 74535-2

No. 74535-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ELLEN B. KLYCE, a single individual; and THOMAS C. DASHIELL, a single individual,

Respondents,

v.

DAVID EBENAL and BONITA EBENAL, husband and wife, and their marital community

Appellants.

BRIEF OF RESPONDENTS

On Appeal from Whatcom County Superior Court
Hon. Deborra E. Garrett

Attorneys for Respondents Ellen B. Klyce and Thomas C. Dashiell:

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I. INTRODUCTION

In late November of 2013, Respondent Ellen Klyce and Lillian Dashiell gave a secured short-term loan to Appellants David and Bonita Ebenal for Mr. Ebenal's business. The Ebenals executed two promissory notes (the "Notes") that were to be paid in full no later than December 31, 2014. In May of 2015, Ms. Dashiell assigned her interest in her promissory note to her father, Respondent Thomas Dashiell.

While everyone hoped that the Notes would be paid upon the sale of real property in Florida, unrelated litigation has prevented the Ebenals from using the sale proceeds to pay off the Notes. The Ebenals admittedly did not pay the Notes by the December 31, 2014 due date. Discussions ensued, but the parties were unable to agree to new terms, and Ms. Klyce and Mr. Dashiell filed this lawsuit to collect on the Notes in June of 2015. After the lawsuit was filed, Mr. Dashiell and Mr. Ebenal continued to engage in settlement discussions.

When settlement could not be reached, Ms. Klyce and Mr. Dashiell filed for summary judgment. In defense, the Ebenals asserted that two months after this lawsuit was filed, Mr. Dashiell verbally agreed to resolve this matter by extending the due date on the Notes, in exchange for providing Mr. Dashiell access to the Ebenals litigation related to the Florida property sale proceeds. After reviewing California law and argument presented by the parties, the Trial Court determined that California law required any modification to the Notes to be in writing. Therefore, the Trial Court granted summary judgment in favor of Ms. Klyce and Mr. Dashiell.

II. RESTATEMENT OF ISSUES ON APPEAL

1. Must summary judgment in favor of Ms. Klyce and Mr. Dasheill be affirmed when the California Statute of Frauds requires any modifications to the Notes to be in writing, preventing the Ebenals' claim of oral modification.

2. Must summary judgment in favor of Ms. Klyce and Mr. Dashiell be affirmed when the Ebenals' only evidence consists of inadmissible settlement discussions under ER 408?

3. Must summary judgment in favor of Ms. Klyce and Mr. Dashiell be affirmed when the court cannot recognize the disputed oral agreement pursuant to CR 2A?

4. Must summary judgment in favor of Ms. Klyce and Mr. Dashiell be affirmed when pursuit of this lawsuit negates any claim of an intentional waiver of their right to collect on the Notes?

5. Must summary judgment in favor of Ms. Klyce and Mr. Dashiell be affirmed when the Ebenals have failed to present any evidence that they relied on the purported oral agreement?

6. Are Ms. Klyce and Mr. Dashiell entitled to their attorney fees and costs on appeal?

III. RESTATEMENT OF THE CASE

In November of 2013, Ellen Klyce and Lillian Dashiell loaned monies totaling $750,000 to David and Bonita Ebenal for Mr. Ebenal's business. CP 2:7-17, 5:12-15, 19-21, 29-31. The loan was structured with the Ebenals executing two promissory notes, one in favor of Ms. Klyce and the other in favor Ms. Dashiell. *Id.* The Notes were secured by (1) Deeds of Trust on four houses owned by the Ebenals; and (2) collateral security interests in a $775,000 Preferred Interest in Hunter Hospitality LLC, and the Ebenals' interest in Pompano, LLC. CP 19-21, 29-31.

The Notes were to be paid in full, with all accrued interest, on the earlier of the sale of real property by Hunter Hospitality LLC in Pompano, Florida, or December 31, 2014. CP 19-21, 29-31. In July of 2014, the real property in Florida was sold, but the proceeds from the sale remain tied up in extensive litigation. CP 37:21-38:7. The Ebenals admit they have failed to make the payments required by the Notes, and are therefore in default. CP 5:17; 20, 30. After the default, Lillian Dashiell assigned her promissory note to her father, Mr. Dashiell on May 15, 2015. CP 23.

To collect on the Notes, Ms. Klyce and Mr. Dashiell filed this lawsuit on June 17, 2015. In their answer, the Ebenals admit that they executed the Notes, and that they "have not made payments to Plaintiffs . . . ." CP 2:7-17, 5:12-15. Based on this admission, Ms. Klyce and Mr. Dashiell filed for summary judgment on October 16, 2015. CP 9-14.

In response to the summary judgment motion, the Ebenals submitted a four-page response outlining the extensive litigation of the sale proceeds, and asserting that on August 31, 2015, two months after this lawsuit was filed, that Mr. Dashiell and Mr. Ebenal entered into an oral modification agreement where Mr. Dashiell and Ms. Klyce would extend the payment date of the Notes to June 1, 2016, in exchange for the Ebenals providing Mr. Dashiell access to their counsel and litigation strategy in the various legal matters regarding the sale proceeds. CP 32-35; 38:8-17. The Ebenals then, in only ten lines, reference a portion of the California code regarding contract modification, cite to a vague definition of consideration, and cite to a generic statement about waiver and estoppel. CP 33:22-31:8. With no analysis or explanation on how the purported facts relate, the Ebenals conclude: "Here, there has been either a modification by mutual promises, or waiver and estoppel of the maturity date." CP 34:7-8.

In direct response, Ms. Klyce and Mr. Dashiell presented the following arguments: (1) any conversations between Mr. Dashiell and Mr. Ebenal constituted inadmissable settlement discussions under ER 408; (2) any alleged agreement did not meet the requirements of a CR 2A Agreement and therefore, the settlement could not be recognized by the court; (3) California law required any modification of the Notes and Deeds of Trust to be in writing; (4) Mr. Dashiell's settlement discussions do not constitute waiver, and (5) promissory estoppel was inapplicable because the Ebenals failed to present any reliance evidence. CP 46-48.

At the summary judgment hearing on November 13, 2016, while argument was presented on all of the defenses raised by the Ebenals, the focus of the oral argument was on whether the California statute of frauds and the case of *Secrest v. Sec. Nat'l Mortg. Loan Trust*, 167 Cal. App.4th 544, 552, ___ Cal.Rptr.3d ___ (2008) required the purported modification to be in writing. *See generally*, RP. After reviewing California law and hearing argument from both sides, the Trial Court determined that any modification needed to be in writing, and therefore, Ms. Klyce and Mr. Dashiell were entitled to summary judgment:

> The primary issue is whether these agreements come under the California Statute of Frauds and that is purely a legal question based on California law.
>
> I do see the case of **Secrest vs. Security National Mortgage Loan Trust** 2008 decision as controlling and stating the law is really quite clearly that a forbearance agreement that modifies the conditions of, the conditions of the note and deed of trust is itself a document which must be in writing under the terms of Statute of Frauds.
>
> So based on my understanding of California law and the terms of the note itself the lenders are entitled to the judgment that they are seeking here. . . . The Court's decision is simply a question of law as to the applicability of the Statute of Frauds and I find that the notes at issue are subject to the Statute of Frauds and is, any effort to modify those notes and it's for that reason that the Plaintiff's motion is granted.

RP 27:25-28:25 (emphasis in original). On December 4, 2015, the Trial Court entered an Order Granting Summary Judgment. CP 50-54.

V. RESPONSE ARGUMENT

A. Summary Judgment In Favor Of Ms. Klyce And Mr. Dashiell Must Be Affirmed Because California's Statute of Frauds Requires Modifications To The Notes To Be In Writing.

On appeal from summary judgment, "questions of law are reviewed *de novo*." *Bainbridge Citizens United v. Washington State Dep't Natural Res.*, 147 Wn. App. 365, 371, 198 P.3d 1033 (2008). In this matter, the Notes and their respective deeds of trust are governed by

California law. CP 19-21, 29-31.

1. **The Trial Court properly determined that *Secrest v. Sec. Nat'l Mortg. Loan Trust* is the controlling law, thus requiring summary judgment in favor of Ms. Klyce and Mr. Dashiell because there is no written modification of the Notes.**

Under California law, the statute of frauds require that notes and the deeds of trust securing them be in writing. Cal. Civ. Code §1624(a)(3); *Secrest v. Sec. Nat'l Mortg. Loan Trust*, 167 Cal. App.4th 544, 552, ___ Cal.Rptr.3d ___ (2008). By statute, any modification to a contract subject to the statute of frauds must also be in writing:

> Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. **The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions**.

Cal. Civ. Code §1698(c) (emphasis added). In *Secrest*, the California Court of Appeal ruled that a forbearance agreement modifying the terms of a note and deed of trust must also be in writing. 167 Cal. App.4th at 553.

In this case, the Ebenals contend that the Notes, and consequently the Deeds of Trust, were orally modified when Mr. Dashiell purportedly agreed to extend the due date of the Notes to June 1, 2016, in exchange for Mr. Dashiell's input and participation in the Ebenals' sale proceeds litigation. CP 38:8-17. Under California law, this would be a modification because the purported oral agreement changed the Ebenals' obligation to pay the Notes on the original due date. *Secrest*, 167 Cal. App. 4th at 553 ("A modification of a contract is a change in the obligations of a party by a subsequent mutual agreement of the parties").

Since there is a purported modification of the Notes and Deeds of Trust, the Trial Court properly concluded that *Secrest* is controlling, ruling that as a matter of law, Ms. Klyce and Mr. Dashiell are entitled to summary judgment because the oral modification did not satisfy the statute of frauds. RP 27:13-15; RP 27:25-28:15; 28:20-25.

2. The Ebenals have failed to present any legal authority to support their claim that *Secrest* is inapplicable.

The legal authority presented by the Ebenals to avoid summary judgment does not support their claim that the *Secrest* case is inapplicable.[1] First, the Ebenals' reliance on "a leading treatise on California law,"[2] is mistaken because in *Secrest*, the Court of Appeal concluded that any suggestion that a forbearance agreement does not need to be in writing is ***wrong***:

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[1] Br. Appellant at 7.

[2] Br. Appellant at 6.

> The Miller and Starr treaties on California real property law suggests a forbearance agreement is enforceable without a writing. The treatise states: "A beneficiary can agree not to exercise the right of foreclosure or to delay the commencement of foreclosure. An oral agreement not to foreclose the lien of a mortgage or deed of trust, if given for consideration, is enforceable without any written confirmation by the beneficiary or trustee." **In support of that proposition, Miller and Starr cite only *Cornelison v. Kornbluth* . . . which does not address that issue**.

Secrest, 167 Cal. App. 4th at 554 (internal citations omitted) (emphasis added).

Second, the Ebenals reliance on *Johnson v. Sellers*, 798 N.W.2d 690 (S.D. 2011), is misplaced for several reasons. To begin with, South Dakota law is not applicable in this case. *See* CP 19-21, 29-31. Additionally, the *Johnson* case was not cited to in *Secrest*, even though the Ebenals' presentation of the facts and legal reasoning from the *Secrest* case implies otherwise. *See Secrest*, 167 Cal. App. 4th 544; Br. Appellant at 6. Finally, the *Johnson* case is not a contract modification case - the South Dakota court held that a waiver of performance did not need to be in writing. *Johnson*, 798 N.W.2d at 695. The Ebenals do not claim that Ms. Klyce and Mr. Dashiell waived timely payment. *See generally*, CP 37-39. Instead, Mr. Ebenals's testimony states the Notes were orally modified, changing the Ebenals' obligation to pay the Notes on the original due date in exchange for "full access to [the Ebenals'] attorney so they could work together on what and when to file in the Pompano case." *Secrest*, 167 Cal. App. 4th at 553; CP 38:8-17.

Finally, the facts in *Lueras v BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49, 163 Cal. Rptr. 3d 804 (2013), are distinguishable. In *Lueras*, the Court of Appeal determined that an unsigned written forbearance agreement was still enforceable because Bank of America accepted payments during the deferral period, and the written forbearance agreement specifically stated that it did not modify the loan documents. *Id.* at 71. Contrary to the Ebenals' contention, the Court of Appeal affirmed California law that "a forbearance agreement that modifies a note and deed of trust is subject to the statute of frauds," only finding that the statute of frauds was inapplicable in *Lueras* because the written forbearance agreement clearly stated there was no modification. *Id.* The facts in *Lueras* do not exist in this case.

Here, there is no unsigned written forbearance agreement stating that there are no modifications. *See* CP 37-39. More importantly, since Mr. Ebenal presented evidence that the purported oral agreement modifies the Notes and Deeds of Trust by extending the due date, there was no need for Ms. Klyce or Mr. Dashiell to present further evidence. *Secrest*, 167 Cal. App. 4th at 553; CP 38:8-17; Br. Appellant at 7. Further, and contrary to the Ebenals' attempt to minimize the Deeds of Trust, Ms. Klyce and Mr. Dashiell ***could not*** have brought a concurrent foreclosure action at the same time that they pursued this lawsuit. RCW 61.12.120 ("The plaintiff shall not proceed to foreclose his or her mortgage while he or she is prosecuting any other action for the same debt or matter which is secured by the mortgage").

The Ebenals have failed to present any controlling legal authority showing that the California statute of frauds and the holding in *Secrest* are inapplicable. The Trial Court's decision should be affirmed because it correctly applied California law, requiring the entry of summary judgment in favor of Ms. Klyce and Mr. Dashiell because the Notes and Deeds of Trust cannot be orally modified.

B. Summary Judgment In Favor Of Ms. Klyce And Mr. Dashiell Must Also Be Affirmed On Other Grounds Because The Ebenals Have Failed To Establish Essential Elements Supporting Their Other Affirmative Defenses Of Waiver And Promissory Estoppel.

