Filed 3/12/14 Fairbanks v. Bank of America CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

JOHN FAIRBANKS et al., Plaintiffs and Appellants, v. BANK OF AMERICA, N.A., et al., Defendants and Respondents.	C072086 (Super. Ct. No. 11CV38097)

In this case plaintiffs John and Kathryn Fairbanks ask for relief from a judgment dismissing their lawsuit arising from implementation of the federal government's Home Affordable Modification Program (HAMP). Plaintiffs urge us to follow the lead of the Fourth Appellate District in *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780 (*West*), wherein the Court of Appeal, reversing the trial court, held the homeowner had stated viable causes of action for fraud, negligent misrepresentation, breach of a written contract, promissory estoppel, and unfair business practices. While we agree with the court's analysis in *West* based on the compelling factual allegations the homeowner asserted in that case, plaintiffs' complaint is devoid of many of the facts upon which *West* was decided.

Here plaintiffs defaulted on their mortgage loan, made temporary reduced payments under a trial HAMP modification, and then renovated the property. Without identifying who or when, they allege that someone representing defendants told them in a telephone call that if they made the reduced payments for three months, they would qualify for a permanent reduction in their monthly payments. Like in *West*, defendants ultimately informed plaintiffs that they did not qualify for a permanent plan. Unlike in *West*, their property has not been sold and plaintiffs do not allege defendants secretly scheduled a sale while inducing them to challenge the bank's calculation of the value of the home.

Plaintiffs filed suit against defendants Bank of America, N.A. (B of A), and others, alleging causes of action for fraud, promissory estoppel, wrongful foreclosure, and unfair business practices. Due to fatal deficiencies in the pleadings not present in *West*, we must affirm the judgment sustaining defendants' demurrer to the first amended complaint without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

The First Amended Complaint

Plaintiffs currently own and reside on property located at 14098 Cobb Lane in Burson, California. In 2006 they obtained a loan from New Century Mortgage Corporation (New Century) in the amount of $481,950. The terms of the loan were set forth in a promissory note secured by a deed of trust. New Century is identified as the lender and beneficiary in the deed of trust. Defendant BAC Home Loans Servicing, LP (BAC), an affiliate or predecessor of defendant B of A, is the servicer of the loan, charged with collecting monthly payments under the deed of trust.

On June 30, 2008, New Century substituted ReconTrust Company as trustee. New Century simultaneously assigned its interest under the deed of trust to Deutsche Bank

National Trust Company as trustee for Morgan Stanley ABS Capital I Inc. Trust 2006-HE7 Mortgage Pass-Through Certificates, Series 2006-HE7 (Deutsche Bank) and/or Mortgage Electronic Registration Systems, Inc. (MERS), as appropriate.

By July 1, 2008, plaintiffs were $28,630.68 past due on their loan and therefore ReconTrust Company recorded a notice of default. Plaintiffs did not cure the arrearages on their home loan. On August 4, 2009, a notice of trustee's sale was recorded and the sale was scheduled for August 20, 2009. Plaintiffs applied for a loan modification. The sale was postponed.

In or about October 2009 BAC and B of A informed plaintiffs that "they qualified for a loan modification. Plaintiffs were put on a Three Month Trial Modification Plan by BAC and B of A for which they began making payments in or about October of 2009." They allege they made the modified payments for the three-month trial period and for an additional six months. Relying on BAC and B of A's representations that they qualified for a HAMP loan modification and that if they made their trial payments on time they would become permanent, "they made several thousand dollars of improvements to the Subject Property." BAC and B of A informed plaintiffs they did not qualify for a loan modification.

On October 3, 2011, ReconTrust recorded a second notice of trustee's sale to be held on October 25, 2011. Plainitffs' unpaid loan balance and other charges amounted to $608,538.78. Plaintiffs do not challenge defendants' representation that to date the sale has not gone forward.

The Demurrers

In November 2011 plaintiffs filed the initial complaint and the trial court sustained defendants' demurrer with leave to amend. Plaintiffs filed their first amended complaint in April 2012 based on the same operative facts. This time the court sustained the demurrer without leave to amend and plaintiffs appeal the judgment of dismissal.

