

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

ELENA GROSS,

Plaintiff and Appellant,

v.

RECONTRUST COMPANY, N.A. et al.,

Defendants and Respondents.

E053958

(Super.Ct.No. RIC10019338)

OPINION

APPEAL from the Superior Court of Riverside County. John Vineyard,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Elena Gross, in pro. per., for Plaintiff and Appellant.

Malcolm Cisneros, William G. Malcolm and Brian S. Thomley for Defendants and  
Respondents.

This matter arises from plaintiff Elena Gross defaulting on a promissory note  
secured by real property, resulting in a nonjudicial foreclosure sale of plaintiff's home.  
Plaintiff filed this action seeking to recover title to her property and damages. On  
June 22, 2011, the trial court issued its order sustaining without leave to amend the

demurrer of defendants BAC Home Loans Servicing, LP (BAC), erroneously sued as Bank of America Home Loans, and Recontrust Company, N.A. to plaintiff's second amended complaint (SAC). Plaintiff appeals the judgment of dismissal. On appeal, she argues that she successfully pleaded various causes of action arising from defendants' foreclosure of her home. The SAC attempts to allege nine causes of action: (1) and (2) allege violations of the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. § 2601 et seq.); (3) unjust enrichment; (4) fraud involving the loan; (5) intentional misrepresentation of loan modification; (6) breach of contract; (7) promissory estoppel; (8) violation of Business and Professions Code sections 17200 et. seq.; and (9) injunctive relief for violation of Civil Code former sections 2923.5<sup>1</sup> and 2923.52, and Civil Code section 2923.6. Additionally, plaintiff claimed to bring this action under Code of Civil Procedure section 382 on behalf of others similarly situated and not being granted/offered loan modifications under Civil Code former section 2923.5. We find no error and affirm.

## I. FACTS AND PROCEDURAL BACKGROUND

We base our recitation of facts on the properly pleaded material factual allegations of the SAC, the operative pleading, and any matters subject to judicial notice. (*CPF Agency Corp. v. Sevel's 24 Hour Towing Service* (2005) 132 Cal.App.4th 1034, 1040-1041; see also *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

---

<sup>1</sup> Civil Code former section 2923.5 was added in 2008 and by its terms was repealed, effective January 1, 2013. (Stats. 2008, ch. 69, § 2, eff. July 8, 2008, operative Sept. 6, 2008. Amended by Stats. 2009, ch. 43, § 1.)

In March 2005, plaintiff and Timothy Gross purchased real property located at 47822 Belvedere Way in Indio as joint community property (Property). The loan was placed in Mr. Gross's name, and his income was used as the sole qualifying criteria to purchase the Property. About March 2006, a 30-year fixed loan was obtained and a deed of trust was executed identifying plaintiff and Mr. Gross, husband and wife, as joint tenants, as the borrowers. They executed a promissory note promising to pay Countrywide Home Loans, Inc. (Countrywide) \$245,000.00 plus interest. The promissory note was secured by deed of trust encumbering the Property and naming Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide, as beneficiary, and Recontrust Company, N.A., as trustee. LandSafe Appraisal Services, an affiliate of Countrywide, prepared the appraisal of the Property.

Subsequently, on October 6, 2009, Mr. Gross initiated divorce proceedings, and on January 21, 2010, plaintiff was awarded exclusive use of the Property. Mr. Gross was ordered to cooperate with her in an attempt to modify the loan on the Property. Beginning in January 2010, plaintiff sought to obtain a loan modification. By spring 2010, plaintiff had failed to make the necessary mortgage payments and thus defaulted on the promissory note. By June 16, plaintiff was in arrears in the sum of \$15,369.92, and a Notice of Default and Election to Sell was recorded on June 18, 2010. Mortgage Electronic Registration Systems, Inc. assigned the deed of trust to BAC, formerly known as Countrywide Home Loans Servicing, L.P.