The Appellate Court may affirm summary judgment on any correct ground, "even if the trial court did not consider it." *Bainbridge Citizens*

United, 147 Wn. App. at 371, 198 P.3d 1033. The standard of review is *de novo*, and the Appellate Court "engage[s] in the same inquiry as the trial court." *Id.* To avoid summary judgment, the Ebenals were required to present evidence to establish all elements for each of their affirmative defenses. See *Young v. Key Pharm. Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Facts and inferences therefrom are considered in the Ebenals' favor, and summary judgment should be granted if the Ebenals cannot make a sufficient showing of each element essential to their affirmative defenses. *See id.* Summary judgment should be affirmed because the Ebenals failed to present evidence for their affirmative defenses.

1. The purported oral modification is an inadmissible settlement communication under ER 408, leaving the Ebenals with no admissible evidence to support their affirmative defenses.

To prove their affirmative defenses, the Ebenals are relying on inadmissible settlement communications. ER 408 states:

> In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

ER 408. This case was filed on June 17, 2015. CP 1. Two months later, on August 31, 2015, an oral agreement was purportedly reached between Mr. Ebenal and Mr. Dashiell that the payment date of the Notes would be extended to June 1, 2016, in exchange for the Ebenals giving Mr. Dashiell access to their counsel and litigation strategy associated with the sale proceeds. CP 38:8-17. The sole purpose of the purported agreement was an effort to resolve this matter and pay off the Notes. CP 38:14-17. The purported oral agreement, even if true, came directly out of settlement discussions, and is therefore inadmissible under ER 408.

As important, the Ebenals waived their argument that "Appellants were not trying to introduce a settlement agreement"[3] because they failed to assign error or provide any legal authority or argument disputing the fact the purported agreement is a settlement communication subject to ER 408. RAP 10.3(a)(4), (6); *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004); *See generally*, Br. Appellants.

Affidavits in support of summary judgment must contain "facts as would be admissible in evidence." CR 56(c). The only fact supporting the Defendants' affirmative defenses is the inadmissable settlement communication itself. *See generally*, Ebenal Decl. As a matter of law, Defendants cannot establish their affirmative defenses with inadmissable

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[3] Br. Appellant at 7.

settlement evidence, and Ms. Klyce and Mr. Dashiell are entitled to summary judgment. *Young v. Key Pharm. Inc.*, 112 Wn.2d at 225, 770 P.2d 182.

2. The purported oral modification cannot be considered by the Court because CR 2A requires an agreement with respect to the lawsuit to be in writing, leaving the Ebenals with no admissible evidence to support their affirmative defenses.

A court cannot recognize the purported oral modification since CR 2A requires an agreement between the parties (or their counsel) regarding the litigation to be in writing:

> No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court . . . unless the evidence thereof shall be in writing . . . ."

CR 2A. The Ebenals are relying on the purported oral modification made two months after this lawsuit was filed, which oral modification would resolve this lawsuit. CP 38:8-17. CR 2A prevents the court from considering this oral evidence. *See* CR 2A. Additionally, since the Ebenals did not assign error or present any legal authority or argument, the Ebenals have waived their argument that "CR 2A does not apply.[4]" RAP 10.3(a)(4), (6); *Bercier v. Kiga*, 127 Wn. App. at 824, 103 P.3d 232; *See generally*, Br. Appellants. Since affidavits in support of summary

[4] Br. Appellant at 7.

judgment must contain "facts as would be admissible in evidence," and evidence of the purported oral modification cannot be considered under CR 2A, the Ebenals cannot establish their affirmative defenses as a matter of law, entitling Ms. Klyce and Mr. Dashiell to summary judgment. *See* CR 56(c); CR 2A, *Young v. Key Pharm. Inc.*, 112 Wn.2d at 225, 770 P.2d 182; CP 38:8-17.

3. The Ebenals cannot establish waiver because the filing and pursuit of this lawsuit shows that Ms. Klyce and Mr. Dashiell did not intentionally relinquish their rights to collect on the Notes.

The Ebenals have waived their claim that "Mr. Ebenal showed affirmative evidence of . . . waiver"[5] since they failed to assign error or present any legal authority or argument demonstrating that Ms. Klyce and Mr. Dashiell intentionally relinquished their right to collect on the Notes. RAP 10.3(a)(4), (6); *Bercier v. Kiga*, 127 Wn. App. at 824, 103 P.3d 232; *See generally*, Br. Appellants. Waiver is the "intentional relinquishment of a known right or such conduct as warrants an interference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances indicating an intent to waive." *Panno v. Russo*, 186 P.2d 452, 454-55, 82 Cal.App.2d 408 (1947).

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[5] Br. Appellant at 5.

Here, the evidence does not support waiver, and in fact, demonstrates the opposite. After settlement talks failed, Ms. Klyce and Mr. Dashiell filed this lawsuit. CP 37:19-20; CP 1. Further, the parties actively pursued this lawsuit while Mr. Dashiell and Mr. Ebenal had post-filing verbal settlement discussions. CP 4-7; CP 9-14. Active pursuit of this lawsuit shows that Ms. Klyce and Mr. Dashiell did not intentionally relinquish their rights to collect on the Notes. The Ebenals cannot establish an essential element of their waiver claim since there is no evidence that Ms. Klyce and Mr. Dashiell intentionally relinquished their right to collect on the Notes. Therefore, summary judgment should be affirmed. *Young v. Key Pharm. Inc.*, 112 Wn.2d at 225, 770 P.2d 182.

4. The Ebenals cannot establish promissory estoppel because there is no evidence that they relied upon any alleged promise made by Mr. Dashiell.

The doctrine of promissory estoppel "**cannot be invoked and must be held inapplicable** in the absence of a showing that a promise has been made upon which the complaining party relied to his prejudice . . . ." *Garcia v. World Sav., FSB*, 183 Cal. App.4th 1031, 1044, ___ Cal.Rptr.3d ___ (2010) (quoting *Div. of Labor law Enforcement v. Transpacific Transp. Co.*, 69 Cal.App.3d 268, 277, 137 Cal.Rptr. 855 (1977)) (emphasis added).

Here, Mr. Ebenal's own testimony proves that the Ebenals did not rely on any alleged promise from Mr. Dashiell - the Ebenals were ***already participating in the litigation against them*** long before Mr. Dashiell's purported promise was made in August of 2015:

> The property has been the subject of prolonged litigation for years now. When a receiver was appointed in late 2013, we thought it would only take a year or so to get the property sold and the money distributed. In fact, the property was sold in July 2014, but the money has not been distributed because of additional litigation by other parties.

CP 37:21-25; *See also* CP 38:8-17. The Ebenals were already participating in litigation when Ms. Klyce and Mr. Dashiell loaned the Ebenals money. CP 19-21, 29-31, 37:22-25. As important, the Ebenals have waived their promissory estoppel claim since they did not assign error, or present any legal authority or argument showing that they relied on Mr. Dashiell's purported promise. RAP 10.3(a)(4), (6); *Bercier v. Kiga*, 127 Wn. App. at 824, 103 P.3d 232; *See generally*, Br. Appellants. Promissory estoppel is inapplicable as a matter of law because there has been no reliance. *Garcia v. World Sav., FSB*, 183 Cal. App.4th at 1044. Therefore, summary judgment must be affirmed. *Young v. Key Pharm. Inc.*, 112 Wn.2d at 225, 770 P.2d 182.

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C. Ms. Klyce And Mr. Dashiell Should Be Awarded Attorney Fees And Costs On Appeal.

The Notes explicitly provide for an award of attorney fees and costs: "Borrowers shall pay all costs, including, without limitation, reasonable attorneys' fees and costs incurred by Lender in collecting the sums due hereunder . . . .In the event of any action or legal proceeding concerning this Note or the enforcement of any rights hereunder, Lender shall be entitled to . . . all legal and court costs and expenses, including reasonable attorneys' fees, incurred by Lender in connection with such action." CP 20-21, 30-31. Therefore, pursuant to the Notes and RAP 18.1, Ms. Klyce and Mr. Dashiell should be awarded their attorney fees and costs if they prevail in this appeal. RAP 18.1, CP 20-21, 31.

CONCLUSION

The Trial Court properly applied California law, requiring the Trial Court to grant summary judgment in favor of Ms. Klyce and Mr. Dashiell because any purported modification needs to be in writing. Therefore, the Trial Court's summary judgment decision must be affirmed. While not addressed by the Ebenals, Ms. Klyce and Mr. Dashiell have presented additional grounds entitling them to summary judgment, grounds that support the Trial Court's summary judgment decision. Finally, Ms. Klyce and Mr. Dashiell should be awarded their attorney fees and costs.

DATED this 13th day of June, 2016.

Respectively submitted,

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CERTIFICATE OF MAILING

I certify that on June 13, 2016, I sent via email, and mailed, postage prepaid, a copy of the foregoing Brief of Respondent to:

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APPENDIX A

APPENDIX A

California Civil Code § 1624. Contracts deemed invalid unless note or memorandum in writing.

CALIFORNIA CODES

CALIFORNIA CIVIL CODE

Division 3. OBLIGATIONS

Part 2. CONTRACTS

Title 2. MANNER OF CREATING CONTRACTS

Current through Register 2015, No. 41, October 9, 2015

§ 1624. Contracts deemed invalid unless note or memorandum in writing

(a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:

(1) An agreement that by its terms is not to be performed within a year from the making thereof.

(2) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.

(3) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.

(4) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission.

(5) An agreement that by its terms is not to be performed during the lifetime of the promisor.

(6) An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust upon the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property.

(7) A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than one hundred thousand dollars ($100,000),

not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. For purposes of this section, a contract, promise, undertaking, or commitment to loan money secured solely by residential property consisting of one to four dwelling units shall be deemed to be for personal, family, or household purposes.

(b) Notwithstanding paragraph (1) of subdivision (a):

(1) An agreement or contract that is valid in other respects and is otherwise enforceable is not invalid for lack of a note, memorandum, or other writing and is enforceable by way of action or defense, provided that the agreement or contract is a qualified financial contract as defined in paragraph (2) and one of the following apply:

(A) There is, as provided in paragraph (3), sufficient evidence to indicate that a contract has been made.

(B) The parties thereto by means of a prior or subsequent written contract, have agreed to be bound by the terms of the qualified financial contract from the time they reached agreement (by telephone, by exchange of electronic messages, or otherwise) on those terms.

(2) For purposes of this subdivision, a "qualified financial contract" means an agreement as to which each party thereto is other than a natural person and that is any of the following:

(A) For the purchase and sale of foreign exchange, foreign currency, bullion, coin, or precious metals on a forward, spot, next-day value or other basis.

(B) A contract (other than a contract for the purchase of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade) for the purchase, sale, or transfer of any commodity or any similar good, article, service, right, or interest that is presently or in the future becomes the subject of a dealing in the forward contract trade, or any product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into.

(C) For the purchase and sale of currency, or interbank deposits denominated in United States dollars.

(D) For a currency option, currency swap, or cross-currency rate swap.

(E) For a commodity swap or a commodity option (other than an option contract traded on, or subject to the rules of, a contract market or board of trade).

(F) For a rate swap, basis swap, forward rate transaction, or an interest rate option.

(G) For a security-index swap or option, or a security or securities price swap or option.

(H) An agreement that involves any other similar transaction relating to a price or index (including, without limitation, any transaction or agreement involving any combination of the foregoing, any cap, floor, collar, or similar transaction with respect to a rate, commodity price, commodity index, security or securities price, security index, other price index, or loan price).

(I) An option with respect to any of the foregoing.

(3) There is sufficient evidence that a contract has been made in any of the following circumstances:

(A) There is evidence of an electronic communication (including, without limitation, the recording of a telephone call or the tangible written text produced by computer retrieval), admissible in evidence under the laws of this state, sufficient to indicate that in the communication a contract was made between the parties.

(B) A confirmation in writing sufficient to indicate that a contract has been made between the parties and sufficient against the sender is received by the party against whom enforcement is sought no later than the fifth business day after the contract is made (or any other period of time that the parties may agree in writing) and the sender does not receive, on or before the third business day after receipt (or the other period of time that the parties may agree in writing), written objection to a material term of the confirmation. For purposes of this subparagraph, a confirmation or an objection thereto is received at the time there has been an actual receipt by an individual responsible for the transaction or, if earlier, at the time there has been constructive receipt, which is the time actual receipt by that individual would have occurred if the receiving party, as an organization, had exercised reasonable diligence. For the purposes of this subparagraph, a "business day" is a day on which both parties are open and transacting business of the kind involved in that qualified financial contract that is the subject of confirmation.

(C) The party against whom enforcement is sought admits in its pleading, testimony, or otherwise in court that a contract was made.

(D) There is a note, memorandum, or other writing sufficient to indicate that a contract has been made, signed by the party against whom enforcement is sought or by its authorized agent or broker.

For purposes of this paragraph, evidence of an electronic communication indicating the making in that communication of a contract, or a confirmation, admission, note, memorandum, or writing is not insufficient because it omits or incorrectly states one or more material terms agreed upon, as long as the evidence provides a reasonable basis for concluding that a contract was made.

(4) For purposes of this subdivision, the tangible written text produced by telex, telefacsimile, computer retrieval, or other process by which electronic signals are transmitted by telephone or otherwise shall constitute a writing, and any symbol executed or adopted by a party with the present intention to authenticate a writing shall constitute a signing. The confirmation and notice of objection referred to in subparagraph (B) of paragraph (3) may be communicated by means of telex, telefacsimile, computer, or other similar process by which electronic signals are transmitted by telephone or otherwise, provided that a party claiming to have communicated in that manner shall, unless the parties have otherwise agreed in writing, have the burden of establishing actual or constructive receipt by the other party as set forth in subparagraph (B) of paragraph (3).

(c) This section does not apply to leases subject to Division 10 (commencing with Section 10101) of the Commercial Code.

(d) An electronic message of an ephemeral nature that is not designed to be retained or to create a permanent record, including, but not limited to, a text message or instant message format communication, is insufficient under this title to constitute a contract to convey real property, in the absence of a written confirmation that conforms to the requirements of subparagraph (B) of paragraph (3) of subdivision (b).