The purpose of a demurrer is to test the sufficiency of the pleadings to state a cause of action as a matter of law. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153 (*Gomes*).) We must assume the truth of all properly pleaded facts as well as those that are judicially noticeable. (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1501 (*Herrera*).) We are not concerned with plaintiffs' ability to prove the allegations or with any possible difficulties in making such proof. Our review is de novo. (*Gomes* at p. 1153.)

Where, as here, the trial court sustains the demurrer without leave to amend, we must decide whether there is a reasonable possibility the plaintiff can 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*, *supra*, 192 Cal.App.4th at p. 1153.)

DISCUSSION

I

Fraud

Plaintiffs' first cause of action is for fraud. Plaintiffs allege: "Oral representations were made to Plaintiffs by a BAC/ B of A representative, that Plaintiffs qualified for a HAMP modification and would receive a permanent modification if they made all of the trial plan payments in a timely manner." Plaintiffs further allege that defendants intended them to rely on their representations, and they did, in fact, rely on the representations by making payments in accordance with the trial plan, by incurring costs in sending the financial information to defendants, and by spending thousands of dollars making improvements to the property. Defendants, according to the first amended complaint, knew plaintiffs would not receive a permanent loan modification when they made the representations. Plaintiffs assert that defendants lied "for the purpose of obtaining federal money as a special loan servicer of a delinquent loan."

"The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages." (*West*, *supra*, 214 Cal.App.4th at p. 792.) Defendants contend the demurrer was properly sustained without leave to amend because plaintiffs failed to allege a misrepresentation with the requisite specificity to support a fraud claim, failed to establish justifiable reliance, and failed to alleged damages attributable to the purported misrepresentations.

Plaintiffs insist their allegations mirror the allegations found to support a cause of action for fraud in *West*. Not so. Plaintiffs' complaint alleges facts far different from the allegations Genevieve West asserted.

West alleged quite specifically that Chase Bank made misrepresentations in the trial plan agreement and in a letter dated April 5, 2010, both of which were attached as exhibits to the complaint. (*West*, *supra*, 214 Cal.App.4th at p. 793.) In the April 5 letter, the bank notified West she had not been approved for a permanent modification but invited her to request the data upon which the denial was based, and if she found any material inaccuracies, the bank promised to conduct a new evaluation. (*Id*. at p. 789.) She also alleged that on April 8, 2010, she spoke to a supervisor in the loan modification department, informed the bank it had used outdated information, and requested a reevaluation. In a conference call on May 24, 2010, the bank agreed she could resubmit her updated financial data for reevaluation and "there was no foreclosure sale date or sale scheduled." (*Id*. at pp. 790, 793.) Two days later the bank secretly sold her house. (*Id*. at p. 790.)

The Fourth Appellate District concluded that West met the specificity requirement for stating a viable cause of action for fraud, demonstrated justifiable reliance, and adequately pleaded that her reliance on the alleged misrepresentations caused her to suffer damages. (*West, supra*, 214 Cal.App.4th at pp. 793-795.) By contrast, plaintiffs' complaint falls woefully short on all three grounds.

General and conclusory allegations are not sufficient to state a cause of action for fraud. "The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." (*West*, *supra*, 214 Cal.App.4th at p. 793.)

Whereas West alleged specific dates when the defendant bank made misrepresentations, attached the trial plan agreement and the letter promising a reevaluation as exhibits to the complaint, and described the telephone conversations with some particularity, plaintiffs made only the general and conclusory statement that someone told them they were approved for a permanent plan if they made their temporary payments. Not only did they fail to attach the trial period plan as an exhibit, they failed to allege the terms and conditions of the agreement in the body of the complaint. They did not allege who the person was that purportedly told them they had been approved for a permanent modification, or in what capacity that person acted. Unlike West, plaintiffs failed to meet the specificity requirement for pleading fraud.

Nor did they adequately plead justifiable reliance. In both written and oral communications, Chase Bank repeatedly informed West that she could challenge the methodology and data used to calculate whether she qualified for a permanent modification by supplying updated information and requesting a reevaluation. Most significantly, Chase assured her that it would not foreclose on the house during this process. Having received such specific and reasonable assurances, the court concluded West could justifiably rely on the bank's representations and forgo legal action to forestall the sale.