A Notice of Trustee's Sale was recorded, with an initial sale date set for October 21, 2010. In order to set aside the trustee's sale so that she would not lose the

Property, on September 29, 2010, plaintiff initiated this action against defendants. On October 27, 2010, the trial court temporarily enjoined the foreclosure sale of the Property and set a bond equaling monthly payments of \$1,490 to be posted into a blocked account starting November 1. Plaintiff continued to seek a loan modification through February 2011. Following demurrers to her initial and first amended complaint, on March 15, 2011, plaintiff filed her SAC. Defendants again demurred, and the trial court sustained their demurrer without leave to amend. A trustee's sale of the Property was held on June 27, 2011. Two days later, plaintiff's ex parte motion to set aside the sale was denied.

## II. STANDARD OF REVIEW

A demurrer is used to test the sufficiency of the factual allegations of the complaint to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The facts pleaded are assumed to be true, and the only issue is whether they are legally sufficient to state a cause of action. "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

With regard to whether the trial court abused its discretion in denying leave to further amend, *Blank v. Kirwan* goes on to state: “And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

“Leave to amend is properly denied when the facts are not in dispute and the nature of the claim is clear, but there is no liability under substantive law. [Citation.] ‘[All] intendments weigh in favor of the regularity of the trial court proceedings and the correctness of the judgment. Unless clear error of abuse of discretion is demonstrated, the trial court’s judgment of dismissal following the sustaining of defendants’ demurrer will be affirmed on appeal [citation].’ [Citation.]” (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1330 (*Wilhelm*).)<sup>2</sup>

### III. DISMISSAL OF SAC WITHOUT LEAVE TO AMEND AND WITHOUT SPECIFYING THE GROUNDS FOR DISMISSAL

According to plaintiff, the trial court erred in not providing “any grounds for sustaining” the demurrer to the SAC without leave to amend. We disagree. The trial court stated the basis for its decision at the hearing on June 1, 2011. According to the

---

<sup>2</sup> The quote in *Wilhelm* is from *Owens v. Foundation for Ocean Research* (1980) 107 Cal.App.3d 179, 185, which was overruled on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 521, fn. 10.

trial court, “First, as it relates to all causes of action, there’s been no allegation of tender, which affects the plaintiff’s standing. ¶¶ As to the first and second causes of action for violations of RESPA, those causes of action are barred by the applicable statute of limitations, 12 USC 1614. This action was filed over five years after the loan origination based on the allegations of the Complaint. ¶¶ As to the third cause of action for unjust enrichment, that’s not a valid cause of action when there’s a contract that exists between the parties[] that defines the parties[’] rights and obligations. That’s based on *California Medical Association versus Edna*. ¶¶ As to the fifth and sixth causes of action—first, the fo[u]rth cause of action was not pled, the fifth and sixth causes of action were based on the [H]AMP program. The plaintiff has no standing with regard to that contract between Bank of America and the Treasury Department. There is no legal right to a loan modification, and any such modification must be in writing based on the allegations of the Complaint. In fact those causes of action cannot be corrected. ¶¶ As to the seventh cause of action for promissory estoppel; there’s been no proper pleading of the essential elements based on *US Ecology versus the State of California*. Primarily there’s no showing of the detrimental reliance on any representation. ¶¶ As to the eight[h] cause of action for a violation of Business and Professions Code 17200, there’s no proper allegation of any underlying wrongful conduct. ¶¶ As to the ninth cause of action for injunctive relief, it’s not supported by any other theory alleged, and there are no properly alleged theories in which to support that claim.” The court later stated: “In addition to the reasons that I previously stated with regard to the 7th cause of action[] for promissory estoppel, I considered the case and I’m not convinced that any facts have been pled or

could be pled to fall within the holding of the case regarding the promissory estoppel . . . .”

Plaintiff offers no further argument in support of this claim and thus we reject it.

