a cause of action under Business and Professions Code section 17200 because plaintiff could not adequately allege that she suffered injury and lost money or property as a result of the alleged unfair practices. Payments made pursuant to a valid deed of trust do not support a showing of harm.

The trial court found plaintiff failed to show a reasonable possibility the complaint could be amended to state a cause of action. According to the trial court, “[t]he complaint does not suggest on its face that it is somehow capable of amendment and plaintiff fails to demonstrate that the complaint can be amended to change its legal effect.” Following entry of judgment, plaintiff filed a timely notice of appeal.

DISCUSSION

Standard of Review

The function of a demurrer is to test the sufficiency of the complaint by raising questions of law. We give the complaint a reasonable interpretation and read it as a whole with its parts considered in their context. A general demurrer admits the truth of all material factual allegations. We are not concerned with the plaintiff’s ability to prove the allegations or with any possible difficulties in making such proof. We are not bound by the construction placed by the trial court on the pleadings; instead, we make our own independent judgment. (*Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 824.)

Where the trial court sustains the demurrer without leave to amend, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. If we find that an amendment could cure the defect, we must find the court abused its discretion and reverse. If not, the court has not abused its discretion. The plaintiff bears the burden of proving an amendment would cure the defect. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.)

Breach of Implied Covenant of Good Faith and Fair Dealing

Plaintiff contends the trial court abused its discretion in sustaining the demurrer without leave to amend on the breach of implied covenant claim. She argues her complaint set forth a prima facie case for breach of the covenant of good faith and fair dealing based on contract.

In support, plaintiff states she claimed that she and defendant entered into a contractual relationship by virtue of the loan agreement on her property. She performed all of her obligations under the agreement by “tendering every trial payment plan and . . . she was excused from tendering the higher monthly mortgage payment for the period that she was in the trial plan.” Therefore, all conditions necessary for defendant to perform had occurred. Defendant failed to properly credit plaintiff’s payments to her account. Plaintiff was harmed by defendant’s breach because defendant charged her late fees and attorney fees and placed her property in foreclosure.²

The law implies in every contract a covenant of good faith and fair dealing, meaning neither party will do anything that will injure the right of the other to receive the benefits under the contract. (*Bushell, supra*, 220 Cal.App.4th at pp. 928-929.) If a contract exists between the parties, the implied covenant is limited to assuring

² Defendant faults the trial court for considering the breach of the implied covenant of fair dealing only in the tort context. We disagree with plaintiff’s reading of the record.

The trial court stated: “The tort of breach of the implied covenant does not apply in cases that involve ordinary banking transactions. [Citation.] An implied covenant ‘will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself.’ [Citation.] If defendant did expressly what it was given the right to do, there is no breach of the implied covenant. [Citation.] The bank did not have a duty to grant plaintiffs a loan modification, and the implied covenant cannot impose a duty where none existed. The implied covenant does not extend beyond the terms of the contract at issue. [Citation.]” While the trial court began its discourse with reference to the tort of breach of the implied covenant of good faith and fair dealing, the bulk of its analysis referred to the contract between the parties.

compliance with the express terms of the contract and cannot be extended to create obligations not contemplated in the contract. The duty imposed by the implied covenant depends on the nature of the bargain struck between the parties and the legitimate expectations of the parties arising from the contract. (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885; *Commercial Union Assurance Companies v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 918.)

The majority of plaintiff's cause of action for breach of the implied covenant centers on the HAMP trial payments. According to plaintiff, "Under Plaintiff's Loan, Plaintiff has an obligation to make monthly payments and Defendant . . . has the implicit obligation not to hinder or prevent Plaintiff's ability to perform under the Loan. Defendant . . . acted in bad faith when it instructed Plaintiff to make reduce[d] payments under the HAMP Trial in lieu of her regular mortgage payments for nearly two years and then refus[ed] to properly credit the HAMP Trial payments to Plaintiff's account as her monthly mortgage payments. As such, Defendant breached the implied promise of good faith and fair dealing implicit in every contract or agreement."

In reaction to the near collapse of the financial markets in 2008, Congress enacted the Troubled Asset Relief Program (TARP), which in part required the Department of the Treasury to implement a plan to minimize home foreclosures. (*Wigod, supra*, 673 F.3d at p. 556.) That plan, HAMP, enables certain homeowners who are in default or at risk of default to obtain permanent loan modifications, reducing their mortgage payments to no more than 31 percent of their gross monthly income for at least five years. Lenders receive a \$1,000 incentive payment from the government for each HAMP modification, as well as other incentives. (*Bushell, supra*, 220 Cal.App.4th at p. 923.)