We agree with defendants that plaintiffs fail to demonstrate a justifiable reliance upon any of the alleged misrepresentations they purportedly made. Plaintiffs allege they made temporary payments and incurred costs related to the trial period plan in reliance on defendants' representation that they had been approved for a permanent modification. But their decision to participate in the HAMP program was not precipitated by the fraud; rather, they decided to apply to the program because they were in default on their loan and before any of the asserted misrepresentations were made. Similarly, the costs incurred with processing their application also preceded any of the alleged misrepresentation.

Even if we assume the truth of the vague and conclusory allegation that some unidentified person made some general assurance they would be approved for a permanent modification, we conclude the statement does not justify plaintiffs' alleged reliance in spending thousands of dollars to improve their property. After all, they were contractually obligated to make the higher payments and they remained in default. We conclude it is not reasonable to rely on a vague statement in one telephone conversation and thereafter to begin improving property before curing the default or executing a permanent plan modification.

But what sets this case apart from *West* most significantly is that West lost her house and plaintiffs have not. Thus, the fatal deficiency in their pleadings is how the misrepresentations caused plaintiffs' damages. In *West*, the causal connection was clear—the bank promised the house would not be sold while the reevaluation took place and then secretly sold the house. Here plaintiffs continue to reside in the house, presumably enjoying the improvements they have made instead of satisfying their mortgage obligations. Until the house is sold, the damages, if any, are entirely speculative.

In sum, plaintiffs' cause of action for fraud simply is not analogous to West's allegations. Plaintiffs' allegations, unlike West's, lack specificity, fail to demonstrate justifiable reliance, and are devoid of damages. We agree with the trial court that plaintiffs failed to properly allege each element of a fraud claim and have failed, both in the trial court and on appeal, to demonstrate how they could cure these deficiencies. As a result, we affirm the court's dismissal of the fraud claim.

II

Promissory Estoppel

Plaintiffs' cause of action for promissory estoppel is equally vacuous and irredeemable. The elements for promissory estoppel are: "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890 (*Laks*).) While promissory estoppel applies whenever a promissor induces reliance on a promise that would result in injustice if not enforced, a mere " 'hopeful expectation[] cannot be equated with the necessary justifiable reliance.' [Citation.]" (*Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 227 (*Aceves*).) *Aceves*, like *West*, provides a template for allegations that, unlike plaintiffs' complaint, are sufficient to survive demurrer.

In *Aceves*, the plaintiff alleged that U.S. Bank promised to work with her in reinstating and modifying her loan, and in reliance on its promise she did not attempt to save her home under a chapter 13 bankruptcy proceeding. (*Aceves*, *supra*, 192 Cal.App.4th at p. 221.) Breaching the promise, the bank went forward with a foreclosure and did not begin negotiations toward a possible loan solution. (*Ibid*.) Relying on *Laks*, *supra*, 60 Cal.App.3d 885, the bank argued that the promise was not clear and unambiguous in its terms. (*Aceves*, at p. 226.) The court rejected the bank's analogy, highlighting the difference in the pleadings (*ibid*.), a difference relevant to our review of the sufficiency of plaintiffs' cause of action for promissory estoppel.

The court in *Aceves* wrote: "U.S. Bank's discussion of *Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885 [131 Cal.Rptr. 836] misses the mark. There, the plaintiffs applied for a loan and relied on promissory estoppel in arguing that the lender was bound to make the loan. The Court of Appeal affirmed the dismissal of the case on demurrer, explaining that the alleged promise to make a loan was unclear and ambiguous because it did not include all of the essential terms of a loan, including the identity of the borrower and the security for the loan. In contrast, Aceves contends U.S. Bank promised but failed to engage in negotiations toward a solution of her loan problems. Thus, the question here is simply whether U.S. Bank made and kept a promise to *negotiate* with Aceves, not whether, as in *Laks*, the bank promised to make a loan or, more precisely, to modify a loan. Aceves does not, and could not, assert she relied on the terms of a *modified loan agreement* in forgoing bankruptcy relief. She acknowledges that the parties never got that far because U.S. Bank broke its promise to negotiate with her toward a mutually agreeable modification. While *Laks* turned on the sufficiency of the terms of a loan, Aceves's claim rests on whether U.S. Bank engaged in the promised negotiations. The bank either did or did not negotiate." (*Aceves*, *supra*, 192 Cal.App.4th at p. 226.)