Cite as Ca. Civ. Code § 1624

History. Amended by Stats 2014 ch 107 (AB 2136), s 2, eff. 1/1/2015.

APPENDIX B

APPENDIX B

California Civil Code § 1698. Contract in writing.

CALIFORNIA CODES

CALIFORNIA CIVIL CODE

Division 3. OBLIGATIONS

Part 2. CONTRACTS

Title 5. EXTINCTION OF CONTRACTS

Chapter 3. MODIFICATION AND CANCELLATION

Current through Register 2015, No. 41, October 9, 2015

§ 1698. Contract in writing

(a) A contract in writing may be modified by a contract in writing.

(b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.

(c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions.

(d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.

Cite as Ca. Civ. Code § 1698

APPENDIX C

APPENDIX C

__ Cal.Rptr.3d__

167 Cal.App.4th 544

LUTHER E. SECREST et al., Plaintiffs and Appellants,

v.

SECURITY NATIONAL MORTGAGE LOAN TRUST 2002-2 et al., Defendants and Respondents.

G039065

California Court of Appeal, Fourth District, Third Division

October 9, 2008

Appeal from a judgment of the Superior Court of Orange County No. 05CC04248, Andrew P. Banks, Judge.

[167 Cal.App.4th 545] [Copyrighted Material Omitted]

[167 Cal.App.4th 546] **COUNSEL**

Law Offices of Steven R. Young and Jim P. Mahacek for Plaintiffs and Appellants.

The Ryan Firm, Timothy M. Ryan and Barry G. Coleman for Defendants and Respondents.

OPINION

[167 Cal.App.4th 547] **FYBEL, J.**

I.

Introduction

We hold an agreement by which a lender agreed to forbear from exercising the right of foreclosure under a deed of trust securing an interest in real property comes within the statute of frauds. We also conclude the borrowers in this case failed as a matter of law to establish estoppel to assert the statute of frauds. As a result, we affirm a judgment declaring valid a notice of default and election to sell under a deed of trust.

Appellants Luther E. Secrest and Charmella C. Secrest (the Secrests) are the borrowers on a note secured by a deed of trust on their home. Respondents Security National Mortgage Loan Trust 2002-2, JP Morgan Chase Bank, and SN Servicing Corporation (collectively, Respondents) are the current holders of the note and deed of trust. After Respondents recorded a notice of default and election to sell under the deed of trust, the Secrests filed this lawsuit seeking a declaration the notice of default was invalid and an injunction to stop foreclosure proceedings.

In support of their motion for a preliminary injunction, the Secrests produced a purported written forbearance agreement made in January 2002 (the January 2002 Forbearance Agreement) between the Secrests and Ocwen Federal Bank, FSB (Ocwen), the holder of the note and deed of trust at the time. After the trial court issued a preliminary injunction, the parties agreed the trial would be conducted as a law and motion matter and would be limited to the issue whether the January 2002 Forbearance Agreement was enforceable ";in lieu of its predecessor,"; a written forbearance agreement made in April 2001. On essentially uncontroverted facts, the trial court concluded the January 2002 Forbearance Agreement was unenforceable. Based on that conclusion, a referee determined the amount of arrearages the Secrests owed on the note secured by the deed of trust, and a judgment was entered declaring valid the notice of default against the Secrests.

The Secrests challenge the judgment by asserting the January 2002 Forbearance Agreement was enforceable for a variety of reasons. We conclude the January 2002 Forbearance Agreement is unenforceable under the statute of frauds, Civil Code section 1624. The January 2002 Forbearance Agreement constitutes a modification of the note and deed of trust. Because the note and deed of trust come within the statute of frauds, the January 2002 Forbearance **[167 Cal.App.4th 548]** Agreement also comes within the statute of frauds pursuant to Civil Code section 1698. Neither Ocwen, the party to be charged, nor its agent signed the January 2002 Forbearance Agreement.

The Secrests argue their making the downpayment on the January 2002 Forbearance Agreement is sufficient part performance to estop Respondents from asserting the statute of frauds. But under well-established principles of California law, payment of money alone is not enough as a matter of law to take an agreement out of the statute of frauds, and the Secrests have legal means to recover the downpayment if they are entitled to its return.

II.

Facts

In 1996, the Secrests borrowed $552,700 from GE Capital Mortgage Services, Inc., to purchase their home. The loan was evidenced by a promissory note and secured by a deed of trust on the home. In 1999, the note and deed of trust were sold to Ocwen.

Beginning in 1998, the Secrests were almost continually in default of the loan. In April 2001, the Secrests and Ocwen entered into a forbearance agreement (the April 2001 Forbearance Agreement) stating: ";So long as the Borrower(s) comply with all of the conditions set forth in the Forbearance Agreement, Ocwen Federal will undertake no affirmative steps to advance the foreclosure action."; The April 2001 Forbearance Agreement had a reinstatement amount of $76,559.03 and required a downpayment of $15,000 with monthly payments of $7,570.52 commencing June 1, 2001. The April 2001 Forbearance Agreement would terminate if the Secrests ";fail[ed] to meet any of the terms of this Forbearance Agreement or the original Note and Mortgage.";

By January 2002, the Secrests again were in default. Joseph Neamon, a loan resolution consultant representing Ocwen, sent a letter to the Secrests regarding alternatives to foreclosure. In response, Luther Secrest telephoned Neamon to discuss loan status and the Secrests'; financial situation. During the telephone conversation, Neamon offered the Secrests another forbearance agreement if they made a $15,000 downpayment. Luther Secrest said he could not pay $15,000 but would agree to pay $13,422.51. Neamon accepted that proposal and stated he would have a written forbearance agreement prepared and faxed to Luther Secrest.

On January 18, 2002, Luther Secrest received by facsimile a proposed written forbearance agreement. This proposed forbearance agreement was **[167 Cal.App.4th 549]** unsigned and contained provisions nearly identical to those of the April 2001 Forbearance Agreement. Luther Secrest noticed, however, the proposed forbearance agreement had a reinstatement amount of $552,700—an amount he knew could not be correct because it was the original amount of the loan. Luther Secrest also believed the monthly payment amount of $6,700 in the proposed forbearance agreement could not be correct because it appeared to be based on the inaccurate reinstatement amount.

Luther Secrest telephoned Neamon and reported those inaccuracies to him. Neamon agreed the reinstatement amount and the monthly payment amount in the proposed forbearance agreement were incorrect and agreed to correct them.

During the same telephone conversation, Luther Secrest said he and his wife were ";not in arrears"; on the loan, or if they were, they were ";only in arrears by a few monthly payments and certainly no more than nine monthly payments."; Neamon responded by saying he was authorized by Ocwen to negotiate and enter into forbearance agreements on its behalf.

Neamon told Luther Secrest to modify the proposed forbearance agreement by crossing out the $552,700 reinstatement amount, sign the agreement as modified, fax the signed agreement back to him, and wire-transfer $13,422.51 to Ocwen. Neamon agreed that if Luther Secrest did those things, then ";he would immediately stop any collection efforts, perform a complete audit of our residential loan agreement from the date of the inception of the loan to the present to determine the correct amount of arrearage, if any, and subsequently negotiate the correct amount of any reinstatement amount, if any."; Neamon also told Luther Secrest that if the audit showed the Secrests owed anything more on the loan, then he, on behalf of Ocwen, ";would have a corrected forbearance agreement prepared and sent to me in which the reinstatement amount, if any, would be accurately stated based on the results of the complete audit of the residential loan from its inception.";

Luther Secrest crossed out the $552,700 reinstatement amount on the proposed forbearance agreement and signed it. After Charmella Secrest signed the agreement, he faxed it to Neamon and wire-transferred $13,422.51 to Ocwen.

Ocwen sold the Secrest note and deed of trust to Respondents. A loan audit was never conducted and a corrected forbearance agreement was never delivered to the Secrests.

[167 Cal.App.4th 550] III.

Procedural History

In September 2004, Respondents filed a notice of default and election to sell under the deed of trust securing the note. The notice of default stated the past due amount was $75,577.69.

In March 2005, the Secrests filed a lawsuit against Respondents, GE Capital Mortgage Services, Inc., Ocwen, and others, for declaratory relief and injunctive relief to enjoin the foreclosure. The first amended complaint alleged the notice of default was void because it overstated the amount of the default. The complaint did not allege the January 2002 Forbearance Agreement. In October 2005, the Secrests sought, and were granted, a preliminary injunction to halt foreclosure proceedings.

In the reply memorandum in support of the motion for a preliminary injunction, the Secrests produced the January 2002 Forbearance Agreement. Respondents contended they had not seen that agreement before and the Secrests had never informed them of it.

At a review hearing on November 17, 2005, the trial court renewed the injunction and ordered that it remain in effect until resolution of the case or further court order. The parties then entered into a stipulation identifying the sole contested issue, submitting the contested issue to the trial court for resolution in a law and motion proceeding, and, based on that resolution, having a court-appointed referee determine the correct amount due and owing at the time the notice of default was filed.

The stipulation identified the contested issue as: ";Plaintiffs and Defendants agree and stipulate that the only contested legal issue in this case is whether the last forbearance agreement dated in January of 2002 is enforceable between the parties to this action in lieu of its predecessor dated in April of 2001; and if the April 2001 agreement is effective, the amount due and owing as of the date of the forbearance agreement."; The parties stipulated too, ";the issue of which forbearance agreement effective date is controlling (and the amount of the note due and owing at that time if the April, 2001 agreement is effective)"; would be decided by the trial court ";as a law and motion matter.";

The parties agreed that once the trial court decided which forbearance agreement was controlling, a court-appointed accounting referee would determine the amount of arrearages, if any, owed by the Secrests. The parties agreed the referee would use April 1998 as the starting date for the accounting if the trial court decided the January 2002 Forbearance Agreement **[167 Cal.App.4th 551]** was controlling, and would use April 25, 2001 as the starting date for the accounting if the trial court decided the January 2002 Forbearance Agreement was not controlling.

The trial court approved the stipulation, and, in June 2006, the Secrests filed a special motion on the submitted issue. In support of the motion, the Secrests submitted declarations from Luther Secrest and Neamon. Respondents did not controvert those declarations. In their opposition to the Secrests'; special motion on the submitted issue, Respondents asserted the January 2002 Forbearance Agreement was unenforceable under the statute of frauds.

The trial court found, ";the operative forbearance agreement is the April 2001, agreement executed by the plaintiffs, that the total sum due and owing as of April 25, 2001, before application of the $15,000.00 payment is the sum of $605,750.44 which is comprised of $531,184.36 principal plus $76,559.03, less $1,992.95 in the suspense account.";

An amended judgment declared: ";the forbearance agreement dated April 25, 2001, is the enforceable forbearance agreement";; the amount due and owing by the Secrests on the note was $605,750.44; the notice of default recorded on September 13, 2004 was valid and enforceable; the amount of arrearages on September 13, 2004 was $87,045.16; and Respondents were entitled to foreclose the deed of trust.

IV.

The January 2002 Forbearance Agreement Is Unenforceable Under the Statute of Frauds

A. *Respondents Raised the Statute of Frauds in the Trial Court.*

The Secrests argue Respondents waived the statute of frauds by failing to object to the declarations of Luther Secrest and Neamon specifically on that ground. We find no waiver because Respondents presented the statute of frauds issue to the trial court.

The statute of frauds is treated as a rule of evidence which, if not properly raised, may be forfeited. (*In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1104, fn. 3 [32 Cal.Rptr.3d 471, 116 P.3d 1152]; *Howard v. Adams* (1940) 16 Cal.2d 253, 257-258 [105 P.2d 971]; see 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 347, p. 394 [";The statute of frauds must ordinarily be asserted in the lower court, and cannot be raised for the first time on appeal";].) The California Supreme Court explained, ";it is settled **[167 Cal.App.4th 552]** that . . . a defendant waives his right to rely upon any provisions of the statute of frauds [citation] by failing to (a) demur to the complaint, (b) object to the introduction of testimony to prove the oral agreement at the time of trial, or (c) make a motion to strike such testimony."; (*Pao Ch';en Lee v. Gregoriou* (1958) 50 Cal.2d 502, 506 [326 P.2d 135].) A general denial in an answer is sufficient to preserve a statute of frauds objection (*Howard v. Adams, supra*, 16 Cal.2d at p. 257), as is a general demurrer (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 930, p. 389).

Respondents could not have challenged the January 2002 Forbearance Agreement by answer or demurrer because the Secrests did not allege that agreement in their complaint. Rather, they first produced it with their reply brief in support of their motion for a preliminary injunction. As the Secrests argue, Respondents did not pose statute of frauds objections to the Luther Secrest and Neamon declarations. However, once the Secrests produced the January 2002 Forbearance Agreement, the parties stipulated the only issue to be tried was whether it was enforceable in lieu of the April 2001 Forbearance Agreement. In effect, Respondents posed statute of frauds objections by arguing in their opposition to the Secrests'; special motion on the submitted issue that the January 2002 Forbearance Agreement was unenforceable under the statute of frauds. The issue of the statute of frauds was thus squarely presented to the trial court and was not waived.

B. *The January 2002 Forbearance Agreement Modifies the Note and Deed of Trust.*

A contract coming within the statute of frauds is invalid unless it is memorialized by a writing subscribed by the party to be charged or by the party';s agent. (Civ. Code, § 1624 .) Under Civil Code section 1624, the party to be charged means ";';the party to be charged in court with the performance to the obligation, i.e., the *defendant* in the action brought to enforce the contract.';"; (*Ulloa v. McMillin Real Estate & Mortgage, Inc.* (2007) 149 Cal.App.4th 333, 339 [57 Cal.Rptr.3d 1].) Here, the parties to be charged with performance of the January 2002 Forbearance Agreement are Ocwen and Respondents. Neither Ocwen nor its agent signed the January 2002 Forbearance Agreement.

