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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES ARNOLD SMITH et al.,

Plaintiffs and Appellants,

v.

CITIMORTGAGE INC. et al,

Defendants and Respondents.

D068345

(Super. Ct. No. 37-2013-00044333-
CU-OR-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Earl H. Maas III, Judge. Affirmed.

Law Office of Richard L. Antognini and Richard L. Antognini, for Plaintiffs and Appellants.

Aldridge Pite, Christopher L. Peterson and Cuong M. Nguyen, for Defendant and Respondent CitiMortgage, Inc.

McCarthy & Holthus, Melissa R. Coutts and Matthew B. Learned, for Defendant and Respondent Quality Loan Service Corporation.

INTRODUCTION

James Arnold Smith and Sherry Smith appeal a summary judgment entered in favor of CitiMortgage, Inc. (Citi) and Quality Loan Service Corporation (Quality) on their complaint, which challenged Citi's handling of a loan modification application and Quality's subsequent foreclosure proceedings. The Smiths¹ alleged Citi and Quality violated the California Homeowner Bill of Rights (Civ. Code,² §§ 2920.5, 2923.4–2923.7, 2924, 2924.9–2924.12, 2924.15, 2924.17–2924.20) (HBOR), which took effect in 2013, by dual tracking a loan modification application while pursuing foreclosure measures. The Smiths contend summary judgment should be reversed because a triable issue of fact exists as to whether Sherry had authority to sign a loan modification agreement offered by Citi to her husband, James the borrower. We need not decide this issue because, even if Sherry had authority to sign on behalf of James, the marked-up agreement they returned to Citi was not an unqualified acceptance of the agreement. It constituted a rejection of Citi's offer and a counteroffer. Because the Smiths did not have an enforceable loan modification agreement and it is undisputed they did not submit a new application for a loan modification in 2013, the HBOR has no application to this case. The Smiths waived any issues related to their remaining causes of action by failing to address them in their opening brief. Therefore, we affirm the judgment.

¹ Because James and Sherry share a surname, we refer to them individually by their first names for clarity. We refer to them collectively as the Smiths.

² Further statutory references are to the Civil Code unless otherwise indicated.

BACKGROUND

A

James obtained a home loan in September 2003 for \$322,700. James alone signed the note. A deed of trust secured the note with property in Escondido, California. James is identified as the borrower, "a married man, as his sole and separate property." Sherry did not have a loan.

In July 2011 Citi left a message for James to determine if he qualified for a loan modification. Sherry returned the call and stated the loan was delinquent due to medical issues and issues related to a fire. Citi sent James a workout package.

Sherry submitted an application for customer hardship assistance with pay stubs from June 2011 stating James would be placed on disability and his annual income would soon be reduced.³ James testified he wanted the mortgage payments lowered "to make life easier."

In October 2011 the request for modification under the Home Affordable Modification Program (HAMP) was denied. Citi offered to review James for an alternative modification program and requested additional information.

³ James testified he was placed on disability and was never released. However, he did not receive disability compensation and went to work disabled. James's salary in 2011 was approximately \$165,000 per year and with bonuses, he made about \$200,000. His salary in 2012 and 2013 was approximately \$170,000 per year. His salary was never reduced. He stated, however, his income was reduced because he did not receive the bonuses he normally would have received.

James was approved for a trial modification in March 2012. Citi sent a permanent loan modification agreement in June 2012 with instructions for the borrower on the mortgage to read, sign and return the modification agreement. Citi canceled a scheduled foreclosure sale and asked James to return the signed modification agreement.

On July 18, 2012, Citi received an e-mail message from Sherry stating she returned the agreement, but she might rescind because she signed the document under extreme pressure and emotional distress. Citi received the document, but could not book it because it was not signed by the borrower, James. Citi employees informed the Smiths the document was improperly signed and sent a new agreement indicating it needed to be signed by James, as the borrower.

The record contains a copy of the modification agreement, which Sherry signed in James's name and placed her initials in parentheses. Sherry stated Citi employees told her to sign the document in this fashion. The document, however, was marked up by Sherry with questions, demands for information, and disagreements with various terms. James indicated there were things with which she did not agree and wanted changed. Sherry claims she submitted the document to Citi multiple times.

