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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MICHAEL DEL RIO et al.,	
Plaintiffs and Appellants,	E060609
v.	(Super.Ct.No. CIVDS1210848)
U.S. BANK NATIONAL ASSOCIATION, as Successor in Interest, etc.,	OPINION
Defendant and Respondent.	

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge. Affirmed in part; reversed in part.

Vaught & Roesler Law Firm and Richard B. Vaught for Plaintiffs and Appellants.

Nossaman LLP and Robert S. McWhorter for Defendant and Respondent.

INTRODUCTION

Plaintiffs Michael Del Rio and Darla Del Rio[1] appeal from the judgment of dismissal of their third amended complaint after the trial court sustained the demurrer of defendant U.S. Bank National Association as successor in interest to the Federal Deposit Insurance Corporation as receiver for Pomona First Federal. Plaintiffs contend that (1) the trial court erred in relying on defendant's absence of duty in sustaining their causes of action for negligence and negligent misrepresentation and (2) they stated facts sufficient to support causes of action for fraud, negligent misrepresentation, and promissory estoppel. We affirm the dismissal of the cause of action for constructive fraud and reverse as to the causes of action for promissory estoppel, negligence, and negligent misrepresentation.

FACTS AND PROCEDURAL BACKGROUND

"Because this case comes to us on a demurrer for failure to state a cause of action, we accept as true the well-pleaded allegations in plaintiffs' . . . complaint. '"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.]'" (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) We set forth the facts consistent with that standard of review. We note that in their third amended complaint, plaintiffs alleged a

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[1] We will refer to Michael and Darla Del Rio by their first names. We mean no disrespect by the use of their first names.

cause of action for violation of Business and Professions Code section 17200. Because plaintiffs raise no contentions on appeal concerning that cause of action, our statement of facts omits allegations specific to it.

General Allegations

In their third amended complaint, plaintiffs[2] pleaded that in November 2006, they obtained a loan from Pomona First Federal and entered into a deed of trust on property located in Redlands. Plaintiffs further alleged that Michael, a medical doctor, "lost his largest source of patients due to the economic downturn," and he and his wife "separated and later filed for divorce."

Pomona First Federal closed, and the Federal Deposit Insurance Corporation was appointed receiver. Defendant later acquired the loan.

In September 2011, a notice of default and election to sell was sent to plaintiff. In January 2012, plaintiff received a notice of a trustee sale set for February 9, 2012. Plaintiff contacted defendant through its representative, Eugene Copeland. On February 2, 2012, plaintiff informed Copeland that his business had improved, and he was confident that if defendant approved a loan modification, plaintiff could make the monthly payments and bring the loan current. The sale date was postponed. In

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[2] Many allegations of the third amended complaint refer to "plaintiff" in the singular, presumably referring to Michael. Defendant has asserted that Michael obtained the loan as his sole and separate property, and the recorded instrument does not list Darla as a borrower. Defendant posits that Darla has brought suit as a "non-applicant spouse." We refer to "plaintiffs" or "plaintiff" in our statement of facts in the same manner in which those terms are used in the third amended complaint.

April 2012, Copeland requested plaintiff send documentation to support the request for a loan modification, and Copeland sent plaintiff a loan modification package.

On April 20 and 28, 2012, plaintiff sent defendant his personal and business tax returns and other financial documentation as requested as part of the modification documentation. Copeland informed plaintiff on April 30, 2012, that the documentation was complete, and he would forward the information to the review department. Copeland informed plaintiff that his income qualified him for a loan modification under defendant's guidelines. Meanwhile, defendant set another sale date for the property, to take place in May 2012.

On May 1 and 2, 2012, Copeland denied receiving the loan modification package, and he requested further documentation. Plaintiff faxed the information to Copeland, who again stated that plaintiff's income would qualify him for a loan modification under defendant's guidelines. On May 7, 2012, plaintiffs requested from Copeland a postponement of the sale, then set for later that month. Copeland stated that further information was required and that the sale would go forward. Plaintiff filed for federal bankruptcy protection.

Defendant moved for relief from the bankruptcy stay, and the stay was lifted. Thereafter, Copeland contacted plaintiff and requested that he apply for a loan modification. On August 12, 2012, plaintiff faxed the modification packet to Copeland. On September 2, 2012, Copeland claimed he had not received the packet. On September 6, 2012, a third modification packet was faxed to Copeland. Copeland again stated that plaintiff's income qualified him for a loan modification under defendant's guidelines, and told plaintiff not to worry because the modification was almost complete. Plaintiff forwarded all requested information to defendant "in order to solidify the modification."