HAMP Supplemental Directive No. 09-01, issued by the United States Department of the Treasury, sets forth eligibility requirements and modification procedures under HAMP. (U.S. Dept. Treasury, HAMP Supplemental Directive No. 09-01, Apr. 6, 2009, pp. 2-18 (hereafter, Supplemental Directive 09-01).) Lenders must perform HAMP loan

modifications in accordance with Treasury Department regulations. (*West, supra*, 214 Cal.App.4th at p. 787; *Wigod, supra*, 673 F.3d at p. 556.)

Under Supplemental Directive 09-01, before a lender offers a TPP to a distressed borrower, the lender (1) has already found that the borrower satisfies certain simple threshold requirements under HAMP regarding the basic nature of the loan obligation, (2) has already calculated a trial modification payment amount using a “waterfall” method of specified steps that drops the borrower’s monthly mortgage payment to the HAMP figure of 31 percent of monthly gross income, and (3) has already determined that it is more profitable to modify the loan under HAMP than to foreclose upon it. (*West, supra*, 214 Cal.App.4th at pp. 787-788; *Wigod, supra*, 673 F.3d at pp. 556-557, 565; Supplemental Directive 09-01, *supra*, pp. 2-5, 8-10, 14-18.)

After receiving the signed TPP from the borrower, with income verification documents, the lender must confirm that the borrower continues to meet the HAMP eligibility criteria, and if not, the lender should promptly notify the fact in writing to the borrower and consider the borrower for another foreclosure prevention alternative. (Supplemental Directive 09-01, *supra*, pp. 15, 17-18.) In essence, when a lender offers a TPP to a distressed borrower, the lender effectively has already determined the borrower qualifies for HAMP, assuming the borrower’s representations on which the modification is based remain true and correct. (*Bushell, supra*, 220 Cal.App.4th at p. 924; Supplemental Directive 09-01, *supra*, pp. 15, 17-18.)

Once a lender determines the borrower qualifies for HAMP, the lender implements the HAMP modification process in two stages. In the first stage, the lender provides the borrower with a TPP setting forth the trial payment terms; instructs the borrower to sign and return the TPP, a financial hardship affidavit, and income verification documents; and requests the first trial payment. In the second stage, after the trial period, if the borrower has complied with all the terms of the TPP, including making all required trial payments and providing all required documentation, and if the borrower’s representations

on which the modification is based remain correct, the lender must offer the borrower a permanent loan modification. (*Bushell, supra*, 220 Cal.App.4th at pp. 924-925; *West, supra*, 214 Cal.App.4th at pp. 787-788; *Wigod, supra*, 673 F.3d at p. 557; Supplemental Directive 09-01, *supra*, pp. 14-15.)

The lender must offer the borrower a permanent loan modification because when the lender received public tax dollars under TARP, it agreed to offer TPP's and loan modifications under HAMP according to regulations issued by the Department of the Treasury. Under Supplemental Directive 09-01, if the lender approves a TPP, the borrower complies with all the terms of the TPP, and all of the borrower's representations remain true and correct, the lender must offer a permanent loan modification. (*West, supra*, 214 Cal.App.4th at pp. 796-797.) Supplemental Directive 09-01 states: " 'If the borrower complies with the terms and conditions of the [TPP], the loan modification will become effective on the first day of the month following the trial period' " (*West*, at p. 797.)

In the present case, plaintiff does not allege that she and defendant signed an agreement regarding the HAMP trial payments. Nor did plaintiff attach a copy of the TPP or provide any citations to the agreement to support her claims.

Plaintiff does allege she was approved for a TPP by defendant. Defendant failed to mail plaintiff the TPP documentation, and she missed the initial required payment. However, for many months thereafter plaintiff did make the required payments. After informing plaintiff it was denying her loan modification request, defendant told plaintiff that if she resubmitted her application materials, defendant would reconsider her modification request. Plaintiff resubmitted her loan modification package and made TPP payments. Subsequently, defendant informed plaintiff her modification request had been denied and no further HAMP payments would be accepted.

Plaintiff requests us to allow her to amend her complaint to allege breach of the covenant of good faith and fair dealing. We agree plaintiff must be afforded the

opportunity to amend her complaint to set forth a viable cause of action consistent with *Bushell, West, Corvello, and Wigod*. Under these cases, if plaintiff can allege that she executed a TPP under the HAMP program, made all her trial payments, and supplied the required documentation, she will have established a cause of action for breach of the covenant of good faith and fair dealing.