There are obvious parallels between plaintiffs' allegations for promissory estoppel and those of Laks. As in *Laks*, plaintiffs assert that defendants promised a permanent modification of their loan, but the promise is unclear and ambiguous because it does not include all the essential terms of the loans. Moreover, as in *Laks*, there is ambiguity around the conditional nature of the promise. In *Laks*, in a written letter, the first paragraph states the loan modification is a conditional statement. (*Laks*, *supra*, 60 Cal.App.3d at p. 891.) Here plaintiffs allege they agreed to a trial period plan, which, like the conditional promise in *Laks*, suggests the lack of a commitment to a permanent modification. Indeed, as defendants point out, a monthly statement plaintiffs received states, “You will be notified once we have determined your eligibility for a permanent loan modification.”

Plaintiffs insist the statement is immaterial because it followed defendants’ oral promise that they had been approved for a permanent modification if they made their temporary payments. But because plaintiffs do not allege who made the promise and when, we are unable to resolve the ambiguity. Thus, not only is the promise irreparably unclear and unenforceable, the allegations negate another essential element—detrimental reliance.

In *Aceves*, the plaintiff alleged she relied on the bank’s promise to renegotiate her loan by forgoing a chapter 13 bankruptcy. The court found the promise reasonably induced her to fail to act to save her house or, in other words, to detrimentally rely on the promise the bank made. Here plaintiffs are unable to demonstrate detrimental reliance. We agree with defendants that any reliance was neither reasonable nor foreseeable, nor did plaintiffs suffer any detriment.

Plaintiffs do not allege that they told defendants of their desire or plan to improve the property. Since they were in default, it is unreasonable to infer that their ability to improve the property was foreseeable. In *Aceves*, however, the bank was aware the plaintiff was seeking bankruptcy protection and forgoing converting her chapter 7 bankruptcy into a chapter 13 in exchange for the bank’s promise to negotiate a loan modification in good faith. If plaintiffs did rely on the asserted oral promise as they claim they did, they failed to set forth facts upon which we could find their reliance was foreseeable.

But again what sets this case aside from *Aceves*, as it does from *West*, is that the house has not been sold and plaintiffs remain in their home. As a result, they have failed to allege detrimental reliance. It is impossible to ascertain the value of the improvements, not to mention the value of the house itself. In the absence of damages, we agree with the trial court that plaintiffs have failed to plead sufficient detrimental reliance and the demurrer was properly sustained.

III

Wrongful Foreclosure

At its essence, plaintiffs assert that the notice of default is void because of irregularities involved in the securitization of their loan. More specifically, they allege the assignment of the deed was too late and they cannot ascertain who the proper beneficiary is under their deed of trust. Courts have consistently rejected the same or analogous arguments and have concluded a borrower does not have standing to preemptively challenge the authority of the foreclosing parties to foreclose based on a perceived defect in the securitization of their loan. But plaintiffs' argument fails for an even more fatal flaw—ReconTrust Company was authorized to record the deed as either the beneficiary or the trustee. Thus, the securitization of the loan, including the assignment, is irrelevant. Plaintiffs lose either because the notice of default is not void on its face as alleged or because they lack standing to challenge the assignment.

ReconTrust Company, "as agent for the Beneficiary," executed the notice of default on June 30, 2008. The notice provided: "RECONTRUST COMPANY, is acting as an agent for the Beneficiary under a Deed of Trust dated 06/09/2006, executed by JONATHAN L. FAIRBANKS AND KATHRYN J. FAIRBANKS, HUSBAND AND WIFE, AS JOINT TENANTS as Trustor, to secure certain obligations in favor of NEW CENTURY MORTGAGE CORPORATION as beneficiary recorded 06/20/2006, as Instrument No. 2006-11668 (or Book , Page) of Official Records in the Office of the County Recorder of Calaveras County, California." The notice was consistent with the terms of the deed of trust plaintiffs signed. In the deed, New Century is identified as the "Lender" and the "Lender" is further described as "the beneficiary under this Security Instrument."

