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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RENE MARENTES et al.,

Plaintiffs and Appellants,

v.

IMPAC FUNDING CORPORATION,

Defendant and Respondent.

G047973

(Super. Ct. No. 30-2012-00565615)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kim Garlin Dunning, Judge. Reversed.

The Manship Law Firm and Penny J. Manship; Edgar Law Firm and John F. Edgar for Plaintiffs and Appellants.

Sheppard, Mullin, Richter & Hampton, McKenna, Long & Aldridge, John T. Brooks and Jessica L. Mackaness for Defendant and Respondent.

Rene and Martha Marentes (the Marentes) appeal from a judgment of dismissal entered after the trial court sustained Impac Funding Corporation's (IFC) demurrer to the Marentes' first amended complaint. The Marentes argue the trial court erred in sustaining IFC's demurrer to their class action lawsuit because they have standing to bring an action under California's Unfair Competition Law. We agree and reverse the judgment.

FACTS

IFC is a master servicer of and investor in mortgage loans and provides loan modification services. IFC is a subsidiary of Impac Mortgage Holdings, Inc. (IMH). In April 2009, the Marentes attempted to modify their mortgage through Countrywide Financial/Bank of America, their mortgage loan servicer, to decrease their mortgage payment in an effort to keep their home, which was in foreclosure. The Marentes were not required to pay any fees at that time. Three months later, Bank of America notified the Marentes that IMH would not approve the loan modification and suggested the Marentes contact IMH directly.

IMH informed the Marentes they had to pay an "upfront fee" to modify their loan and denied their request to waive the fee and postpone the foreclosure. The Marentes finalized their bankruptcy in early 2010.

In February 2010, IMH sent its customers, including the Marentes, a "one time" offer to modify their loan. The letter stated customers must pay \$2,495 before the loan modification process could begin. The Marentes submitted the necessary documents, were approved, and paid the \$2,495 fee by credit card on March 22, 2010. The Marentes' mortgage loan modification was finalized on October 1, 2010. They made monthly credit card payments, including monthly interest charges on the \$2,495 from March 2010 to October 2010.

In May 2011, IMH sent its customers, including the Marentes, another offer to modify their loan. The Marentes applied, were approved, and were required to pay

\$1,995 before the loan modification process could begin. The Marentes paid the \$1,995 in three installments in May, June, and July 2011. The Marentes' mortgage loan modification was finalized after the last installment.

On April 30, 2012, the Marentes filed a class action complaint against IMH alleging the following three causes of action: (1) violation of Business and Professions Code section 17200,¹ Unfair Competition Law (UCL); (2) violation of Civil Code section 1750, Consumers Legal Remedies Act (CLRA); and (3) violations of Civil Code section 2944.7. IMH filed an answer and then a motion for judgment on the pleadings, which included a request for judicial notice of legislative history. The Marentes opposed the motion. IMH replied.

At the hearing on IMH's motion for judgment on the pleadings, the trial court took judicial notice of the legislative history materials. After considering the parties written submissions and oral argument, the court granted the motion without leave to amend the CLRA and Civil Code section 2944.7 causes of action, and with leave to amend the UCL cause of action. The court suggested to counsel that he should "beef up" the allegations as to "time and money."

On August 22, 2012, the Marentes filed a first amended class action complaint (FAC) against IMH and IFC alleging one UCL cause of action.² The Marentes alleged the same theory of the case as in the original complaint—IFC violated the law when it charged an "upfront fee" before performing loan modification services in violation of Civil Code section 2944.7, subdivision (a)(1). The FAC stated the Marentes "suffered injury in fact and lost money or property." The FAC added that because of the

¹ All further statutory references are to the Business and Professions Code, unless otherwise indicated.

² The trial court subsequently granted the Marentes' motion to dismiss IMH.

“upfront fee,” IFC has “been able to reap unjust revenue and profit.” These were the same allegations included in the original complaint.

IFC filed a demurrer to the Marentes’ FAC. IFC also filed a request for judicial notice. IFC argued the Marentes failed to allege a loss of money or property. IFC asserted the Marentes’ complaint was based on an alleged technical violation of Civil Code section 2944.7. It contended the Marentes did not allege they paid more than they expected to pay or that they did not receive what they paid for. IFC stated the Marentes’ sole complaint was they paid too early, which does not confer standing to bring an action under the UCL.

The Marentes opposed IFC’s demurrer. The Marentes argued they suffered monetary damages based on the theory of the time value of money, i.e., that a dollar today is worth more than a dollar tomorrow, IFC violated Civil Code section 2944.7, and they incurred credit card interest debt.