Business and Professions Code Section 17200

On appeal, plaintiff only tangentially discusses her claim that defendant violated Business and Professions Code section 17200. In its entirety, plaintiff's argument consists of the statement, "Likewise, the claim for violation of California Business and Professions Code § 17200, which is based on the breach of the covenant of good faith and fair dealing claim, also should have survived demurrer, and this should be reversed on appeal."

Business and Professions Code section 17200 permits civil recovery for "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." In her complaint, plaintiff argues defendant's entire course of conduct "constitutes unlawful, unfair, and fraudulent business practices" under section 17200. According to plaintiff, defendant's course of dealing with plaintiff was fraudulent and designed to unlawfully engineer an insurmountable default that would give defendant the color of authority to foreclose on her property. Defendant engaged in the routine practice of encouraging borrowers to apply for a HAMP modification, but once borrowers submitted an application, defendant placed them on a TPP and encouraged them to continue making payments pursuant to the TPP. Defendant failed to credit those payments to the borrowers' accounts as their monthly mortgage payments, leading to foreclosure.

In sustaining defendant's demurrer without leave to amend, the trial court found plaintiff could not adequately allege she suffered injury in fact and lost money or property as a result of defendant's alleged unfair practices. In addition, plaintiff failed to

establish that a specific law was violated, that defendant committed fraud, or that defendant was required to modify plaintiff's loan.

However, in *West*, the court concluded a plaintiff could allege a cause of action under Business and Professions Code section 17200 based on unfair and fraudulent business practices by alleging the lender engaged in the practice of making TPP's that did not comply with HAMP guidelines, made misrepresentations regarding a borrower's rights and foreclosure sales, and wrongfully conducted trustee's sales when the borrower was in compliance with a TPP. (*West, supra*, 214 Cal.App.4th at p. 806.) In the present case, if plaintiff can amend her complaint to allege a breach of the covenant of good faith and fair dealing, she can establish a cause of action for unfair and fraudulent business practices.

Other Causes of Action

The trial court also sustained defendant's demurrer without leave to amend as to plaintiff's causes of action for accounting, promissory estoppel, fraud, and intentional infliction of emotional distress. On appeal, plaintiff asserts: "As to the other causes of action, [plaintiff] should have been given leave to amend, and [plaintiff] should be given leave to amend to articulate other causes of action consistent with the facts as pleaded. Everyone should agree that failing to credit almost \$80,000.00 worth of payments constitutes some kind of wrongdoing, and leave to amend should be granted to articulate other theories, such as breach of contract and wrongful foreclosure."

Again, the trial court sustained defendant's demurrer without leave to amend on these causes of action prior to *West*, *Wigod*, *Corvello*, and *Bushell*. We consider these remaining causes of action in light of this recent authority.

The elements of promissory estoppel are (1) a clear and unambiguous promise by the promisor and (2) reasonable, foreseeable, and detrimental reliance by the promisee. (*Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890.) In *Bushell*, we found the allegation of a TPP contract, through which a permanent modification was to

be offered if certain conditions were met, meets the element of a clear and unambiguous promise. (*Bushell, supra*, 220 Cal.App.4th at p. 930.) In addition, we found a plaintiff can allege damage in the form of detrimental reliance on a lender's promise to permanently modify his or her loan by repeatedly contacting the lender, preparing requested documents, discontinuing efforts to refinance with other institutions, and by losing a home and making it unlikely the plaintiff could purchase another one. (*Ibid.*) Therefore, plaintiff in the present case should be allowed to amend her complaint to state a cause of action for promissory estoppel.

As to the cause of action for fraud, a promise made without any intention of performing it constitutes actual fraud. (Civ. Code, § 1572, subd. 4.) Again, plaintiff should be allowed to amend her complaint to allege a cause of action for fraud based on the TPP and any representations defendant made in connection with the TPP payments.

However, plaintiff's cause of action for an accounting does not implicate a TPP or defendant's failure to offer her a permanent modification plan. As the trial court noted, plaintiff alleged no facts to support a claim that defendant owes any amount, and the payments she made did not exceed her obligations under the deed of trust. Plaintiff offers no amendment to overcome this obstacle and the court correctly sustained the demurrer without leave to amend.

Nor does plaintiff propose an amendment to support her cause of action for intentional infliction of emotional distress. Plaintiff has failed to meet her burden of proving an amendment would set forth a viable cause of action for intentional infliction of emotional distress, and we affirm the trial court's order sustaining the demurrer as to this cause of action without leave to amend.

DISPOSITION

The judgment is affirmed as to the causes of action for an accounting and for intentional infliction of emotional distress. In all other respects, the judgment is reversed

and the matter is remanded for further proceedings. Plaintiff shall recover costs incurred on appeal.

RAYE, P. J.

We concur:

NICHOLSON, J.

ROBIE, J.