An agreement for the sale of real property or an interest in real property comes within the statute of frauds. (Civ. Code, § 1624, subd. (a)(3).) A mortgage or deed of trust also comes within the statute of frauds. Civil Code section 2922 states: ";A mortgage can be created, renewed, or extended, only by writing, executed with the formalities required in the case of a grant of real property.";

[167 Cal.App.4th 553] A forbearance agreement does not create, renew, or extend a deed of trust. The January 2002 Forbearance Agreement states: ";Borrower(s) understand all the rights and obligations of the Note and Mortgage, except as expressly changed by this Forbearance Agreement, shall remain in full force. Nothing contained herein shall be construed to impair the Mortgage or effect or impair rights or powers under the Note and Mortgage to recover . . . any sum due under the Note, together with interest and costs.";

The January 2002 Forbearance Agreement, though not creating, renewing, or extending the note and deed of trust, did modify them. An agreement to modify a contract that is subject to the statute of frauds is also subject to the statute of frauds. (Civ. Code, § 1698, subd. (a) [";A contract in writing may be modified by a contract in writing";]; *Collins v. Marvel Land Co.* (1970) 13 Cal.App.3d 34, 43 [91 Cal.Rptr. 291].) A modification of a contract is a change in the obligations of a party by a subsequent mutual agreement of the parties. (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 964, p. 1055.)

The January 2002 Forbearance Agreement attempted to modify the note and deed of trust in several ways. First, the January 2002 Forbearance Agreement substituted a new monthly payment for the monthly payment required under the note. Second, the January 2002 Forbearance Agreement altered the lender';s ability to exercise a right to foreclose under the note and deed of trust due to the borrower';s default. The deed of trust states it secures a debt ";evidenced by Borrower';s note dated the same date as this Security Instrument"; including ";all renewals, extensions and modifications of the Note."; The January 2002 Forbearance Agreement attempted to modify the note and therefore serves as additional evidence of the debt secured by the deed of trust. The January 2002 Forbearance Agreement was therefore subject to the statute of frauds.

A few courts in other jurisdictions have expressly concluded a forbearance agreement is subject to the statute of frauds. A Pennsylvania appellate court, in *Atlantic Financial Federal v. Orianna Historic Associates* (1991) 406 Pa.Super. 316, 319 [594 A.2d 356], held a forbearance agreement was subject to the statute of frauds, explaining: ";In the present case, the alleged oral agreement not to foreclose was between the mortgagor and mortgagee. As between these parties, the mortgage represented an interest in land. The agreement not to foreclose was therefore an agreement to surrender an interest in land. As such, the agreement was within the Statute of Frauds."; In *Glastonbury Bank & Trust Co. v. Corbett Construction Co., Inc.* (Conn.Super.Ct. 1992) 1992 Conn. Super. Lexis 3016, *8-*9, a Connecticut trial court used the same reasoning to conclude ";an agreement to forbear from foreclosing a mortgage involves an interest in real property; therefore, such an agreement is within the purview of the Statute of Frauds and must be in writing."; These cases provide limited guidance,

[167 Cal.App.4th 554] however, because, in Pennsylvania and Connecticut, mortgages are considered conveyances of legal title. (*State v. Hahn* (1988) 207 Conn. 555, 562 [541 A.2d 499].) In contrast, under California law, a mortgage or deed of trust is a lien on property. (*Monterey S.P. Partnership v. W. L. Bangham, Inc.* (1989) 49 Cal.3d 454, 460; 4 [261 Cal.Rptr. 587, 777 P.2d 623]; 4 Witkin, Summary of Cal. Law, *supra*, Secured Transactions in Real Property, §§ 3, 6, pp. 560, 565.)

Other courts have implicitly concluded a forbearance agreement is subject to the statute of frauds. In *Henrikson v. First Union National Bank (4th Cir. 2005) 120 Fed.Appx.* 949, the borrower alleged a writing memorialized an oral forbearance agreement made three months before the writing. Without directly addressing whether a forbearance agreement comes within the statute of frauds, the Fourth Circuit Court of Appeals concluded the writing satisfied Nevada';s statute of frauds because it set forth the property location, the payment terms and dates, and possible recourse on default, and was signed by the lender';s agent. (*Id.* at p. 952.) In *Consolidation Services, Inc. v. KeyBank National Assn.* (7th Cir. 1999) 185 F.3d 817, 820, the Seventh Circuit concluded a 45-day forbearance agreement was unenforceable under Indiana';s statute of frauds. In *Emigrant Mortgage Co., Inc. v. Berger* (N.Y.Sup.Ct. 2006) 14 Misc.3d 1202 [831 N.Y.S.2d 359], a New York trial court concluded, without explanation, a forbearance agreement was unenforceable because it did not comply with New York';s statute of frauds.

The Miller and Starr treatise on California real property law suggests a forbearance agreement is enforceable without a writing. The treatise states: ";A beneficiary can agree not to exercise the right of foreclosure or to delay the commencement of foreclosure. An oral agreement not to foreclose the lien of a mortgage or deed of trust, if given for consideration, is enforceable without any written confirmation by the beneficiary or trustee."; (4 Miller & Starr, Cal. Real Estate (3d ed. 2003) § 10:123, p. 379.) In support of that proposition, Miller and Starr cite only *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 596-597 [125 Cal.Rptr. 557, 542 P.2d 981], which does not address that issue. Instead, at the cited pages, *Cornelison v. Kornbluth* states: ";Upon the transfer of real property covered by a mortgage or deed of trust as security for an indebtedness, the property remains subject to the secured indebtedness but the grantee is not personally liable for the indebtedness or to perform any of the obligations of the mortgage or trust deed unless his agreement to pay the indebtedness, or some note or memorandum thereof, is in writing and subscribed by him or his agent or his assumption of the indebtedness is specifically provided for in the conveyance."; (*Ibid.*)

[167 Cal.App.4th 555] C. *Respondents Are Not Estopped from Asserting the Statute of Frauds.*

The Secrests argue their making the downpayment on the January 2002 Forbearance Agreement constituted part performance sufficient to estop Respondents from asserting the statute of frauds. This argument fails under well-established law.[1]

Part performance allows enforcement of a contract lacking a requisite writing in situations in which invoking the statute of frauds would cause unconscionable injury. (*In re Marriage of Benson, supra,* 36 Cal.4th at p. 1108.) ";[T]o constitute part performance, the relevant acts either must ';unequivocally refer[ ]'; to the contract [citation], or ';clearly relate'; to its terms. [Citation.] Such conduct satisfies the evidentiary function of the statute of frauds by confirming that a bargain was in fact reached. [Citation.]"; (*Id.* at p. 1109.) In addition to part performance, the party seeking to enforce the contract must have changed position in reliance on the oral contract to such an extent that application of the statute of frauds would result in an unjust or unconscionable loss, amounting in effect to a fraud. (*Anderson v. Stansbury* (1952) 38 Cal.2d 707, 715 [242 P.2d 305]; *Oren Realty & Development Co. v. Superior Court* (1979) 91 Cal.App.3d 229, 235 [154 Cal.Rptr. 97].)

The Secrests argue their payment of $13,422.51 to Ocwen constituted part performance and a change of position sufficient to prevent Respondents from asserting the statute of frauds. ";Before a party can be estopped to assert the statute [of frauds] due to the other';s part performance, it must appear that a sufficient change of position has occurred so that the application of the statutory bar would result in an unjust and unconscionable loss, amounting in effect to a fraud. [Citations.] . . . The payment of money is not ';sufficient part performance to take an oral agreement out of the statute of frauds'; [citation], for the party paying money ';under an invalid contract . . . has an adequate remedy at law.';"; (*Anderson v. Stansbury, supra,* 38 Cal.2d at pp. 715-716; see also *Oren Realty & Development Co. v. Superior Court,supra,* 91 Cal.App.3d at p. 235; *Shive v. Barrow* (1948) 88 Cal.App.2d 838, 848 [199 P.2d 693]; *Loper v. Flynn* (1946) 72 Cal.App.2d 619, 622-623 [75 Cal.Rptr. 188, 165 P.2d 256].)

[167 Cal.App.4th 556] The Secrests do not assert they changed their position in reliance on the January 2002 Forbearance Agreement in any way other than by making the downpayment.

It is arguable the Secrests fully performed their obligations under the January 2002 Forbearance Agreement by wire-transferring $13,422.51 to Ocwen. ";Where the contract is unilateral, or, though originally bilateral, has been fully performed by one party, the remaining promise is taken out of the statute [of frauds], and the party who performed may enforce it against the other."; (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 370, p. 414, and authorities cited.) In *Dougherty v. California Kettleman, etc*. (1937) 9 Cal.2d 58, 81 [69 P.2d 155], the California Supreme Court explained: ";The fact that the agreement between Dougherty and Ochsner rested in parol is of no legal significance in this case. This agreement was fully executed by Dougherty. Assuming the contract could not be performed within a year and therefore fell within the statute of frauds, the circumstances of this case, showing as they do complete performance by Dougherty, clearly create an estoppel to plead the statute. Dougherty';s performance was clearly induced by Ochsner';s representations that he would sign the contract. This creates an estoppel."; (See also *Dutton v. Interstate Investment Corp.* (1941) 19 Cal.2d 65, 70 [119 P.2d 138] [";the finding of the trial court that Dutton had fully performed all of his obligations under the contract operates to remove the bar of the statute [of frauds]";]; *Dean v. Davis* (1946) 73 Cal.App.2d 166, 168 [166 P.2d 15] [";The statute of frauds has no application to an executed agreement";]; *Marr v. Postal Union Life Ins. Co.* (1940) 40 Cal.App.2d 673, 679 [105 P.2d 649] [";Where . . . there has been full performance upon the part of the party seeking to enforce the contract, the doctrine of estoppel arises";].)

The principle that full performance takes a contract out of the statute of frauds has been limited to the situation where performance consisted of conveying property, rendering personal services, or doing something other than payment of money. This limitation is consistent with *Anderson v. Stansbury, supra,* 38 Cal.2d 707 [242 P.2d 305] and other authority supporting the proposition the payment of money is insufficient part performance to take a contract out of the statute of frauds. In *Dougherty v. California Kettleman, etc., supra,* 9 Cal.2d 58 [69 P.2d 155], the plaintiff performed his obligations to find oil-bearing land and obtain prospecting permits. In *Dutton v. Interstate Investment Corp., supra,* 19 Cal.2d 65 [119 P.2d 138], the plaintiff performed his obligation to negotiate oil leases and sought his share of royalties promised by the defendants. In *Dean v. Davis, supra,* 73 Cal.App.2d 166 [166 P.2d 15], the plaintiff performed his part of the bargain by securing employment for the defendant, and in *Marr v. Postal Union Life Ins. Co., supra,* 40 Cal.App.2d 673 [105 P.2d 649], the plaintiffs fully performed their obligations by conveying real property to the defendants.

[167 Cal.App.4th 557] In conclusion, the Secrests failed as a matter of law to establish estoppel to assert the statute of frauds. We emphasize the only action undertaken by the Secrests in reliance on the January 2002 Forbearance Agreement was making the downpayment. The Secrests have legal means to recover that money if they are entitled to its return or have not received credit for it. We do not address what other actions in reliance on the January 2002 Forbearance Agreement might have been sufficient to raise an estoppel to assert the statute of frauds because the Secrests asserted only the payment of money as the basis for estoppel.

Our conclusion renders moot Respondents'; motion to take judicial notice, and we deny it for that reason.

V.

Disposition

The judgment is affirmed. Respondents to recover their costs incurred on appeal.

Sills, P. J., and Aronson, J., concurred.

Notes:

[1] Respondents assert the Secrests waived their estoppel argument by failing to cite to the record in the legal argument section of their opening brief. (See Cal. Rules of Court, rule 8.204.) We find no waiver. The procedural history section and uncontroverted facts section of the Secrests'; opening brief comply with California Rules of Court, rule 8.204. The legal argument section is primarily law, and the references to matters in the appellate record are generally to the Luther Secrest declaration or Neamon declaration. Despite the paucity of record references in the argument section, we were able to locate relevant portions of the record ";expeditiously"; and ";without thumbing through and rereading earlier portions of a brief."; (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 9:36, p. 9-11 (rev. # 1, 2006).)

APPENDIX D

APPENDIX D

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798 N.W.2d 690 (S.D. 2011)

2011 SD 24

Steven D. JOHNSON, Plaintiff and Appellee,

v.

Harrell L. SELLERS, Husband, Defendant and Appellant,

and

Sandra L. Green, Wife, Defendant.

No. 25751.

Supreme Court of South Dakota.

May 25, 2011

Considered on Briefs March 21, 2011.

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Richard J. Helsper, Reed T. Mahlke of Glover & Helsper, PC, Brookings, South Dakota, Attorneys for plaintiff and appellee.

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Ellie M. Vandenberg, Volga, South Dakota, Attorney for defendant and appellant.

ZINTER, Justice.

[¶ 1.] Steven Johnson sued Harrell Sellers for specific performance of a written agreement to purchase real estate. Sellers refused to sell after the transaction was unable to be closed on the agreed date. On cross motions for summary judgment, the circuit court ordered specific performance. The court ruled that Sellers waived the right to insist on the initial closing date and that fulfillment of the contract was possible. We affirm.

Facts and Procedural History

[¶ 2.] Johnson entered into a written agreement to purchase real estate from Sellers. The thirty-four acre parcel included a residence and farmland. The purchase agreement, which was prepared by Johnson's attorney, incorrectly indicated that Sellers was a single person.[1] Sellers was married at the time but was in the process of obtaining a divorce from Sandra Green. Green and Sellers lived in the residence during their marriage. Green moved out in October 2008, and Sellers started the divorce in January 2009.

[¶ 3.] The May 21, 2009, purchase agreement specified a closing date of June 15, 2009. An initial title insurance commitment was prepared on May 22. The title commitment disclosed that Sellers was married and that Green's name was not on the title. Johnson's attorney mailed a copy of the title commitment and a letter to both parties on June 3. The letter again incorrectly stated that Sellers was single.