IFC replied. It argued the trial court had already rejected the Marentes’ first two arguments, that the time value of money and the alleged statutory violation conferred standing. IFC contended the third argument did not confer standing because the Marentes made no showing they would not have charged the fee if the fee had been due later or that they would have paid off the charge faster if the fee had been due later.

After considering the parties’ written submissions and oral argument, the trial court sustained IFC’s demurrer without leave to amend. The court mused, “You got what you paid for; you just shouldn’t have paid for it when you did.” IFC gave notice of the entry of the order and judgment on January 18, 2013. The Marentes appealed.

DISCUSSION

Our review is de novo. “We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. [Citation.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which

judicial notice has been taken. [Citation.] We construe the pleading in a reasonable manner and read the allegations in context. [Citation.] ‘We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court’s stated reasons. [Citation.]’ [Citation.]” (*Entezampour v. North Orange County Community College Dist.* (2010) 190 Cal.App.4th 832, 837.)

California courts refer to sections 17200 through 17210 as the UCL. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 520 (*Jenkins*)). The UCL prohibits “any unlawful, unfair or fraudulent business act or practice.” The remedies available for a violation are limited to “(1) *injunctive relief*, ‘the primary form of relief available under the UCL’ or (2) *restitution*, “as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.” [Citation.]’ [Citation.]” (*Ibid.*)

Section 17200 defines “unfair competition” as “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” Because section 17200 is written in the disjunctive, the UCL creates three varieties of unfair competition: *unlawful*, *unfair*, or *fraudulent* business acts or practices. (*Jenkins, supra*, 216 Cal.App.4th at p. 520; *Law Offices of Mathew Higbee v. Expungement Assistance Services* (2013) 214 Cal.App.4th 544, 553 (*Higbee*); *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 252.) “““By proscribing “any unlawful” business practice, “section 17200 ‘borrows’ violations of other laws and treats them as unlawful practices” that the unfair competition law makes independently actionable.” [Citation.] “Virtually any law—federal, state or local—can serve as a predicate for a [UCL] action.” [Citation.]’ [Citation.]” (*Higbee, supra*, 214 Cal.App.4th at p. 553.) The UCL’s provision for “*restitution* “as may be necessary to restore to any person in interest any money or property, real or personal,” indicates a party seeking relief under the UCL must have suffered injury. Since the passage of Proposition 64, case law has further defined UCL’s injury component. Current law dictates a private

plaintiff must allege he or she “has *suffered injury in fact* and has *lost money or property* as a *result* of the unfair competition[.]” to have standing to sue under the UCL (§ 17204). (*Jenkins, supra*, 216 Cal.App.4th at pp. 520-521.)

In *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322 (*Kwikset*), the California Supreme Court held that to satisfy the standing requirement of section 17204, a plaintiff must “(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim.” The *Kwikset* court held a plaintiff can satisfy the economic injury prong of the standing requirement in “innumerable ways” but listed four injuries that would qualify under section 17204: (1) the plaintiff surrendered more or acquired less in a transaction than the plaintiff otherwise would have; (2) the plaintiff suffered the diminishment of a present or future property interest; (3) the plaintiff was deprived of money or property to which the plaintiff had a cognizable claim; or (4) the plaintiff was required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. (*Kwikset, supra*, 51 Cal.4th at p. 323.) The foregoing list is not exhaustive and the notion of “lost money” under the UCL is not limited. (*Ibid.*) The *Kwikset* court explained, “the quantum of lost money or property necessary to show standing is only so much as would suffice to establish injury in fact” and “it suffices . . . to “allege[.] some specific, ‘identifiable trifle’ of injury.” [Citations.]” (*Id.* at pp. 324-325.) “““The basic idea . . . is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.” [Citations.]” (*Id.* at p. 325, fn. 7.)

Here, in their FAC, the Marentes allege IFC’s demand for payment of a fee before the modification process began violated Civil Code section 2944.7, subdivision (a)(1). Civil Code section 2944.7, subdivision (a)(1), states:

“(a) Notwithstanding any other provision of law, it shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following: [¶] (1) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.”

It is undisputed IFC charged and collected an “up front” fee before the mortgage loan modification was fully performed. IFC suggests, if anything, this was just a “technical violation of the statute’s payment timing rules.” We conclude the “up front” fee was a violation of Civil Code section 2944.7, subdivision (a), satisfying the UCL’s unlawful act requirement.