Those authorized to record a notice of default are identified in Civil Code section 2924 and include "[t]he trustee, mortgagee, or beneficiary, or any of their authorized agents." ReconTrust Company issued the notice of default as the authorized agent of the beneficiary, New Century. As a result, the notice of default is not void as alleged. If, as stated in the notice of default, ReconTrust Company was the agent of the beneficiary, New Century, at the time the notice was given, it was not void as alleged.

Plaintiffs insist, however, "the assignment of the Deed of Trust was fraudulent." An assignment of the deed of trust apparently occurred the same day. In the document entitled "Substitution of Trustee and Assignment of Deed of Trust," also dated June 30, 2008, New Century transferred the deed of trust to Deutsche Bank and/or MERS and substituted ReconTrust Company as the trustee. If, therefore, the substitution was effective at the time ReconTrust Company executed the notice of default, it could have done so in its capacity as trustee. Either way, neither Deutsche Bank nor MERS was required to execute or record the notice of default, and any irregularities in the assignment to either or both of these parties had nothing to do with its validity. We reject plaintiffs' argument that the notice of default is void.

Nor do we accept plaintiffs' contention that they have standing to challenge the authority of the foreclosing parties to commence foreclosure proceedings. Several recent cases have rejected the same or similar claims. In *Gomes*, *supra*, 192 Cal.App.4th 1149, ReconTrust Company, as here, sent the borrower the notice of default. In *Gomes*, ReconTrust Company acted as the agent for MERS. " 'MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.' [Citation.]" (*Id*. at p. 1151.) The borrower, like plaintiffs, alleged that he " '[did] not know the identity of the Note's beneficial owner' " (*id*. at p. 1152) and that MERS did not have authority to initiate the foreclosure. The trial court sustained a demurrer to the complaint without leave to amend.

Affirming, the Court of Appeal refused to interfere in the delicately balanced and comprehensive nonjudicial foreclosure scheme established by the Legislature. (Civ. Code, § 2924 et seq.) The court concluded, "Because California's nonjudicial foreclosure statute is unambiguously silent on any right to bring the type of action identified by Gomes, there is no basis for the courts to create such a right." (*Gomes*, *supra*, 192 Cal.App.4th at p. 1156.)

Similarly, the borrower in *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 (*Fontenot*) complained that MERS lacked authority to transfer the note because the deed of trust designated MERS as both the " 'nominee for the lender' " and the " 'beneficiary.' " (*Id*. at pp. 262-263.) Like plaintiffs, the borrower failed to allege how she was prejudiced by MERS's purported assignment. The court found the deficiency fatal to the cause of action for wrongful foreclosure.

The court explained that "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. . . . Even if MERS lacked authority to transfer the note, it is difficult to conceive how plaintiff was 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 her obligations under the note. Plaintiff effectively concedes she was in default, and she does not allege that the transfer to HSBC interfered in any manner with her payment of the note [citation], nor that the original lender would have refrained from foreclosure under the circumstances presented. If MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a $1 million promissory note." (*Fontenot*, *supra*, 198 Cal.App.4th at p. 272.)

The pattern continues. In *Herrera*, *supra*, 205 Cal.App.4th 1495, the borrower again alleged a defect in MERS's assignment of the deed of trust, arguing that the successors and assignees of the original lender did not have an agency agreement with MERS. And again the borrowers, like plaintiffs, did not claim that the lender committed misconduct by initiating foreclosure proceedings, nor did they contend they were not in default. "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 her obligations under the note." (*Id*. at p. 1507.) Following the lead of the courts in *Gomes* and *Fontenot*, the *Herrera* court found no abuse of discretion in denying the plaintiffs leave to amend.

The Fourth District Court of Appeal reiterated the same general rule in *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 511: "California courts have refused to delay the nonjudicial foreclosure process by allowing trustor-debtors to pursue preemptive judicial actions to challenge the right, power, and authority of a foreclosing 'beneficiary' or beneficiary's 'agent' to initiate and pursue foreclosure." Jenkins, like each of the distressed homeowners in all of these cases, alleged an improper transfer of the promissory note during the securitization process. But the court noted that Jenkins' obligations under the promissory note remained unchanged, even if the subsequent assignments were invalid. She lacked standing to challenge or enforce any of the agreements reached during the securitization process, including the investment trust's pooling and servicing agreement. In the court's view, there might have been a true victim lurking, but it was not the borrower who had defaulted on her obligation and sought to create a controversy in which she was not a party. (*Id.* at p. 515.)