[¶ 4.] Some time after signing the purchase agreement, Sellers told his attorney about the agreement. Because of Green's potential homestead rights [2] and the pending divorce,[3] Sellers's attorney

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told him that he could not sell the property without Green's permission. On June 4, Green's attorney indicated that Green would not authorize the sale. On June 9, Sellers's attorney wrote Green's attorney asking for permission to complete the sale. On June 15, Green's attorney responded that Green had not yet made a decision whether to allow the sale. On June 19, Green's attorney indicated that Green would not consent to the sale for the amount specified in the purchase agreement. Partly as a result of these difficulties, the closing did not occur on June 15.

[¶ 5.] There were also difficulties in closing because of Sellers's inability to move his personal property from the real estate. Johnson indicated in his deposition that " a few days" before the closing " Harrell [Sellers] had expressed that he wouldn't be able to have all of his stuff moved by [the June 15 closing]." In his affidavit supporting summary judgment, Johnson explained that " [o]n or about June 10, 2009, Sellers told me that he wouldn't be ready to close by the 15, due to a pending auction sale, scheduled for June 27, 2009." Johnson responded " that, if [Sellers] needed more time, that was no problem." From June 10 through June 27, Johnson helped Sellers prepare Sellers's personal property for the auction. Sellers admitted in his deposition that he " asked for a continuance" of the June 15 closing. Sellers indicated that he " needed several months to clear out."

[¶ 6.] During this same period of time, Sellers was clearing the title problems caused by the pending divorce. On June 25, Sellers signed a stipulation and agreement in the divorce proceeding to vest all Green's rights in the real estate in Sellers. On July 22, Green signed the stipulation. Notwithstanding this resolution of the problems holding up the closing and notwithstanding Sellers's oral request to extend the closing, Sellers sent a letter to Johnson on July 24 " rescinding" the purchase agreement. Sellers stated that the property was no longer for sale " due to aspects of [his] divorce."

[¶ 7.] On July 31, Johnson filed a notice of lis pendens. On August 4, the divorce court entered a judgment and decree of divorce awarding all interest in the property to Sellers. On August 5, Johnson filed this suit for specific performance of the agreement. Sellers was served on August 13.

[¶ 8.] On August 14, Sellers's attorney sent a letter to Johnson indicating that Sellers then agreed to perform the agreement. The letter stated that " Mr. Sellers agrees that the real property will be sold to Mr. Johnson." A new closing date of September 16 was suggested.[4] But on August 21, Sellers's attorney sent another letter stating that he was no longer representing Sellers. This letter indicated that Sellers then intended " to contest and defend himself in the lawsuit for specific performance."

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[¶ 9.] Following the filing of cross motions for summary judgment, the circuit court ruled that Sellers continued the date for closing without objection from Johnson. The court further ruled that the entry of the judgment and decree of divorce resolved any title problems. Because performance of the agreement was then possible, the court rejected Sellers's impossibility of contract defense. The court awarded specific performance, noting that specific performance was the presumed remedy for breach of an agreement to sell real property.

[¶ 10.] Sellers appeals raising two issues:

1. Whether the circuit court erred in granting summary judgment for Johnson.

2. Whether the circuit court abused its discretion by ordering specific performance of the purchase agreement.

Decision

[¶ 11.] This Court reviews a grant of summary judgment " to determine whether the moving party has demonstrated the absence of any genuine issue of material fact and entitlement to judgment on the merits as a matter of law." *DRD Enterprises, L.L.C. v. Flickema,* 2010 S.D. 88, ¶ 10, 791 N.W.2d 180, 183-84. Sellers does not contend that there are genuine issues of material fact. " The circuit court's conclusions of law are reviewed de novo." *Id.*

[¶ 12.] Both parties agree that the closing could not occur as scheduled on June 15. The closing was not possible on June 15 because of: the pending divorce and Green's refusal to agree to the sale on the proposed terms; the potential title problem regarding homestead rights; and Sellers's desire to have an auction of his personal property on the premises. By August 4, however, these impediments to closing had been resolved, and Sellers was able to convey title to the real estate.

[¶ 13.] Notwithstanding the ability to convey good title, Sellers argues that the impossibility of performance doctrine justified his failure to perform the contract. Sellers contends that by the time the title problems had been resolved, it was no longer possible to close the transaction on the June 15 date specified in the agreement. Sellers relies on SDCL 20-2-2, which provides that " [a] condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of chapter 53-5 relating to the object of contracts ... is void." SDCL 53-5-3 provides: " Where a contract has but a single object and such object is ... wholly impossible of performance, ... the entire contract is void."

[¶ 14.] " The object of a contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do." SDCL 53-5-1. The conduct of these parties reflects that the object of this contract was the sale of the property rather than a June 15 closing. Shortly before June 15, without repudiating the forthcoming sale, Sellers himself requested a postponement of the closing in order to conduct an auction on the premises. Thereafter, both parties worked together to facilitate the sale by getting the personal property ready for the June 27 auction. Further, on August 14, Sellers's attorney confirmed that Sellers was still going to complete the sale, and he suggested a new September 16 closing date. Thus, the evidence reflects that the object of this contract was to sell the property, not to close the transaction on June 15. Furthermore, the title problems were resolved by August 4. Therefore, the object of this contract was not wholly impossible of performance

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within the meaning SDCL 20-2-2 and SDCL 53-5-3.

[¶ 15.] Sellers, however, contends that because this contract was for the sale of land, the statute of frauds prevented the June 15 closing date from being extended without a written agreement. Sellers relies on *Vander Heide v. Boke Ranch, Inc.,* 2007 S.D. 69, ¶ 25, 736 N.W.2d 824, 833 (" A contract subject to the statute of frauds cannot be modified by oral agreement."); SDCL 53-8-2 (providing that an " agreement for sale of real estate" is " not enforceable by action unless the contract or some memorandum thereof is in writing and subscribed by the party to be charged or his agent"); and SDCL 53-8-7 (" A contract in writing may be altered by a contract in writing without a new consideration or by an executed oral agreement, and not otherwise."). Johnson responds that the statute of frauds did not prevent Sellers from orally waiving the June 15 closing date. We agree with Johnson.

[¶ 16.] Although the statute of frauds prohibits oral alteration of a written contract for the sale of land, a waiver of the time for performance is not an alteration of a written contract. *Endres v. Warriner*, 307 N.W.2d 146, 149 (S.D.1981) (involving an extension of the time for payment in a statute of frauds case). The statute of frauds does not preclude a waiver because a " waiver does not change or alter the terms of a contract. Rather, the contract remains with its original provisions but the right to enforce the payment at the time set forth in the contract is suspended until the time of extension has expired." *Id.* at 149-50. Therefore, a waiver does not have to be in writing. *Id.* at 150.

[¶ 17.] Sellers acknowledges *Endres* but argues that it was implicitly overruled by *Vander Heide,* 2007 S.D. 69, 736 N.W.2d 824. We disagree. *Vander Heide* involved an oral discussion altering the terms of an easement, not the oral waiver of the time for performance of a real estate contract. 2007 S.D. 69, ¶ ¶ 18-32, 736 N.W.2d at 832-35. Further, in restating the general rule that a " contract subject to the statute of frauds cannot be modified by oral agreement," *id.* ¶ 25, we relied on *Rooney v. Dayton-Hudson Corp.,* 310 Minn. 256, 246 N.W.2d 170 (Minn.1976). *Rooney* recognized that " a contract subject to the statute of frauds could not be modified orally," but it also recognized that an " oral stipulation for an extension of time of payment goes simply to the question of performance," not to a modification of the contract itself. 310 Minn. at 266, 246 N.W.2d at 175. " [T]he distinction must be kept in mind between the contract itself, which is within the purview of the statute [of frauds], and the subsequent performance, which is not." *Id.* Thus, our decision in *Vander Heide* supports rather than overrules *Endres.* These cases recognize that notwithstanding the statute of frauds, parties may orally waive conditions involving the performance of the contract. Because both the time for payment and the time for closing involve performance of the contract, both may be waived notwithstanding the statute of frauds. We conclude that there was no legal impediment to the circuit court's finding that Sellers orally waived the June 15 closing.

[¶ 18.] A party who waives the time for performance must give notice of any withdrawal of the waiver and give the other party a reasonable time to complete the contract. *Endres,* 307 N.W.2d at 150. " If no time is specified for the performance of an act, a reasonable time is allowed." SDCL 53-10-2. Therefore, when a " vendor has waived his right to enforce a forfeiture of the contract[,] he must give such notice of his intention to declare a forfeiture as will give reasonable

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time and opportunity to the vendee to perform." *Spolek v. Hatch,* 21 S.D. 386, 389, 113 N.W. 75, 77 (1907). " [A] vendor cannot use his own indulgence as a trap in which to catch the vendee." *Id.* [5]

[¶ 19.] The circuit court found that " the contract date was continued at the request of Mr. Sellers and acquiesced to by Mr. Johnson." The record supports the court's finding. Sellers initially asked for the continuance of the closing date and Johnson agreed. Thereafter, Sellers gave no indication that his waiver of the June 15 closing was withdrawn until July 24, when he sent a letter attempting to rescind. But at that point, Johnson had a reasonable time to complete the contract. *See Endres,* 307 N.W.2d at 150. And, just eleven days later on August 4, title had been cleared and closing of the purchase agreement was possible. This was a reasonable time to resolve the title problems that had prevented the initial closing. Moreover, on August 14, Sellers's attorney confirmed that Sellers again agreed to sell the property, and he proposed a new September 16 closing date. Therefore, even if Sellers possessed a right of rescission, his August 14 letter waived that right. " A [party] may waive [the] right [of rescission] by delay or conduct inconsistent with that right." *Wolken v. Wade,* 406 N.W.2d 720, 725 (S.D.1987).

[¶ 20.] We conclude the circuit court correctly determined that Sellers waived the right to insist on performance of the closing on June 15. Thereafter, the impediments to closing were resolved within a reasonable time. Because the contract was capable of performance within a reasonable time of the initial closing date, the circuit court could award specific performance.

[¶ 21.] Sellers, however, argues that specific performance was an inappropriate remedy. " Specific performance is an equitable remedy and this [C]ourt's standard of review addresses whether there has been an abuse of discretion by the circuit court after reviewing the facts and circumstances of each case." *Lamar Adver. of S.D., Inc. v. Heavy Constr., Inc.,* 2008 S.D. 10, ¶ 10, 745 N.W.2d 371, 375.

[¶ 22.] " The presumed remedy for the breach of an agreement to transfer real property is specific performance." *McCollam v. Cahill,* 2009 S.D. 34, ¶ 15, 766 N.W.2d 171, 176. Sellers's only argument on this issue is that specific performance was inappropriate because the contract was invalid or impossible to perform, contentions we have rejected. Because Sellers has identified no other fact or circumstance suggesting that specific performance was an inappropriate remedy, we conclude that the circuit court did not abuse its discretion in ordering that relief.

[¶ 23.] Affirmed.

[¶ 24.] GILBERTSON, Chief Justice, and KONENKAMP, MEIERHENRY, and SEVERSON, Justices, concur.

Notes:

[1] Johnson was unaware that Sellers was married at the time they executed the agreement.

[2] Homestead rights protect a spouse's residential property by requiring both husband and wife to join in a conveyance of their homestead. SDCL 43-31-17 provides: " A conveyance or encumbrance of a homestead by its owner, if married and both husband and wife are residents of this state, is valid if both husband and wife concur in and sign or execute such conveyance or encumbrance either by joint instrument or by separate instruments."

Any " attempted conveyance of the homestead that is not joined in by both husband and wife is absolutely void from the beginning inasmuch as the sole-signing vendor is entirely lacking in power and authority to transfer the property." *Speck v. Anderson,* 318 N.W.2d 339, 343 (S.D.1982). But the homestead exemption is not an " ab initio voiding of [an] otherwise arguably valid option." *Id.* SDCL 43-31-17 does not create in the non-owner spouse any estate in the land because the right of homestead is a mere privilege. *Speck,* 318 N.W.2d at 344. Therefore, " when the need for protection for the family ceases, then there is no longer any reason for the homestead." *Id.* " The homestead exemption is ... temporary and exists only so long as the conditions prevail under which it was allowed by the homestead law." *Id.*

Consequently, if the time for performance of a contract coincides with the time when the homestead interest no longer exists, the contract may be validly performed. Further, a spouse's homestead interest in the other spouse's property ceases when a decree of divorce is entered. " The relation of husband and wife having terminated, the wife ceased to have any claim upon or right in the husband's property, whether homestead or otherwise, unless such rights were preserved by the decree of the court." *Brady v. Kreuger,* 8 S.D. 464, 470, 66 N.W. 1083, 1085 (1896).

[3] SDCL 25-4-33.1 restrains spouses from transferring marital assets after a summons and complaint for divorce has been filed:

Upon the filing of a summons and complaint for divorce ..., and upon personal service of the summons and complaint on the defendant, a temporary restraining order shall be in effect against both parties until the final decree is entered, the complaint dismissed, or until further order of the court: (1) Restraining both parties from transferring, encumbering, concealing, or in any way dissipating or disposing of any marital assets, without the written consent of the other party or an order of the court[.]

[4] The letter stated:

As Mr. Johnson wishes to close on the purchase of the real estate from Harrell Sellers, Mr. Sellers agrees that the real property will be sold to Mr. Johnson. Please do not seek to serve the Summons and Complaint upon Mr. Sellers. That will be a waste of money.

I believe Mr. Johnson talked about a potential closing date of September 16. I believe that can be done....

[5] The purchase agreement contained a clause making time of the essence of the contract. A provision in a contract that time is of the essence is limited to the original contract, and when time for payment under the original contract is extended, the time is of the essence provision is waived. *Id.* at 388, 113 N.W. at 76. In applying this rule, we see no distinction between the time for payment and the time for closing.

APPENDIX E

APPENDIX E

Page __

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221 Cal.App.4th 49

RICHARD LUERAS, Plaintiff and Appellant,

v.

BAC HOME LOANS SERVICING, LP, et al., Defendants and Respondents.

G046799

California Court of Appeals, Fourth District, Third Division

October 31, 2013

Appeal from a judgment of the Superior Court of Orange County No. 30-2011-00481113, Kirk H. Nakamura, Judge.