On October 10, 2012, plaintiff contacted Copeland to determine the progress of the modification. Copeland informed plaintiff that defendant was selling the property the next day. The sale was set during the ongoing modification negotiations without any notice to plaintiffs. The sale went forward, and the property was sold back to defendant.

Allegations of Constructive Fraud

Plaintiffs alleged that Copeland "repeatedly advised [them] that the bank was interested in reaching a loan modification agreement" with them, and "defendants continued to establish a duty of care by promising to calculate a modified payment based upon their review of plaintiffs['] financial circumstances." Plaintiffs further alleged that defendants "had a duty to review [their] applications in good faith and actually to use the facts and correct math with due care." Plaintiffs alleged that defendants acted "in a reckless and careless manner" by "repeatedly requesting duplicate documentation, stating that no additional documentation was necessary, then requiring additional documents, stating the applications were under review, and then not under review." Plaintiffs alleged that Copeland's representations that reviews were occurring and that plaintiffs qualified for a loan modification were false and were made with the intent to defraud plaintiffs, and plaintiffs justifiably relied on those representations to their detriment.

Allegations of Promissory Estoppel

Plaintiffs alleged that Copeland clearly and unambiguously promised them that if they sent in applications and documents immediately on request, there would be no foreclosure; that they qualified for a loan modification; and that a loan modification would be offered. Plaintiffs alleged that those promises were made on "April 30, May 1, May 2, May 7 and September 6, 2012." Plaintiffs alleged they were ignorant of the facts and relied on those promises, and their reliance was reasonable and foreseeable. In reliance on those promises, they failed to pursue other options to save their home, including "a hard money loan, creative financing or pursuing a loan with another lender," or "a short sale or traditional marketing of the property." Plaintiffs alleged they suffered damages including the loss of their home, damage to their credit, and general and specific damages.

Allegations of Negligence and Negligent Misrepresentation

Plaintiffs alleged that Copeland repeatedly and intentionally misrepresented to them that their applications were under review, that they qualified for a loan modification under defendant's guidelines, and that a loan modification would lead to a lower monthly payment that would allow them to save their home from foreclosure. Copeland told them five times that no foreclosure would occur during the review process. Copeland did not tell them that other departments could overrule the representations that no foreclosure would occur. Copeland's representations were material and were intended to induce plaintiffs to forgo other remedies. Plaintiffs were ignorant of the fact that foreclosure could occur at any time and were justified in their reliance on Copeland's representations.

As a result of their reliance, they lost their home to the trustee sale, and they suffered damages to their credit and incurred attorney fees and costs.

DISCUSSION

Existence of Duty of Care

Plaintiffs contend that the trial court erred in relying on defendant's absence of duty in sustaining their causes of action for negligence and negligent misrepresentation. The trial court held as to the negligence cause of action that "there is no factual basis for a duty of care; the pleadings are insufficient to support an exception from the conventional lender relationship and the creation of a duty of care." As to the negligent misrepresentation cause of action, the court held that "the allegation fails as no duty of care can be established."

"'To state a cause of action for negligence, a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries. [Citation.] Whether a duty of care exists is a question of law to be determined on a case-by-case basis.'" (*Alvarez v. BAC Home Loans Servicing*, *L.P*. (2014) 228 Cal.App.4th 941, 944 (*Alvarez*).) "As a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Id.* at p. 945.) That rule is a general rule only, however, and whether a lender owes a duty to a borrower in a specific instance requires the balancing of the factors set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*). (*Alvarez*, at p. 945.)

In *Biakanja*, the court held: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja*, *supra*, 49 Cal.2d at p. 650.)

In *Lueras v. BAC Home Loans Servicing*, *LP* (2013) 221 Cal.App.4th 49 (*Lueras*), the court held that because a loan modification is the renegotiation of loan terms, the *Biakanja* factors do not support imposing a common law duty on a lender "to offer, consider, or approve" a loan modification. (*Lueras*, at p. 67.) Rather, any such duty is "created solely by the loan documents, statutes, regulations, and relevant directives and announcements from the United States Department of the Treasury, Fannie Mae, and other governmental . . . agencies." (*Ibid.*) A majority of the *Lueras* court further held, however, that "a lender *does* owe a duty to a borrower to not make material misrepresentations about the status of an application for a loan modification or about the date, time, or status of a foreclosure sale." (*Id.* at p. 68, italics added.) The court explained that harm to the borrower was foreseeable if the lender made "an inaccurate or untimely communication about a foreclosure sale or about the status of a loan modification application, and the connection between the misrepresentation and the injury suffered could be very close." (*Id.* at p. 69.) A majority of the court thus reversed the judgment as to the cause of action for negligent misrepresentation with directions to allow the plaintiff the opportunity to amend the complaint to plead a cause of action for negligent misrepresentation.