IFC next contends the Marentes lack standing under the UCL because they have not lost money or property. It reasons the Marentes did not over pay, they simply paid the agreed upon price “too early.” IFC argues the plain language of the UCL limits standing to persons who have “lost money or property.”

The Marentes allege “for at least six months, [they] lost money and/or credit because of [IFC’s] conduct.” They agree and do not dispute IFC performed the loan modification. Their theory is, as IFC contends, they paid too early. Relying on the time value of money theory,³ the Marentes allege IFC deprived them of the use of their money during that time because they could have invested the money.

³ Time value of money is defined as the following: “The idea that money available at the present time is worth more than the same amount in the future due to its potential earning capacity. This core principle of finance holds that, provided money can earn interest, any amount of money is worth more the sooner it is received.” (Investopedia <<http://www.investopedia.com/terms/t/timevalueofmoney.asp>> [as of May 19, 2014].)

IFC contends because the Marentes allege only the loss of use of their money or credit, they have not been injured within the meaning on the UCL. IFC notes the Marentes failed to show they would not have charged the fee on their credit card if the fee had been due later, or that they would have paid off the charge faster if the fee had been due later.

“[A] litigant’s standing to sue is a threshold issue to be resolved before the matter can be reached on the merits. [Citation.]” (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1345.) “Because standing goes to the existence of a cause of action, lack of standing may be raised by demurrer or at any time in the proceeding, including at trial or in an appeal. [Citations.]’ [Citation.]” (*Ibid.*)

A UCL claim will survive a demurrer based on standing if the plaintiff can plead “general factual allegations of injury resulting from the defendant’s conduct.” (*Kwikset, supra*, 51 Cal.4th at p. 327.) “[I]njury in fact is ‘an invasion of a legally protected interest which is (a) concrete and particularized, [citations]; and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical,’” [citation].’ [Citations.] ‘Particularized’ in this context means simply that ‘the injury must affect the plaintiff in a personal and individual way.’ [Citation.]” (*Id.* at pp. 322-323.) The question presented is whether the injury the Marentes allege establishes a loss or deprivation of money or property sufficient to qualify as injury in fact.

The concept that the use of money has value has long been recognized in the law. When the executor of an estate unreasonably delays settling and distributing an estate, the court may charge the executor with interest. An award of interest is prompted by the use of the money even if the executor did not profit from the use of the estate’s funds. (*In re Hilliard* (1890) 83 Cal. 423, 427-428.) “[I]n situations where the defendant could have timely paid [a certain] amount and has thus deprived the plaintiff of the economic benefit of those funds, the defendant should therefore compensate with appropriate interest.” (*Wisper Corp. v. California Commerce Bank* (1996)

49 Cal.App.4th 948, 962.) “It has long been settled that [Civil Code] section 3287 should be broadly interpreted to provide just compensation to the injured party for loss of use of money during the prejudgment period. [Citations.]” (*Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 132.) “Interest on the money during the time of the delay is a measure of damage for the loss of its use.” (*Surety Sav. & Loan Assn. v. National Automobile & Cas. Ins. Co.* (1970) 8 Cal.App.3d 752, 759.)

That the loss of use of money results in a loss or deprivation of money or property has similarly been embraced in the law. “The policy underlying authorization of an award of prejudgment interest is to compensate the injured party—to make that party whole for the accrual of wealth which could have been produced during the period of loss. [Citations.]” (*Cassinovs v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1790.) The value of money today is likely to be less than in the future. “That money received in the future is worth less than at the time of judgment is recognized in judgments themselves, which, as in this case, typically add interest to the award at a rate calculated from the date of judgment.” (*Franck v. Polaris E-Z Go Div. of Textron, Inc.* (1984) 157 Cal.App.3d 1107, 1117, fn. 1.) “The present value of a gross award of future damages is that sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award. [Citations.] ‘The concept of present value recognizes that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.’ [Citation.]” (*Holt v. Regents of University of California* (1999) 73 Cal.App.4th 871, 878.)

To adopt IFC’s argument that the lost use of money or credit does not amount to “lost money or property,” we would necessarily have to adopt the premise that the use of money has no value. This would be contrary to well established legal principles. Admittedly, the loss may be difficult to quantify and restitution may only be a minimal amount, but these are not issues to be addressed at the pleading stage. IFC’s

contention the Marentes were required to show they would not have charged the fee if the fee had been due later, or that they would have paid off the charge faster if the fee had been due later, is meritless. We conclude the Marentes' allegation that "for at least six months, [they] lost money and/or their credit" is at least an identifiable trifle of injury as required for standing under the UCL.

DISPOSITION

The judgment is reversed. Appellants shall recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.