[221 Cal.App.4th 50] [Copyrighted Material Omitted]

[221 Cal.App.4th 51] [Copyrighted Material Omitted]

[221 Cal.App.4th 52] [Copyrighted Material Omitted]

[221 Cal.App.4th 53] [Copyrighted Material Omitted]

[221 Cal.App.4th 54] **COUNSEL**

Law Offices of Lenore Albert and Lenore L. Albert for Plaintiff and Appellant.

Reed Smith, David J. de Jesus and Adam M. Forest for Defendants and Respondents.

OPINION

[221 Cal.App.4th 55] FYBEL, ACTING P. J.

Introduction

Richard Lueras appeals from a judgment entered after the trial court sustained without leave to amend a demurrer to his verified first amended complaint (the First Amended Complaint). After the foreclosure sale of his home, Lueras sued Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP (Bank of America), ReconTrust Company, N.A. (ReconTrust), and Federal National Mortgage Association, commonly called and referred to as ";Fannie Mae."; The First Amended Complaint asserted causes of action for negligence, breach of contract, violation of the Perata Mortgage Relief Act (Civ. Code, § 2923.5), fraud/misrepresentation, unfair and unlawful practices (Bus. & Prof. Code, § 17200), and to quiet title.

The First Amended Complaint included no allegations directed specifically to Fannie Mae, and we therefore affirm the judgment in its favor. As to Bank of America and ReconTrust, we affirm the judgment as to the causes of action for violation of Civil Code section 2923.5 and to quiet title, but, in all other respects, reverse and remand to permit Lueras to amend the First Amended Complaint.

The key fact alleged in the First Amended Complaint is that a mere 13 days before Bank of America foreclosed on Lueras';s home, Bank of America falsely represented in writing to Lueras that no foreclosure sale would occur while Lueras was being considered for ";other foreclosure avoidance programs."; In so doing, Bank of America expressly and in writing informed Lueras he ";will not lose [his] home during this review period."; A Bank of America representative also informed Lueras the pending foreclosure sale would be postponed. Nevertheless, days later, Bank of America foreclosed on Lueras';s home.

Another key point is the trial court sustained a demurrer without leave to amend to the First Amended Complaint—i.e., Lueras had filed only two complaints in a complicated and evolving area of law before facing dismissal. Given the standard of review and California';s policy of liberality in granting of amendments, Lueras should be given an opportunity to amend the First Amended Complaint.

Allegations

In reviewing the order sustaining the demurrer, we accept the factual allegations of the First Amended Complaint as true.

[221 Cal.App.4th 56] (*Committee for Green Foothills v. Santa ClaraCountyBd. of Supervisors* (2010) 48 Cal.4th 32, 42 [105 Cal.Rptr.3d 181, 224 P.3d 920].) We also accept as true facts appearing in exhibits attached to the complaint. (*Sarale v. Pacific Gas & Electric Co.* (2010) 189 Cal.App.4th 225, 245 [117 Cal.Rptr.3d 24]; *Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1626-1627 [272 Cal.Rptr. 623].) If the facts expressly alleged in the complaint conflict with an exhibit, the contents of the exhibit take precedence. (*Sarale v. Pacific Gas & Electric Co., supra,* at p. 245.)

In March 2007, Lueras refinanced his home loan in the amount of $385, 000. The monthly payment on the 30 year loan was $1, 965.10. To secure the loan, a trust deed against Lueras';s home was recorded.

Lueras made every monthly payment due until he and his wife suffered financial hardship. In 2009, Lueras requested a loan modification from the lender, Bank of America, under the Home Affordable Modification Program (HAMP).[1]

In 2009, Fannie Mae instituted the HomeSaver Forbearance program, which was available to those who did not qualify for HAMP loan modifications. According to the First Amended Complaint, ";[t]he program was supposed to lead to a permanent plan so that the borrower could ';save'; their [*sic*] home and in the interim offer the owner a 6 month plan reducing the monthly payment by 30% to 50% less than the current mortgage payment."; Fannie Mae';s Announcement 09-05R, [2] issued in April 2009, stated: ";HomeSaver Forbearance is a new loss mitigation option available to borrowers [who] are either in default or for whom default is imminent and who do not qualify for the HAMP. A servicer should offer a HomeSaver Forbearance if such borrowers have a willingness and ability to make reduced monthly payments of at least one half of their contractual monthly payment. The plan should reduce the borrower';s payments to an amount the borrower can afford, but no less than 50 percent of the borrower';s contractual monthly payment, including taxes and insurance and any other escrow items at the time the forbearance is implemented. During the six month period of forbearance, the **[221 Cal.App.4th 57]** servicer should work with the borrower to identify the feasibility of, and implement, a more permanent foreclosure prevention alternative. The servicer should evaluate and identify a permanent solution during the first three months of the forbearance period and should implement the alternative by the end of the sixth month."; (Announcement 09-05R, *supra*, at pp. 31 32 <https://www.fanniemae.com/content/ announcement/0905.pdf> [as of Oct. 31, 2013].)

Although Lueras requested a HAMP loan modification, ";Bank of America apparently offered [him] the Forbearance program instead of the HAMP program."; In a letter dated August 17, 2009, Bank of America notified Lueras that ";you qualify for the Fannie Mae HomeSaver Forbearance™ program"; and, as a consequence, he was eligible for reduced mortgage payments for a period of up to six months. The letter stated: ";Under the HomeSaver Forbearance program, we are working with Fannie Mae, a government sponsored enterprise, to reduce your mortgage payment by up to 50% for up to 6 months while we work with you to find a long term solution.";

Lueras accepted Bank of America';s offer for reduced monthly payments under the HomeSaver Forbearance program by entering into a forbearance agreement (the Forbearance Agreement), which was attached as an exhibit to the First Amended Complaint. The Forbearance Agreement reduced the monthly payments on Lueras';s home loan to $1, 101.16 for six months, commencing on September 16, 2009. The Forbearance Agreement stated the ";Deferral Period Payment"; commenced on September 16, 2009, and ended on the earliest of (1) six months from ";the execution date by Servicer";; (2) ";execution of an agreement with Servicer for another resolution of my default under my loan Documents...";; or (3) ";my default under the terms of this Agreement."; The Forbearance Agreement stated: ";The Servicer will suspend any scheduled foreclosure sale, provided I continue to meet the obligations under this Agreement.";

The Forbearance Agreement also stated: ";During the Deferral Period, Servicer will review my Loan to determine whether additional default resolution assistance can be offered to me. At the end of the Deferral Period either (1) I will be required to recommence my regularly scheduled payments and to make additional payment(s), on terms to be determined by Servicer, until all past due amounts owed under the Loan documents have been paid in full, (2) I will be required to reinstate my Loan in full, (3) Servicer will offer to modify my Loan[,] (4) Servicer will offer me some other form of payment assistance or alternative to foreclosure, on terms to be determined solely by Servicer..., or (5) if no feasible alternative can be identified, Servicer may commence or continue foreclosure proceedings or exercise other rights and remedies provided Servicer under the Loan Documents.";

[221 Cal.App.4th 58] Lueras made the monthly payment of $1, 101.16 for a period of 10 months. During that time, Bank of America did not work with Lueras to identify the feasibility of, much less implement, a more permanent foreclosure prevention alternative; Bank of America did not evaluate and identify a permanent solution during the first three months of the deferral period; and Bank of America did not implement a permanent solution by the end of the sixth month period.

Meanwhile, Lueras submitted to Bank of America all information required to determine whether he qualified for a HAMP loan modification. In October 2010, while Lueras waited for Bank of America';s determination, he was served with a notice of default by the trustee, ReconTrust. The notice of default stated the total amount in arrears was $64, 424.98 as of October 19, 2010. It was not until this notice of default was recorded that Bank of America began to explore with Lueras alternatives to foreclosure. At that point, Lueras enlisted the aid of the California Attorney General';s Office, which agreed to monitor and assist with the loan modification process on behalf of Lueras.

In December 2010, Lueras requested a loan modification package from Fannie Mae. In January 2011, Lueras returned the completed package to Fannie Mae, which sent a copy of it to Bank of America. The completed package included over 100 pages of documents from Lueras.

In February 2011, Lueras was served with a notice of trustee';s sale with a scheduled sale date of February 22, 2011. Bank of America rescheduled the sale date a total of four times, ultimately setting the sale for May 18, 2011.

The First Amended Complaint alleged that Bank of America eventually determined Lueras was eligible for a HAMP loan modification and made an oral offer to modify the loan. Lueras accepted the offer. But, the First Amended Complaint also alleged that, in a letter dated May 5, 2011, Bank of America informed Lueras he was not eligible for a HAMP loan modification. The May 5, 2011 letter, which was attached as an exhibit to the First Amended Complaint, stated Bank of America was reviewing Lueras';s financial information ";to determine if there are other options available to you"; and that Bank of America ";will contact you within 10 days to let you know what other options are available to you and the next steps you need to take."; The May 5 letter also stated: ";If a foreclosure sale of your home is currently pending and on hold, that hold will continue and remain in effect while you are considered for other foreclosure avoidance programs."; While advising Lueras not to ignore any foreclosure notices, the letter stated, ";you will not lose your home during this review period.";

[221 Cal.App.4th 59] Lueras immediately contacted Nancy Whitaker of Bank of America, who told him the May 5, 2011 letter was sent by ";a third party ';home retention'; vendor"; and was an error. Whitaker told Lueras that he had been placed in an approved program in which the interest rate on his loan would be reduced for four years. She advised him that Bank of America needed to obtain Fannie Mae';s approval.

In a letter to Lueras, dated May 6, 2011, Bank of America informed him it was reviewing his financial documents to determine whether he was eligible for a HAMP loan modification. The May 6 letter, which was attached as an exhibit to the First Amended Complaint, stated Lueras would receive one of three possible responses: (1) notification he had been approved for a trial period plan under HAMP, (2) notification he was not eligible for a HAMP loan modification, or (3) more information was needed to make a decision.

Lueras immediately contacted Bank of America about the May 6 letter. He was informed the letter was sent in error as his application had already ";been approved"; by Bank of America. Whitaker told Lueras the trustee';s sale, which had been rescheduled for May 18, 2011, would be reset, pending approval by Fannie Mae. On Lueras';s copy of the May 6, 2011 letter is this handwritten note: ";per Nancy [¶] ';sent in error';... [¶] 5/18 reset... [¶] already approved.";

During May 2011, Lueras made many contacts with Fannie Mae, Bank of America, and the California Attorney General';s Office, but ";[n]o response was ever received stating why the foreclosure was proceeding."; Lueras never received a further response—oral or written—from Bank of America, advising whether he was or was not eligible for a loan modification program. He likewise never received notice from Fannie Mae that it had denied him a loan modification.

According to the First Amended Complaint, the Making Home Affordable program guidelines require the loan servicer to wait 30 days from the date of denial of a HAMP loan modification before foreclosing so the borrower can appeal the decision.

On May 18, 2011, Lueras was informed by the California Attorney General';s Office that the foreclosure sale would be conducted on that date. Minutes later, Lueras';s home was sold at the foreclosure sale to H and K Acquisitions, LLC. H and K Acquisitions, LLC, was named as a defendant in the First Amended Complaint but is not a party to this appeal.

Procedural History

Lueras filed this lawsuit in June 2011. The complaint asserted causes of action for negligence, breach of contract, breach of contract (third party **[221 Cal.App.4th 60]** beneficiary), fraud/misrepresentation, unfair and unlawful practices, and to quiet title. The trial court sustained, with leave to amend, a demurrer by Bank of America, ReconTrust, and Fannie Mae.[3]

Lueras filed the First Amended Complaint, which asserted causes of action for negligence (against Bank of America, ReconTrust, and Fannie Mae), breach of contract (against Bank of America and Fannie Mae), violation of Civil Code section 2923.5 (against Bank of America and ReconTrust), fraud/misrepresentation (against Bank of America and Fannie Mae), unfair and unlawful practices (against Bank of America and Fannie Mae), and quiet title (against Bank of America, ReconTrust, and Fannie Mae). The trial court sustained without leave to amend Bank of America, ReconTrust, and Fannie Mae';s demurrer to the First Amended Complaint and ordered it dismissed with prejudice. Lueras timely appealed from the subsequently entered judgment of dismissal.

Motion to Strike Portions of Lueras';s Reply Brief

Bank of America, ReconTrust, and Fannie Mae move to strike several portions of Lueras';s reply brief referring to a December 19, 2007 letter, of which Lueras requested we take judicial notice. The motion is made on the ground the request for judicial notice was improper and, therefore, those portions of Lueras';s reply brief, which reference the December 19, 2007 letter, should be stricken. We grant the motion.

California Rules of Court, rule 8.204(a)(1)(C) states an appellate brief must ";[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears."; We may decline to consider passages of a brief that do not comply with this rule. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 195 [147 Cal.Rptr.3d 41].) As a reviewing court, we usually consider only matters that were part of the record when the judgment was entered. (*Ibid.*)

By separate order, we previously denied Lueras';s request for judicial notice; we therefore decline to consider those portions of Lueras';s reply brief which are supported solely by the December 19, 2007 letter. Those portions are (1) on page 4, the first full paragraph beginning ";On December 19, 2007 Congress received letters";; and (2) from page 19, the fourth full paragraph beginning ";In the letter dated December 19, 2007"; through the third full paragraph on page 20, ending ";investors would not lose their dividends.";

[221 Cal.App.4th 61] Standard of Review

We independently review a ruling on a demurrer to determine whether the pleading alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189].) In so doing, ";[t]he complaint must be liberally construed and survives a general demurrer insofar as it states, however inartfully, facts disclosing some right to relief."; (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 22 [157 Cal.Rptr. 706, 598 P.2d 866].)

";On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, ... [w]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] 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. [Citation.]"; (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865 [62 Cal.Rptr.3d 614, 161 P.3d 1168].)