In *Alvarez*, the court agreed with *Lueras* that while lenders do not owe a duty to offer or approve loan modification, the factors set forth in *Biakanja* weighed in favor of imposing a duty to exercise reasonable care on a lender in reviewing a loan for a potential modification. (*Alvarez*, *supra*, 228 Cal.App.4th at pp. 944, 948.) The *Alvarez* court explained: "The transaction was intended to affect the plaintiffs and it was entirely foreseeable that failing to timely and carefully process the loan modification applications could result in significant harm to the applicants." (*Ibid.*) The court continued: "With respect to whether defendants' conduct was blameworthy—the fifth *Biakanja* factor—it is highly relevant that [their] 'ability to protect [their] own interests in the loan modification process [is] practically nil' and the bank holds 'all the cards.' [Citation.] . . . . [¶] The borrower's lack of bargaining power, coupled with conflicts of interest that exist in the modern loan servicing industry, provide a moral imperative that those with the controlling hand be required to exercise reasonable care in their dealings with borrowers seeking a loan modification. Moreover, the allegation in the complaint that defendants engaged in 'dual tracking,' which has now been prohibited [citation] increases the blame that may properly be assigned to the conduct alleged in the complaint. [Citation.]" (*Alvarez*, at pp. 949-950.) The court determined that although the complaint was poorly drafted, "potentially meritorious" causes of action for fraud, negligence, and unfair competition could "be distilled from the allegations of the complaint," and the court therefore reversed the judgment as to those causes of action. (*Id.* at p. 944.)

Here, likewise, we conclude that defendant had a duty of care to exercise reasonable care in its dealing with plaintiffs' application for a loan modification. Thus, plaintiffs adequately alleged a breach of that duty to support causes of action for negligence and negligent misrepresentation.

Sufficiency of Allegations to Support Causes of Action for Constructive Fraud, Promissory Estoppel, and Negligent Misrepresentation

Constructive Fraud

Plaintiffs' first cause of action was for constructive fraud. Constructive fraud is "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault . . . by misleading another to his prejudice" or as "any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." (Civ. Code, § 1573.) However, the breach of duty that supports a cause of action for constructive fraud must arise in "'a confidential or fiduciary relationship to another which induces justifiable reliance by the latter to his [or her] prejudice.'" (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131.) "[A]bsent special circumstances . . . a loan transaction is at arm's length and there is no fiduciary relationship between the borrower and lender." (*Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 466.)

Because plaintiffs did not allege any facts that would indicate a confidential or fiduciary relationship with defendant, they failed to state a cause of action for constructive fraud. The trial court properly sustained defendant's demurrer to the cause of action for constructive fraud.

Promissory Estoppel

"Promissory estoppel is an equitable doctrine that allows enforcement of a promise that would otherwise be unenforceable based on lack of consideration." (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1063.) """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.]" (*Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 225 (*Aceves*).) Detrimental reliance must be specifically pleaded; a conclusory allegation that the plaintiffs relied on a defendant's promises is insufficient. (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 48.)

The trial court held that plaintiffs had not sufficiently pled a clear, unambiguous promise or reliance. The trial court explained that "importantly there's a sequence here where there were discussions about [a] modification, but then there was a bankruptcy filing. So it's clear that any promises that may have been made before that bankruptcy filing there's not any reliance on that." The trial court further stated: "[A]fter the dismissal [of the bankruptcy proceedings], there isn't any allegation of any clear and unambiguous promise that foreclosure would not occur."

We need not resolve whether plaintiffs could reasonably rely on promises made *before* the bankruptcy filing because we determine that the trial court erred in holding that they failed to allege a clear and unambiguous promise, after the dismissal of the bankruptcy proceedings, that foreclosure would not occur. Rather, plaintiffs alleged that such a promise was in fact made on September 6, 2012, which was after the bankruptcy stay had been lifted.