#### IV. PLAINTIFF’S CLAIM AS A CLASS ACTION

According to plaintiff, she initiated this action alleging “individual causes of action[] and causes of action on behalf of a class”; however, the trial court erroneously found that class certification “would not be a bar to a demurrer.” She faults the trial court for not providing her “the proper time to conduct discovery necessary to present a class certification motion.” The basis for her attempt to certify the class is that many similarly situated borrowers were not being granted/offered loan modifications pursuant to Civil Code former sections 2923.5 and 2923.52, and Civil Code section 2923.6. However, as our colleagues in the Third Division of our district observed, because “[t]he operation of [Civil Code former] section 2923.5 is highly fact specific, and the details as to what might, or might not, constitute compliance can readily vary from lender to lender and borrower to borrower,” it may not be enforced in a class action. (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 215 (*Mabry*.) We agree. Thus, the trial court did not err in rejecting her request for class certification.

#### V. PLAINTIFF’S MOTION TO STRIKE

In opposing defendants’ demurrer, plaintiff submitted a motion to strike the demurrer and opposition. At the hearing, she referenced her motion to strike and the trial court stated: “I treated that as an opposition to the demurrer; otherwise it was an improper pleading, and I’m going to order it stricken on the Court’s own motion, other

than I did consider it as an opposition.” On appeal, plaintiff faults the trial court for not considering her motion to strike.

Plaintiff references Code of Civil Procedure section 435, which provides that a motion to strike a demurrer is a proper pleading. Here, she sought to strike defendants’ demurrer on the ground that “it attempts to litigate [her] individual claim, prior to a class certification hearing.” Regardless of the trial court’s discussion of the propriety of the motion to strike, the fact remains that the trial court correctly denied plaintiff’s request for class certification on the grounds stated in *Mabry*. (*Mabry, supra*, 185 Cal.App.4th at p. 215.) Accordingly, even if we were to conclude that the trial court erred in treating plaintiff’s motion to strike defendants’ demurrer as merely additional argument in opposition, such error was harmless.

## VI. FAILURE TO PROVIDE TENDER

Plaintiff contends the right conferred by Civil Code former section 2923.5 “is a right to be contacted to ‘assess’ and ‘explore’ alternatives to foreclosure prior to a notice of default.” Thus, she argues that “it would defeat the purpose of the statute to require the borrower to tender payment as a condition[.]” In claiming that plaintiff lacked standing due to her failure to tender the amount owed on the promissory note, defendants argued: “If a borrower who has defaulted on his/her payments requests the Court to exercise its equitable powers to stop or set aside foreclosure proceedings, the borrower must first do equity himself/herself.” Because plaintiff challenged the initiation of nonjudicial foreclosure on the Property by seeking injunctive relief, defendants demurred on the ground that she failed to tender payment of the amount owing.

Civil Code former section 2923.5 applies to certain real estate transactions occurring between January 1, 2003, and December 31, 2007. It requires the entity seeking to foreclose on a delinquent residential mortgage to satisfy certain due diligence requirements by contacting the homeowner, discussing the delinquency with the homeowner, and certifying compliance with the due diligence requirements.

In an extremely thorough opinion, our colleagues in Division Three have discussed Civil Code former section 2923.5 in detail. (*Mabry, supra*, 185 Cal.App.4th 208.) Relevant here, the court held, “. . . If [Civil Code former] section 2923.5 is not complied with, then there is no valid notice of default and, without a valid notice of default, a foreclosure sale cannot proceed. The available, existing remedy is found in the ability of a court in [Civil Code] section 2924g, subdivision (c)(1)(A), to postpone the sale until there has been compliance with [former] section 2923.5. Reading [former] section 2923.5 together with section 2924g, subdivision (c)(1)(A) gives [former] section 2923.5 real effect.” (*Id.* at p. 223.) The court further stated that, if the lender did not comply with Civil Code former section 2923.5, and the foreclosure sale has already been held, the noncompliance does not affect title to the foreclosed property. (*Mabry, supra*, 185 Cal.App.4th at pp. 214-215.)