James never signed the loan modification agreement. A power of attorney allowing Sherry to act as James's attorney in fact was recorded after this lawsuit was filed. The Smiths claim they provided this document to Citi in 2011 and were not aware it needed to be recorded.

After the time to accept the agreement expired, Citi sent a letter on August 23, 2012, advising that the modification request was denied because Fannie Mae

modification requirements were not met and because Citi had not received the necessary loan modification documents.

The Smiths did not make payments pursuant to the modification agreement. Sherry stated Citi employees told her to wait and she did not know where to send the payment. The last payment Citi received on the loan was in June 2012, which brought the loan current through April 2011.

Quality recorded a notice of default in December 2012 stating the property was in foreclosure because James was behind in his payments and the reinstatement amount as of December 6, 2012 was \$42,462.67.⁴

Citi offered other trial period plans in November 2012 and February 2013. Because Citi received no payments under either of these trial period plans, neither became effective. Citi notified the Smiths it would proceed with a foreclosure sale in April 2013. The Smiths presented a screen shot of a web page indicating Citi was processing a "Homeowner Assistance" request in April 2013, but there is no evidence in the record the Smiths submitted a new modification application.

In May 2013 after this lawsuit was filed, the Smiths responded to Citi's request for financial information for Citi to evaluate options for James's delinquency and to avoid foreclosure. James signed the document stating he had a permanent modification "pending changes/corrections" and he would like to make payments "once the

⁴ By June 1, 2013, the reinstatement amount was \$71,136.20.

corrections/changes are completed." James signed a letter authorizing his attorney or Sherry to engage in discussions and negotiations regarding his mortgage and to act as his designated representative.

B

The Smiths filed this lawsuit against Citi and Quality in April 2013. The operative first amended complaint asserted seven causes of action against Citi: (1) wrongful foreclosure in violation of the HBOR, (2) unfair or deceptive business practices (Bus. & Prof. Code, §§ 17200, 17203, 17500), (3) promissory estoppel, (4) fraud and deceit (§§ 1572, 1709, 1710), (5) intentional infliction of emotional distress, (6) quiet title, and (7) specific performance of permanent modification agreement. The first amended complaint included allegations against Quality only in the first, second, and sixth causes of action.

Citi and Quality each moved for summary judgment. Citi specifically contended the permanent loan modification agreement was not properly signed by James as the borrower and, even if Sherry had the authority to sign for James, she returned a marked-up copy with substantial modifications, which effectively rejected the proposed agreement. The court granted the motions finding each defendant met its burden of proof and the Smiths failed to establish triable issues of fact as to the causes of action alleged. It entered judgment in favor of Citi and Quality.

DISCUSSION

I

We review the trial court's summary judgment ruling de novo, using the same standards applicable to the trial court. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) A motion for summary judgment "should be granted if no triable issue exists as to any material fact and the defendant[s] [are] entitled to a judgment as a matter of law." (*Id.* at pp. 1002-1003, citing Code Civ. Proc., § 437c, subd. (c).) "In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [the plaintiff's] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) However, the plaintiffs "shall not rely upon the mere allegations or denials of [their] pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).)

"We are not bound by the issues actually decided by the trial court. 'The appellate court should affirm the judgment of the trial court if it is correct on any theory of law applicable to the case, including but not limited to the theory adopted by the trial court, providing the facts are undisputed. [Citations.] Thus we must affirm so long as any of the grounds urged by [defendants], either here or in the trial court, entitle [them] to summary judgment.' " (*Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th 1489, 1498.)

II

The Smiths contend their case hinges on whether Sherry had the right to accept the loan modification offered by Citi by signing the agreement in place of James. They contend they raised triable issues of fact on this question which precludes summary judgment for Citi and Quality. We disagree.

Assuming, without deciding, Sherry had the authority to sign for James, she submitted a qualified acceptance by submitting the modification agreement with substantial mark-ups, not simply corrections of typographical errors. The mark-ups included statements rejecting terms of the proposed modification agreement, such as the maturity date, terms regarding enforcement of the agreement, and a provision regarding payment of insurance premiums. This constituted a rejection of Citi's June 2012 loan modification offer and a proposal of a counteroffer. "An acceptance must be absolute and unqualified A qualified acceptance is a new proposal." (§ 1585.) A qualified acceptance "is a counteroffer that constitutes a *rejection* of the original offer, with the result that the original offer cannot thereafter be accepted by the offeree." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 185, p. 219; *Flintco Pacific, Inc. v. TEC Management Consultants, Inc.* (2016) 1 Cal.App.5th 727, 736 [acceptance made contingent upon additional terms and conditions conflicting with the original offer constituted a counteroffer and terminated the power to accept the original offer].)