As to the element of detrimental reliance, plaintiffs alleged that they "failed to pursue other options to save their home" including "a hard money loan, creative financing or pursuing a loan with another lender," or a short sale or traditional marketing of the property. In *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780 (*West*), the court concluded that the plaintiff's complaint, read as a whole, sufficiently alleged justifiable reliance on a promise. The court held that the complaint could "be reasonably interpreted to allege that [the plaintiff's] reliance on [the defendant's] alleged misrepresentations caused [her] not to take legal action to stop the trustee's sale." (*Id.* at p. 804.) The plaintiff further stated in her brief on appeal that "'she would have pursued other options, including possibly selling her home, retaining counsel earlier, and/or finding a co-signer to save her home.'" (*Id.* at p. 805.)

In *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031 (*Garcia*), borrowers requested an extension of the foreclosure sale on their home for approximately a week when a pending loan on a separate property would close. A bank official told borrowers that their home would not "go to [foreclosure] sale because I have the final say-so and . . . I'll extend it." (*Id.* at p. 1035.) In reliance on that statement, the borrowers obtained a high cost, high interest loan on separate property to cure the default on the loan secured by a deed of trust on their residence. (*Id.* at p. 1042.) The court held that under those circumstances, summary adjudication of the claim of promissory estoppel was erroneous. (*Id.* at p. 1046.)

In *Aceves*, *supra*, 192 Cal.App.4th 218, a homeowner fell into default on a residential loan, and the lender bank filed a notice of default and election to sell under its deed of trust. (*Id.* at p. 223.) The homeowner filed for bankruptcy, intending to convert her chapter 7 proceeding to a chapter 13 proceeding and to obtain financial help from her husband to cure the default and resume regular payments. (*Aceves*, at pp. 221, 223.) The bank promised to work with the homeowner on a loan reinstatement and modification if she would forgo further bankruptcy proceedings. In reliance on that promise, the homeowner did not convert to a chapter 13 proceeding and did not oppose the bank's motion to lift the bankruptcy stay. After the bankruptcy court lifted the stay, the bank failed to work with the homeowner to reinstate and modify the loan, and instead completed the foreclosure. (*Aceves*, at pp. 221, 224.) The trial court sustained the bank's demurrer to the homeowner's cause of action for promissory estoppel, but the appellate court reversed, finding the plaintiff had alleged a sufficiently concrete promise, reasonable reliance on that promise, and resulting detriment. (*Id.* at p. 222.) The court found that the borrower suffered detriment by losing rights she would have had in a chapter 13 bankruptcy proceeding, including the right to cure the default and reinstate the loan to predefault conditions with up to five years to pay the arrearages. (*Aceves*, at pp. 229-230.) The borrower had affirmatively alleged that she could and would have taken advantage of these rights if she had not forgone a chapter 13 filing. (*Aceves*, at p. 229.)

While plaintiffs' allegations were not as compelling as those in *Garcia* and *Aceves*, we nonetheless conclude that plaintiffs' allegations, like the similar allegations and statements found sufficient in *West*, adequately pled the element of reasonable reliance. Thus, the trial court erred in sustaining the demurrer as to the cause of action for promissory estoppel.

Negligent Misrepresentation

The elements of a claim for negligent misrepresentation are (1) the defendant's misrepresentation of a material past or existing fact without reasonable grounds for believing that fact to be true, and with intent to induce reliance, (2) the plaintiff's ignorance of the truth and justifiable reliance on the misrepresentation, and (3) the resulting damages. (*Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962.) Negligent misrepresentation must be pleaded with specificity rather than with general and conclusory allegations. "[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.) Plaintiffs pleading fraud or deceit must also "specifically allege their damages and how their reliance on [the misrepresentation] caused those damages." (*Rossberg v. Bank of America*, *N.A.* (2013) 219 Cal.App.4th 1481, 1501.)

Here, plaintiffs adequately pled specific statements made by Copeland on specific dates. Specifically, they pled that Copeland repeatedly told them that their applications were under review, that they qualified for a loan modification under defendant's guidelines, that a loan modification would lead to a lower monthly payment that would allow them to save their home from foreclosure, and that no foreclosure would occur during the review process. They also alleged that Copeland did not tell them that other departments could overrule the representation that no foreclosure would occur.

As to the element of reliance, we have addressed the adequacy of the pleading in connection to the cause of action for promissory estoppel; the same analysis applies to reliance in the context of the claim of negligent misrepresentation.

We conclude the trial court erred in sustaining defendant's demurrer to the cause of action for negligent misrepresentation.

DISPOSITION

The judgment is affirmed as to the cause of action for constructive fraud and reversed as to the causes of action for promissory estoppel, negligence, and negligent misrepresentation.

Costs are awarded to appellants.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

SLOUGH
J.