At the outset, and as part of our discussion of the standard of review, we address the argument that some or all of Lueras';s claims are not viable because the foreclosure sale has been rescinded and ";any equity Lueras might have in the property remains."; In opposition to the demurrer to the First Amended Complaint, Lueras acknowledged, ";the trustee was able to rescind the foreclosure sale"; and, in his reply brief, argues, ";[t]he rescission of the trustee';s deed upon [sale] does not moot Mr. Lueras';[s] claims.";

In reviewing the judgment, we are limited to the well pleaded facts of the complaint and matters subject to judicial notice. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [119 Cal.Rptr.2d 709, 45 P.3d 1171]; *Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433 [110 Cal.Rptr.3d 498].) The First Amended Complaint did not allege rescission of the foreclosure sale. No party has requested we take judicial notice of anything establishing such rescission. No party has explained what ";rescission"; means in this context, briefed the legal consequences of a rescission on possible future attempts to foreclose, or informed us of the status of any current foreclosure proceedings. No party has argued that statements of Lueras';s counsel constitute judicial admissions.

In short, nothing in the record permits us to consider the foreclosure sale to have been rescinded or the legal significance of any such rescission in **[221 Cal.App.4th 62]** reviewing the judgment and the sufficiency of the First Amended Complaint. Whether a rescission of the foreclosure sale occurred and the legal significance of a rescission is better resolved in the trial court, after Lueras has the opportunity to replead and, as necessary and permitted, upon concrete evidence. Further, assuming there was a ";rescission"; of the foreclosure sale, we cannot say as a matter of law at this stage that Lueras cannot plead any cause of action.

Discussion

I.

Negligence

In the first cause of action of the First Amended Complaint, for negligence, Lueras alleged Bank of America and ReconTrust breached a duty of care in the handling of his application for a loan modification and in foreclosing his property. Bank of America and ReconTrust argue Lueras failed to allege, and cannot allege, the existence of a duty of care.

A. Overview of the Law of Negligence and Relevant Allegations of the First Amended Complaint

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. (*Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 662 [142 Cal.Rptr.3d 24].) Whether a duty of care exists is a question of law to be determined on a case by case basis. (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472 [63 Cal.Rptr.2d 291, 936 P.2d 70].)

We start by identifying the allegedly negligent conduct by Bank of America and ReconTrust because our analysis is limited to ";the specific action the plaintiff claims the particular [defendant] had a duty to undertake in the particular case."; (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 280 [12 Cal.Rptr.3d 846].) In the first cause of action, Lueras alleged that Bank of America and ReconTrust owed him a duty of care to (1) handle his loan ";in such a way to prevent foreclosure and forfeiture of his property";; (2) ";determine modification approvals, explore and offer foreclosure alternatives with Mr. Lueras prior to default";; (3) ";exercise reasonable care and skill in timely and accurately responding to customer requests and inquiries";; (4) ";record proper land records";; (5) ";properly service the loan";; (6) ";ensure chain of title prior to foreclosing";; and (7) ";stop all foreclosure sales that are unlawful.";

[221 Cal.App.4th 63] Lueras alleged Bank of America and ReconTrust breached that duty of care in several ways. Most importantly, Lueras alleged Bank of America and ReconTrust had a duty to offer Lueras a loan modification and breached that duty by refusing to do so. He also alleged Bank of America and ReconTrust breached their duty of care by ";failing to timely and accurately respond to customer requests and inquiries, "; by ";failing to comply with state consumer protection laws, properly service the loan, and use consistent methods to determine modification approvals, "; and by ";failing to... record proper land records... and ensure chain of title prior to foreclosing and to stop all foreclosure sales that are unlawful.";[4]

Lenders and borrowers operate at arm';s length. (*Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 466 [51 Cal.Rptr.3d 561]; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579 [37 Cal.Rptr.2d 653]; *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 476 [261 Cal.Rptr. 735], disapproved on other grounds in *Riverisland Cold Storage, Inc. v. Fresno Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1182 [151 Cal.Rptr.3d 93, 291 P.3d 316].) "[A]s 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."; (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096 [283 Cal.Rptr. 53] (Nymark).)

In *Nymark*, *supra*, 231 Cal.App.3d at page 1092, the court held a lender owed no duty of care to a borrower in preparing an appraisal of the real property security for the loan when the purpose of the appraisal is to protect the lender by satisfying it that the collateral provided adequate security for the loan. The court reached this holding by considering the six factors identified in *Biakanja v. Irving* (1958) 49 Cal.2d 647 [320 F.2d 16] (*Biakanja*) to determine whether to recognize a duty of care. (*Nymark*, *supra*, at p. 1098.) Those factors are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant';s conduct and the injury suffered, (5) the moral blame attached to the defendant';s conduct, and (6) the policy of preventing future harm. (*Ibid.*)

The *Nymark* court stressed the purpose of the appraisal was to protect the lender';s interest and was not intended to assure the borrower the collateral was sound or to induce him to enter into the loan transaction. (*Nymark*, *supra*,

[221 Cal.App.4th 64] 231 Cal.App.3d at p. 1099.) The foreseeability of harm to the borrower—who would know the value of his own property—was remote, the connection between the lender';s conduct and the injury suffered was ";tenuous, "; there was ";no moral blame because [the borrower] was in a position to protect himself from loss, "; and a strong public policy prevented imposing on the lender a duty of care in the preparation of an appraisal. (*Id.* at pp. 1099 1100.)

In *Ragland v. U.S. Bank National Assn.*, *supra*, 209 Cal.App.4th at page 207, a borrower contended the lender misadvised her to miss a loan payment in order to be considered for a loan modification. The borrower alleged the lender negligently caused her severe emotional distress by then failing to modify her loan and selling her home in a foreclosure sale. (*Id.* at p. 205.) Affirming summary adjudication of a cause of action for negligent infliction of emotional distress, a panel of this court concluded, ";[t]he undisputed facts established there was no relationship between [the borrower] and [the lender] giving rise to a duty the breach of which would permit [the borrower] to recover emotional distress damages based on negligence."; (*Id.* at p. 208.)

Some federal district courts in California have concluded a lender owes no duty of care to a borrower to modify a loan. In *Armstrong v. Chevy Chase Bank, FSB* (N.D.Cal., Oct. 3, 2012, No. 5:11 cv 05664 EJD) 2012 U.S.Dist. Lexis 144125, pp. *11 *12, the court explained: ";[A] loan modification, which at its core is an attempt by a money lender to salvage a troubled loan, is nothing more than a renegotiation of loan terms. This renegotiation is the same activity that occurred when the loan was first originated; the only difference being that the loan is already in existence. Outside of actually lending money, it is undebatable that negotiating the terms of the lending relationship is one of the key functions of a money lender. For this reason, ';[n]umerous cases have characterized a loan modification as a traditional money lending activity.';"; (See *Diunugala v. JP Morgan Chase Bank, N.A.* (S.D.Cal., Oct. 3, 2013, No. 12cv2106 WQH-NLS) 2013 U.S.Dist. Lexis 144326, p. *10 [";Absent special circumstances, there is no duty for a servicer to modify a loan";]; *Sanguinetti v. CitiMortgage, Inc.* (N.D.Cal., Sept. 11, 2013, No. 12-5424 SC) 2013 U.S.Dist. Lexis 130129, p. *17 [";Loan modifications are part of the lending process, and negotiating a lending agreement';s terms is one of a bank';s key functions";]; *Bunce v. Ocwen Loan Servicing, LLC* (E.D.Cal., July 17, 2013, No. CIV. 2:13-00976 WBS EFB) 2013 U.S.Dist. Lexis 100111, p. *15, [agreeing with *Armstrong v. Chevy Chase Bank, FSB* that lender does not owe duty in loan modification activities]; *Kennedy v. Bank of America, N.A.* (N.D.Cal., Apr. 26, 2012, No. 12-CV952 YGR) 2012 U.S.Dist. Lexis 58636, pp. *21-*22 [lender owes borrower no duty of care in process of approving loan modification]; *Dooms v. Federal Home Loan Mortgage Corp.* (E.D.Cal., Mar. 31, 2011, No. CV F 11-0352 LJO DLB) 2011 U.S.Dist. Lexis 38550, p. *28 [";The [lender] owed no duty of **[221 Cal.App.4th 65]** care to [the borrower] arising from her default, property foreclosure, and loan modification attempts";]; *DeLeon v. Wells Fargo Bank, N.A.* (N.D.Cal., Oct. 22, 2010, No. 10-CV-01390-LHK) 2010 U.S.Dist. Lexis 112941, p. *12 [the defendant lender did not have a duty ";to complete the loan modification process";].)

Other United States District Courts have concluded a lender might owe a borrower a duty of care in negotiating or processing an application for a loan modification. (See *Ansanelli v. JP Morgan Chase Bank, N.A.* (N.D.Cal., Mar. 28, 2011, No. C 10-03892 WHA) 2011 U.S.Dist. Lexis 32350, pp. *21-*22 [allegation that lender offered plaintiffs a loan modification and ";engage[d] with them concerning the trial period plan"; was sufficient to create duty of care]; *Becker v. Wells Fargo Bank, N.A., Inc.* (E.D.Cal., Nov. 30, 2012, No. 2:10-cv-02799 LKK KJN PS) 2012 U.S.Dist. Lexis 170729, pp. *34-*35 [complaint stated claim against lender for negligence during the loan modification process]; *Crilley v. Bank of America, N.A.* (D. Hawaii, Apr. 26, 2012, Civ. No. 12-00081 LEK-BMK) 2012 U.S.Dist. Lexis 58469, p. *29 [denying motion to dismiss because plaintiffs ";have pled sufficient facts to support a finding that Defendant went beyond its conventional role as a loan servicer by soliciting Plaintiffs to apply for a loan modification and by engaging with them for several months"; regarding the modification]; *Garcia v. Ocwen Loan Servicing, LLC* (N.D.Cal., May 10, 2010, No. C 10-0290 PVT) 2010 U.S.Dist. Lexis 45375, pp. *7-*11 [plaintiff';s allegations of lender';s conduct in handling application for loan modification pleaded a duty of care].)

After oral argument, we invited the parties to submit supplemental briefs on three recent opinions, including *Jolley v. ChaseHome Finance, LLC* (2013) 213 Cal.App.4th 872 [153 Cal.Rptr.3d 546] (*Jolley*), which addressed whether a construction lender owed a duty of care to the borrower. In *Jolley*, the plaintiff and Washington Mutual Bank (WaMu) entered into a construction loan agreement by which the plaintiff borrowed $2, 156, 000 to renovate a house for use as rental property. (*Id.* at pp. 877, 878.) Problems arose due to WaMu';s alleged failure to properly disburse loan proceeds, and WaMu agreed to modify the loan based on an expansion of the construction project. (*Id.* at p. 878.) Several months after the last disbursement, WaMu was closed by the Office of Thrift Supervision and placed in receivership under the Federal Deposit Insurance Corporation. (*Id.* at p. 879.) Certain of WaMu';s assets, including the construction loan, were acquired by the defendant bank. (*Ibid.*)

Soon thereafter, the plaintiff ceased making payments on the loan, claiming he had been forced to default by WaMu';s breaches and negligence in the funding of the construction loan. (*Jolley*, *supra*, 213 Cal.App.4th at p. 880.) The plaintiff tried to obtain a loan modification from the defendant and was told ";there was a ';high probability';"; the defendant would modify the loan to **[221 Cal.App.4th 66]** avoid foreclosure and it was likely the construction loan could be rolled over into a fully amortized conventional loan. (*Id.* at pp. 880-881.) So assured, the plaintiff completed construction by borrowing money from family and friends. (*Id.* at p. 881.) Instead of offering a loan modification, the defendant demanded payment of the loan in full and refused the plaintiff';s request to postpone the planned foreclosure sale. (*Ibid.*)

The plaintiff sued the defendant for various causes of action, including negligence, fraud, breach of contract, and promissory estoppel. (*Jolley*, *supra*, 213 Cal.App.4th at p. 881.) The trial court granted summary judgment, and the Court of Appeal reversed. (*Id.* at pp. 877-878.) On the negligence cause of action, the Court of Appeal recognized the general rule that a financial institution does not owe a duty of care to a borrower when the institution acts within its traditional role as a lender of money. (*Id.* at p. 898.) The Court of Appeal concluded, however, the general rule did not apply to the facts of the case. The court explained: ";When considered in full context, the cases show the question is not subject to black-and-white analysis—and not easily decided on the ';general rule.'; We conclude here, where there was an ongoing dispute about WaMu';s performance of the construction loan contract, where that dispute appears to have bridged the [Federal Deposit Insurance Corporation]';s receivership and Chase';s acquisition of the construction loan, and where specific representations were made by a Chase representative as to the likelihood of a loan modification, a cause of action for negligence has been stated that cannot be properly resolved based on lack of duty alone."; (*Ibid.*)

The Court of Appeal did not end its analysis there. The court next considered the six factors identified in *Biakanja*, *supra*, 49 Cal.2d 647, for determining whether to impose a duty of care. (*Jolley*, *supra*, 213 Cal.App.4th at pp. 899-901.) The court assessed those factors and concluded they compelled the conclusion the defendant owed the plaintiff a duty to review his request for a loan modification in good faith. (*Id.* at pp. 899-901.)

The *Jolley* court acknowledged it was dealing with a construction loan, not a residential home loan ";where, save for possible loan servicing issues, the relationship ends when the loan is funded."; (*Jolley*, *supra*, 213 Cal.App.4th at p. 901.) ";By contrast, in a construction loan the relationship between lender and borrower is ongoing, in the sense that the parties are working together over a period of time, with disbursements made throughout the construction period, depending upon the state of progress towards completion. We see no reason why a negligent failure to fund a construction loan, or negligent delays in doing so, would not be subject to the same standard of care."; (*Ibid.*, fn. omitted.) Despite limiting its holding to construction loans, the *Jolley* court went to great lengths, in dictum, to explain the ";no duty rule is only a general rule"; and to suggest that a lender may be liable for negligence in its handling **[221 Cal.App.4th 67]** of a loan transaction within its traditional role as a lender of money. (*Id.* at pp. 901-902, citing *Ottolini v. Bank of America*(N.D.Cal., Aug. 19, 2011, No. C-11-0477 EMC) 2011 U.S.Dist. Lexis 92900, pp. *16-*17.)