Defendants argue there is no private right of action under Civil Code former section 2923.52 et seq. once the foreclosure sale has occurred. *Mabry* supports this argument. (*Mabry, supra*, 185 Cal.App.4th at pp. 214-215 [“[t]he Legislature did nothing to affect the rule regarding foreclosure sales as final”].) As quoted above, the *Mabry* court also explains why the only remedy available is a presale remedy, i.e., the power to

postpone the pending sale until there has been compliance with Civil Code former section 2923.5. (*Mabry, supra*, at pp. 221-224, 226-232.) Here, such remedy was provided: The foreclosure sale was postponed from its initial date in October 2010 to June 27, 2011. However, the trial court conditioned the temporary postponement of the sale with a bond equaling monthly payments of \$1,490 to be posted into a blocked account starting November 1, 2010. Plaintiff admits that she “had multiple contacts with Bank of America and that [she] was pre-approved . . . under HAMP.” Defendants note that Civil Code former section 2923.5 is to be narrowly construed and requires the servicer only to communicate options for the borrower to avoid foreclosure. As *Mabry* recognized, “there is no *right* . . . under the statute, to a loan modification.” (*Mabry, supra*, 185 Cal.App.4th at p. 231.)

Based on the above, defendants did comply with Civil Code former section 2923.5 and engaged in discussions with plaintiff regarding her delinquency and possible loan modification. Nonetheless, defendants were not required to hold off foreclosure indefinitely. Plaintiff sought, and obtained, a temporary injunction postponing the foreclosure sale, but she failed to comply with the court’s order of setting a bond equaling monthly payments of \$1,490 to be posted into a blocked account starting November 1, 2010. The trial court correctly applied the tender rule.

## VII. RESPA CLAIMS

Plaintiff contends that, as a matter of law, she is not foreclosed on equitable tolling because she “was not aware of the facts detailing the unfair and fraudulent business practices under RESPA until she filed the complaint.” Such claims involved the

appraisal of the original loan for the Property. Plaintiff claimed that Countrywide's arrangement with LandSafe Appraisal Services constituted illegal kickbacks and fee splitting, in violation of RESPA.<sup>3</sup> However, the statute of limitations for a private plaintiff suing for an alleged RESPA violation is one year "from the date of the occurrence of the violation . . . ." (12 U.S.C. § 2614.) The "occurrence of the violation" is the date the loan closed. (*Jensen v. Quality Loan Serv. Corp.* (E.D. Cal. 2010) 702 F.Supp.2d 1183, 1195.) Plaintiff's loan closed in March 2006, over four years before she filed her complaint. Thus, any claim she may have had under RESPA is time barred.

Notwithstanding the above, plaintiff pleaded the doctrines of equitable estoppel and equitable tolling in the SAC. These doctrines may toll the statute of limitations. "[T]he three elements of equitable tolling are '(1) that defendant received timely notice in pursuing the first remedy, (2) there is a lack of prejudice to the [d]efendant in gathering evidence to defend against the second action, and (3) there is good faith and reasonable conduct by plaintiff in filing the second action.'" (*Thomas v. Gilliland* (2002) 95 Cal.App.4th 427, 434.) "Four elements must ordinarily be proved to establish an equitable estoppel: (1) The party to be estopped must know the facts; (2) he must intend

---

<sup>3</sup> RESPA prohibits kickbacks and unearned fees. (*Sosa v. Chase Manhattan Mortg. Corp.* (11th Cir. 2003) 348 F.3d 979, 981.) Section 8(b) of RESPA (12 U.S.C. § 2607(b)) specifically provides: "No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." Section 8(a) of RESPA prohibits giving or receiving "any fee, kickback, or thing of value" for a business referral for real estate settlement services." (12 U.S.C. § 2607(a), (b).)

that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury.” [Citation.]” (*Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1268.)

In her brief, plaintiff only discusses equitable tolling. Defendants argue that it does not apply under the facts of this case. “The doctrine of equitable tolling ‘focuses on excusable delay by the plaintiff,’ . . . and centers upon whether ‘a reasonable plaintiff would . . . have known of the possible existence of a possible claim within the limitations period.’ [Citation.]” (*Brewer v. Indymac Bank* (E.D. Cal. 2009) 609 F.Supp.2d 1104, 1117-1118.) Here, plaintiff alleged that Countrywide concealed its schemes of charging fees for services that were not rendered and inflating appraisal values. However, allegations must be factual and specific, not vague or conclusionary. (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43-44.) She further alleged that she had no notice or duty to inquire or investigate defendants’ actions because she relied on Countrywide fulfilling its fiduciary and agency duties. However, “[t]he relationship between a lending institution and its borrower-client is not fiduciary in nature. [Citation.] A commercial lender is entitled to pursue its own economic interests in a loan transaction. [Citation.] This right is inconsistent with the obligations of a fiduciary which require that the fiduciary knowingly agree to subordinate its interests to act on behalf of and for the benefit of another. [Citation.]” (*Nymark v. Heart Fed.*

*Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1093, fn. 1.) Accordingly, plaintiff's statements are insufficient to satisfy any of the elements of equitable tolling.

### VIII. FRAUD AND INTENTIONAL MISREPRESENTATION

Plaintiff claims she “properly pled [i]ntentional misrepresentation of the loan and the loan modification in her complaint as a class allegation and as an individual basis . . . .” She argues that the lender is “liable for . . .<sup>[4]</sup> misrepresentation as the bank and bank officials negotiating the loan indicated that [she] was eligible[,] . . . and already approved for loan modification under the HAMP program.” She further adds that liability for misrepresentation and fraud is based on the lender not informing “the borrower that the loan appraisal value that led to the original loan instrument would be influenced by its parent company to the detriment of the borrower and falsely misrepresented ethical and fair business practices.”

“[F]raud must be specifically pleaded. This means: (1) general pleading of the legal conclusion of fraud is insufficient; and (2) every element of the cause of action for fraud must be alleged in full, factually and specifically, and the policy of liberal construction of pleading will not usually be invoked to sustain a pleading that is defective in any material respect. [Citation.] ‘It is bad for courts to allow and lawyers to use vague but artful pleading of fraud simply to get a foot in the courtroom door.’ [Citation.]”

(*Wilhelm, supra*, 186 Cal.App.3d at p. 1331.)

---

<sup>4</sup> While plaintiff claims negligent misrepresentation in her brief, we note the SAC alleges a claim for intentional misrepresentation.

According to defendants, plaintiff failed to plead any facts showing that any concealment was material, “i.e., that she would not have entered into the loan agreement if the appraisal fee had not been ‘inflated.’ [¶] For the same reason, [plaintiff] also pled no facts showing that [defendants] had a duty—apart from the duties imposed by RESPA—to disclose the ‘true cost’ of the appraisal.” We agree. Further, defendants argue that plaintiff’s claim of a fiduciary relationship between defendants and her is unsupported and false. Again, we agree with defendants. As we have already observed, defendants had no “fiduciary relationship” with plaintiff. (*Nymark v. Heart Fed. Savings & Loan Assn.*, *supra*, 231 Cal.App.3d at p. 1093, fn. 1.)

IX. CIVIL CODE FORMER SECTIONS 2923.5 AND 2923.52,  
CIVIL CODE SECTION 2923.6, AND BUSINESS AND  
PROFESSIONS CODE SECTION 17200

Plaintiff claims that she properly pleaded class and individual allegations regarding defendants’ unlawful, unfair or fraudulent business practices involving her loan modification and Property appraisal. These causes of action allege that defendants engaged in unfair business practices in violation of Business and Professions Code section 17200. The claims are based on the alleged fraud and RESPA violations. Having failed to adequately plead those causes of actions, plaintiff has not stated a claim under Business and Professions Code section 17200. In addition, the claims are barred by the four-year statute of limitations, which began to run on the date the cause of action accrued, not on the date of discovery. (Bus. & Prof. Code, § 17208; *Karl Storz Endoscopy-Am., Inc. v. Surgical Techs., Inc.* (9th Cir. 2002) 285 F.3d 848, 857.) Because

any purported misrepresentations resulting in the original loan occurred, by necessity, before the loan was finalized in March 2006, these claims are at least six months too late.

#### X. PROMISSORY ESTOPPEL

Plaintiff contends she properly alleged a claim for promissory estoppel. According to the SAC, defendants allegedly misled plaintiff by falsely representing they would modify her loan.