There is no evidence Citi accepted the proposed counteroffer. Rather, Citi sent a written notice denying the modification request stating the necessary loan documents had not been received and the requirements for modification were not met.

Citi sent two additional trial period plan proposals, one in November 2012 and another in February 2013. However, the Smiths did not make payments under either proposal and neither became effective. When the Smiths did not make payments under the trial proposals, Citi notified James his account was only paid through April 2011 and it would proceed with a foreclosure sale in April 2013. James signed a document in May 2013 asserting his permanent modification was "pending changes/corrections" and he wished to make payments "once the corrections/changes are complete."

Therefore, there was undisputed evidence there was no enforceable agreement based upon the document Sherry signed for James in 2012. Since there was no enforceable modification agreement, the Smiths' causes of action fail.

A

The Cause of Action for Violation of the HBOR Fails

The Smiths' first cause of action alleged Citi and Quality violated the new HBOR. They alleged violation of the dual tracking and mandatory notification requirements by proceeding with foreclosure measures in 2013 while the Smiths believed they had a permanent modification pending, even though they wanted changes and corrections made to the agreement before they would agree to make payments.

"The [HBOR], effective January 1, 2013, was enacted 'to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure.' (§ 2923.4, subd. (a).) Among other things, HBOR prohibits 'dual tracking,'

which occurs when a bank forecloses on a loan while negotiating with the borrower to avoid foreclosure. (See § 2923.6.) HBOR provides for injunctive relief for statutory violations that occur prior to foreclosure (§ 2924.12, subd. (a)), and monetary damages when the borrower seeks relief for violations after the foreclosure sale has occurred (§ 2924.12, subd. (b))." (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.)

Section 2923.6, subdivision (c), which prohibits a mortgage servicer or trustee from recording a notice of default or sale until a loan modification application is denied or is not timely accepted, became effective January 1, 2013. (Stats. 2012, ch. 87.) There is no indication the Legislature intended the HBOR to apply retroactively. (§ 3; *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 818; *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1460 [" 'A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so. [Citations.] A statute has retrospective effect when it substantially changes the legal consequences of past events' "].)

However, as we discussed, the Smiths did not accept the permanent loan modification, but returned a marked-up version of the agreement requesting changes and corrections. The loan modification application was denied in August 2012, after the time for acceptance of the permanent modification expired without the Smiths' unconditional acceptance.

Citi presented evidence it did not receive "a partial or complete loan modification application at any point since March of 2012." The Smiths submitted a screen shot from

the Citi's Web site indicating Citi was "processing" a "Homeowner Assistance request based on the information [they] provided" in April 2013. The record does not disclose exactly what request was pending, but the Smiths do not dispute they did not submit a loan modification application other than the one they submitted in 2012, which was denied.

Because there is undisputed evidence the Smiths did not present a new loan modification application in 2013, the HBOR had no application to the notice of sale in 2013. (See *Williams v. Wells Fargo Bank, NA* (C.D.Cal. Jan. 27, 2014, No. EDCV 13-02075 JVS (DTBx)) 2014 U.S. Dist. LEXIS 17215, at pp. *16-17 [plaintiffs who failed to submit evidence of a new loan modification application after a denial failed to state a claim under § 2923.6].) Therefore, the Smiths did not raise a triable issue of fact with respect to their cause of action for wrongful foreclosure or violation of the HBOR as to either Citi or Quality.

B

Remaining Causes of Action

The Smiths' opening brief summarily asserted "[a]ll the causes of action survive," but neither the opening brief nor the reply brief provided legal analysis or citation to the record with respect to the summary adjudication of any cause of action other than a violation of the HBOR. Accordingly, any issues related to the remaining causes of action against Citi and Quality are waived. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286-287 ["to demonstrate error, an appellant must supply the reviewing court with some cogent argument supported by legal analysis and citation to the record"]

otherwise the issue may be deemed waived]; *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1410 [issues not raised in the opening brief are waived].)

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

O'ROURKE, J.