Here, too, it is undisputed that plaintiffs are in default and they seek to block a nonjudicial foreclosure sale based on alleged irregularities in the securitization of their loan. Like their counterparts in the above cases, they allege that the assignment of their deed of trust was fraudulent. But they fail to allege how they suffered prejudice as a result of the transfers. We agree with the growing number of courts that have foreclosed a borrower from launching a preemptive judicial action to challenge the authority of those who initiate the foreclosure proceedings. As these cases clearly demonstrate, plaintiffs' wrongful foreclosure cause of action is without merit and was properly dismissed.

IV

Unfair Competition

Plaintiffs remind us that unfair competition claims under Business and Professions Code section 17200 must be broadly construed to give courts the discretion to thwart ever more clever and shrewd schemes to defraud. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) And we certainly recognize that unfair competition can be established by showing a violation of any state, federal, or local law. (*Ibid*.) But despite the breadth of the statute, a plaintiff must demonstrate conduct that can be described as unlawful, unfair, or deceptive or fraudulent. (*Ibid*.) For all the reasons described at length above, plaintiffs fall miserably short of alleging a viable cause of action for unfair competition.

We agree with defendants that by attempting to mimic the allegations in *West*, plaintiffs are attempting to put a square peg in a round hole. Plaintiffs' allegations against defendants bear no resemblance to the egregious conduct the court described in *West*. "We conclude the third amended complaint stated a cause of action under the UCL [unfair competition law] based on unfair or fraudulent practices. Liberally construed, the third amended complaint alleged Chase Bank engaged in a practice of making [trial period plans] that did not comply with HAMP guidelines and the United States Department of the Treasury directives; made misrepresentations regarding a borrower's right and ability to challenge the bank's calculation of the [net present value]; made misrepresentations about pending foreclosure sales; and wrongfully had trustee's sales conducted when the borrower was in compliance with a [trial period plan]. Under such allegations, Chase Bank engaged in unfair business practices under any of the three definitions. Chase Bank concedes that West's cause of action under the UCL 'depends on the viability of the underlying claims,' and the claims for fraud, negligent misrepresentation, breach of written contract, and promissory estoppel are viable." (*West*, *supra*, 214 Cal.App.4th at p. 806.)

Liberally construed, plaintiffs' complaint remains devoid of allegations to state a viable cause of action for fraud, promissory estoppel, or wrongful foreclosure. Moreover, there are no allegations of a pattern of deceptive practices related to trial period plans or wrongful foreclosures. Indeed, plaintiffs' house has not even been sold. Thus, not only have plaintiffs failed to state viable causes of action, they have failed to sustain damages cognizable under the unfair competition law. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.)

In reply, plaintiffs dismiss the importance of alleging specific damages this early in the pleading stage and insist they "can be further fleshed out as a part of the discovery process." Plaintiffs cannot postpone their burden and force defendants to defend a meritless action. To date, they claim only the cost of their temporary payments, the costs of applying for the trial period plan, the costs of the improvements they made to the property, and attorney fees. None of these allegations is sufficient to state a claim.

As the court in *West* pointed out, the temporary payments are not damages because the borrower was obligated to make her mortgage payments. The cost associated with applying for the program is not attributable to any conduct by defendants but was plaintiffs' voluntary response to their own unfortunate financial situation. The cost of the improvements may or may not result in damages as the value of the home is yet to be determined since the house has not been sold. Since plaintiffs were unable to state any viable cause of action, defendants did not cause plaintiffs to incur any attorney fees. In short, the unfair competition claim fares no better than the vacuous other claims upon which it is based. The trial court properly dismissed this final cause of action and entered a judgment of dismissal. Throughout the litigation plaintiffs have failed to allege any new or different facts upon which to base a viable cause of action, and consequently, the court did not abuse its discretion by sustaining the demurrer without leave to amend.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

ROBIE, J.

MURRAY, J.