“The elements of a promissory estoppel claim are “(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.” [Citation.]’ [Citation.]” (*Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1672.)

Relying on *Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218 (*Aceves*) and *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031 (*Garcia*), plaintiff argues she established that promissory estoppel was a viable cause of action which the trial court should have permitted her to allege. In *Aceves*, the plaintiff filed a Chapter 7 bankruptcy because she could not make her mortgage payments. (*Aceves, supra*, at p. 223.) The defendant bank promised to modify her loan if the plaintiff agreed not to proceed with bankruptcy and not convert the matter to a Chapter 13 bankruptcy. (*Aceves, supra*, at p. 223.) In reliance on the bank’s promise, the plaintiff abstained from proceeding with bankruptcy proceedings and did not oppose the bank’s motion for relief from the stay. Meanwhile, the bank proceeded with nonjudicial foreclosure proceedings and, after the stay was lifted, foreclosed on the plaintiff’s property. (*Id.* at pp. 223-224.) The *Aceves*

court held that the plaintiff had adequately alleged a cause of action for promissory estoppel. (*Id.* at p. 225.) Under similar facts in *Garcia*, in which the plaintiff held off obtaining a loan to repay her mortgage arrearages, the *Garcia* court held that the defendant bank's promise to postpone the trustee's foreclosure sale of the plaintiff's property supported a promissory estoppel cause of action. (*Garcia, supra*, at p. 1046.)

The instant case is distinguishable from *Aceves* and *Garcia* in that plaintiff has not shown that defendants breached a promise to delay foreclosure or that plaintiff detrimentally relied on defendants' purported representations that she was "pre-approved" for a loan modification. Rather, the SAC merely alleges defendants told her that a loan modification package would be sent out, that no package was sent, and that she merely waited around for the package to arrive. Plaintiff pleaded no facts showing she suffered damages or substantially changed her position in reliance of defendants' purported representations that she was "pre-approved" for a loan modification. The SAC does not claim that she was going to file bankruptcy but delayed taking such action based upon defendants' promise to postpone foreclosure pending a loan modification. Thus, there was no breach of any promise not to proceed with foreclosure. As for any promise for a loan modification, "there is no *right* . . . under the statute [Civil Code former section 2923.5], to a loan modification." (*Mabry, supra*, 185 Cal.App.4th at p. 231.) Nonetheless, according to the SAC, defendants did engage in discussions with plaintiff about a loan modification. However, there was no promise that her loan would actually be modified, much less what the terms of that modification would be.

## XI. UNJUST ENRICHMENT

Plaintiff asserts that she properly pleaded a claim for unjust enrichment based on the original loan being “procured by Fraud and misrepresentation by Defendants . . . .” She claims that defendants “unjustly and fraudulently inflated and influenced land appraisal values for the loan instrument.” However, plaintiff admits she entered into a loan agreement with Countrywide. According to the chain of title, BAC was the beneficiary of the deed of trust. “As a matter of law, an unjust enrichment claim does not lie where the parties have an enforceable express contract. [Citation.]” (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370.)

Notwithstanding the above, plaintiff argues that restitution may still be awarded “in lieu of breach of contract damages, when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason . . . .” However, as we have previously concluded, she failed to plead facts that would support a claim that the original loan was procured by fraud or was otherwise unenforceable. (See discussion in part VIII, *ante*.)

## XII. REQUEST TO REOPEN CASE NO. E052242 AND CONSIDER IT WITH THIS APPEAL

On November 3, 2010, the trial court granted the preliminary injunction to halt foreclosure proceedings involving the Property. Plaintiff appealed the court’s order requiring her to set a bond equaling monthly payments of \$1,490 to be posted into a blocked account starting November 1, 2010. Her appeal was dismissed on September 12, 2011, following the court’s granting defendants’ demurrer to the SAC without leave to

amend. Plaintiff requests that we open her appeal in case No. E052242 and consider it with this appeal. Having found no merit to any issues raised in this appeal, we find no reason to open case No. E052242.

XIII. DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

RICHLI

J.

KING

J.