The *Jolley* court reviewed recent federal and state legislation directed at aiding resident homeowners at risk of losing their homes through foreclosure, and concluded that, while the new legislation did not directly apply to construction loans, it ";sets forth policy considerations that should affect the assessment whether a duty of care was owed to [the plaintiff] at that time."; (*Jolley*, *supra*, 213 Cal.App.4th at p. 905.) If the new legislation supports imposition of a duty of care on a construction lender, then it would support imposition of such a duty of care on a lender of home loans.

We disagree with *Jolley* to the extent it suggests a residential lender owes a common law duty of care to offer, consider, or approve a loan modification, or to explore and offer foreclosure alternatives. As the *Jolley* court recognized, ";there is no express duty on a lender';s part to grant a modification under state or federal loan modification statutes."; (*Jolley*, *supra*, 213 Cal.App.4th at p. 903.) In *Aspiras v. Wells Fargo Bank, N.A.* (2013) 219 Cal.App.4th 948, 952, 963-964 [162 Cal.Rptr.3d 230], the court distinguished *Jolley*and declined to impose a duty of care on an institutional lender in handling a loan modification. The *Aspiras*court agreed with the federal district courts that had held, ";';offering loan modifications is sufficiently entwined with money lending so as to be considered within the scope of typical money lending activities.';"; (*Aspiras v. Wells Fargo Bank, N.A.*, *supra*, at p. 964.)

We conclude a loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution';s conventional role as a lender of money. A lender';s obligations to offer, consider, or approve loan modifications and to explore foreclosure alternatives are 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 or quasi governmental agencies. The *Biakanja* factors do not support imposition of a common law duty to offer or approve a loan modification. If the modification was necessary due to the borrower';s inability to repay the loan, the borrower';s harm, suffered from denial of a loan modification, would not be closely connected to the lender';s conduct. If the lender did not place the borrower in a position creating a need for a loan modification, then no moral blame would be attached to the lender';s conduct.

[221 Cal.App.4th 68] B. Why the Allegations of the First Amended Complaint Do Not State a Cause of Action for Negligence

Accordingly, in this case, Bank of America and ReconTrust did not have a common law duty of care to offer, consider, or approve a loan modification, or to offer Lueras alternatives to foreclosure. Likewise, Bank of America and ReconTrust did not have a duty of care to handle Lueras';s loan ";in such a way to prevent foreclosure and forfeiture of his property."; Their rights, duties, and obligations in those regards were set forth in the note and deed of trust, the Forbearance Agreement, federal and state statutes and regulations, and the directives and announcements of the United States Department of the Treasury and Fannie Mae. (Cf. *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154 [121 Cal.Rptr.3d 819] [" 'Because of the exhaustive nature of [the nonjudicial foreclosure] scheme, California appellate courts have refused to read any additional requirements into the non judicial foreclosure statute';";].)

Lueras did not allege Bank of America and ReconTrust did anything wrongful that made him unable to make the original monthly loan payments. Lueras did not allege Bank of America and ReconTrust caused or exacerbated his initial default by negligently servicing the loan. To the contrary, he alleged his inability to make the payments was caused by financial hardship due to the ";drastically decreased... demand of his services of his contracting business"; and his wife';s loss of employment. Lueras';s allegations that Bank of America and ReconTrust owed him duties to ";follow through on their own agreements, "; to comply with consumer protection laws, and to stop foreclosure sales that were unlawful fail to state a cause of action for negligence because such duties, if any, are imposed by the loan documents and the Forbearance Agreement, statutes, or regulations. If Bank of America and ReconTrust failed to ";follow through"; on those agreements, then Lueras';s remedy lies in breach of contract, not negligence.

Thus, the First Amended Complaint did not, and cannot as a matter of law, state a claim for negligence based on Bank of America';s alleged failure to offer Lueras a loan modification.

C. *Basis for Granting Leave to Amend*

We conclude, 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. The law imposes a duty not to make negligent misrepresentations of fact. (Civ. Code, § 1710, subd. 2 [defining ";deceit"; to include ";[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing **[221 Cal.App.4th 69]** it to be true";]; *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 172-174 [132 Cal.Rptr.2d 490, 65 F.3d 1255].) In a different context, courts have held a bank depositor can state a claim for negligent misrepresentation, based on a bank employee';s incorrect statements about the settlement of a check. (*Wells Fargo Bank, N.A. v. FSI Financial Solutions, Inc.* (2011) 196 Cal.App.4th 1559, 1572-1573 [127 Cal.Rptr.3d 589]; *Holcomb v. Wells Fargo Bank, N.A.* (2007) 155 Cal.App.4th 490, 498-500 [66 Cal.Rptr.3d 142].) It is foreseeable that a borrower might be harmed by 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.[5]

Leave to amend must be granted if ";there is a reasonable possibility that the defect can be cured by amendment. . . ." (*City of Dinuba v. County of Tulare, supra*, 41 Cal.4th at p. 865.) The First Amended Complaint generally alleged Bank of America failed to exercise ";reasonable care and skill in timely and accurately responding to customer requests and inquiries."; Based on the record before us and on the grounds we have explained in detail, it is reasonably possible that Lueras could amend the First Amended Complaint to state a cause of action for negligent misrepresentation. We therefore reverse the judgment as to the negligence cause of action and remand to the trial court with directions to allow Lueras the opportunity to amend the First Amended Complaint to plead a cause of action for negligent misrepresentation.

II.

Breach of Contract

In the second cause of action of the First Amended Complaint, for breach of contract, Lueras asserted two theories: (1) Bank of America breached the deed of trust by failing to tender him the difference between the amount of the indebtedness and the auction price of his home at the foreclosure sale and (2) Bank of America breached the Forbearance Agreement.[6]

Bank of America argues the first theory is no longer viable because the foreclosure sale has been rescinded. As we have explained, in reviewing the judgment, we are limited to the well pleaded facts of the complaint and matters subject to judicial notice. (*Zelig v. County of Los Angeles, supra*, 27 Cal.4th at p. 1126.) The First Amended Complaint did not allege rescission of **[221 Cal.App.4th 70]** the foreclosure sale, no party has requested we take judicial notice of anything establishing such rescission, and no party has argued that statements of Lueras';s counsel constitute judicial admissions.

Under the second theory, Lueras alleged Bank of America breached the Forbearance Agreement ";by terminating the ';Deferral Period'; although the Servicer (i) never executed the Agreement, (ii) never offered another resolution of any default such as a modification, pre foreclosure sale or deed in lieu of foreclosure, or (iii) found Mr. Lueras [in] default under the program.";[7] In essence, Lueras alleged Bank of America breached the Forbearance Agreement by failing to offer him a loan modification or some other resolution that would avoid foreclosure before commencing or resuming foreclosure of his home. Because the trial court sustained without leave to amend a demurrer to the breach of contract cause of action, we accept as true the allegations of the breach of contract cause of action and the exhibits attached to the First Amended Complaint. (*Sarale v. Pacific Gas & Electric Co.*, *supra*, 189 Cal.App.4th at p. 245.)

A. Relevant Principles of Contract Interpretation

The arguments presented require us to interpret parts of the Forbearance Agreement. ";The basic goal of contract interpretation is to give effect to the parties'; mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties'; intention is determined from the writing alone, if possible. [Citation.] ';The words of a contract are to be understood in their ordinary and popular sense.'; [Citations.]"; (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955 [135 Cal.Rptr.2d 505].) Civil Code section 1638 states, ";[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.";

";A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."; (Civ. Code, § 1643.) ";The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the **[221 Cal.App.4th 71]** other."; (*Id.*, § 1641.) ";To the extent practicable, the meaning of a contract must be derived from reading the whole of the contract, with individual provisions interpreted together, in order to give effect to all provisions and to avoid rendering some meaningless."; (*Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1027 [124 Cal.Rptr.3d 105].)

B. Whether the Forbearance Agreement Was Binding

In a footnote in the respondents'; brief, Bank of America states it ";does not concede that the forbearance agreement constituted a binding contract, since Lueras admitted that Bank of America did not execute the agreement."; We may decline to address arguments made perfunctorily and exclusively in a footnote. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 [32 Cal.Rptr.2d 762, 878 F.2d 521] [reviewing court may disregard claims perfunctorily asserted without development and without a clear indication they are intended to be discrete contentions]; *Placer Ranch Partners v. County of Placer* (2001) 91 Cal.App.4th 1336, 1343, fn. 9 [111 Cal.Rptr.2d 577]; *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4 [41 Cal.Rptr.2d 263].)

We nonetheless reject this argument on the merits for two reasons. First, Bank of America accepted payments during the deferral period and was entitled to receive a $200 incentive fee ";upon successful reporting to Fannie Mae of the initiation of a HomeSaver Forbearance plan and the collection of one payment under the forbearance plan."; (Announcement 09-05R, *supra*, at p. 32 <https://www.fanniemae.com/content/announcement/0905.pdf> [as of Oct. 31, 2013].) Under those circumstances, Bank of America';s failure to sign the Forbearance Agreement did not render it unenforceable. (*Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1012-1013 [146 Cal.Rptr.3d 90] [lender';s failure to sign and return loan modification contract was not a condition precedent precluding formation of a binding contract].)

Second, while a forbearance agreement that modifies a note and deed of trust is subject to the statute of frauds (*Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 552-554 [84 Cal.Rptr.3d 275]), here, in contrast, the Forbearance Agreement states: ";No Modification. I understand that the Agreement is not a forgiveness of payments on my Loan or a modification of the Loan Documents."; (Original boldface.) The statute of frauds was not raised in the demurrer to the First Amended Complaint.

Lueras argues the deferral period under the Forbearance Agreement has not ended and Bank of America continues to have an obligation under the Forbearance Agreement to suspend foreclosure and offer him assistance. The **[221 Cal.App.4th 72]** Forbearance Agreement states the deferral period, under which Lueras made reduced payments on the note, commences ";on the date of this Agreement"; and ends on the earliest of (1) six months from ";the execution date by Servicer, "; (2) ";execution of an agreement with Servicer for another resolution of my default, "; or (3) ";my default under the terms of this Agreement."; According to Lueras, none of these events has occurred. Since Bank of America never signed the agreement, Lueras argues that six months from the execution date has not elapsed.

We reject the argument the deferral period under the Forbearance Agreement has not ended. Section 2 of the Forbearance Agreement sets forth a table showing the amount and due dates for six ";Deferral Period Payment[s], "; with the first payment due on September 16, 2009, and the final payment due on March 1, 2010. Following this table, the Forbearance Agreement sets forth the provision regarding the beginning and ending of the ";Deferral Period."; Other than the six payments set forth in the table, the Forbearance Agreement identifies no other deferral period payments.[8] Since the Forbearance Agreement was not to be binding until signed by Bank of America, and the first deferral period payment was due on September 16, 2009, a reasonable inference is the parties anticipated and intended that Bank of America would sign the Forbearance Agreement by that date. Viewing section 2 of the Forbearance Agreement in light of the agreement as a whole, we conclude the parties intended the deferral period to end no later than six months from the due date of the first deferral period payment.

C. Bank of America';s Obligations Under the Forbearance Agreement

1. The Forbearance Agreement and Announcement

09-05R

Lueras';s breach of contract cause of action is based primarily on section 2.C of the Forbearance Agreement, labeled ";Additional Assistance"; (boldface omitted). The first sentence of section 2.C states that ";[d]uring the Deferral Period, Servicer[9] will review my Loan to determine whether additional default resolution assistance can be offered to me."; Section 2.C of the Forbearance Agreement then states that, at the end of the deferral period, one of five things will happen: (1) the borrower will be required to resume making regularly scheduled payments and to make additional payments until all past due amounts have been paid; (2) the loan will be reinstated in full; (3) the ";Servicer will offer to modify my Loan";; (4) the ";Servicer will offer me **[221 Cal.App.4th 73]** some other form of payment assistance or alternative to foreclosure, on terms to be determined solely by Servicer . . ."; or (5) ";if no feasible alternative can be identified, Servicer may commence or continue foreclosure proceedings or exercise other rights and remedies provided Servicer under the Loan Documents.";

Section 2.C, on its face, thus expressly required Bank of America to ";review"; Lueras';s loan to determine ";whether additional default resolution assistance can be offered."; The Forbearance Agreement did not expressly require Bank of America to offer Lueras a loan modification or an alternative to foreclosure.

However, in 2009, Announcement 09-05R was issued to provide ";additional policy clarification and instruction"; on HAMP and the HomeSaver Forbearance program. (Announcement 09-05R, *supra*, at p. 1, boldface omitted <https:// www.fanniemae.com/content/announcement/0905.pdf> [as of Oct. 31, 2013].) As to the HomeSaver Forbearance program, Announcement 09-05R states: ";During the six month period of forbearance, the servicer *should work* with the borrower to identify the feasibility of, and implement, a more permanent foreclosure prevention alternative. The servicer *should evaluate and identify* a permanent solution during the first three months of the forbearance period and *should implement* the alternative by the end of the sixth month."; (Announcement 09-05R, *supra*, at p. 32, italics added.)

We conclude these provisions of Announcement 09-05R must be read into HomeSaver Forbearance agreements. *West*, *supra*, 214 Cal.App.4th 780, is instructive. In *West,* a panel of this court addressed whether a residential borrower stated a cause of action against a residential lender for breach of a trial period plan (TPP) under HAMP. (*West*, *supra*, at pp. 796-799.) The borrower alleged the lender had breached the TPP by failing to offer her a permanent loan modification after she had complied with all of the terms of the TPP. (*Ibid.*) The United States Department of the Treasury, HAMP supplemental directive 09-01 (Apr. 6. 2009) provides that if the borrower complies with all of the TPP';s terms and conditions, the loan modification becomes effective on the first day of the month following the trial period. (*West*, *supra*, at p. 797.) Following *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547 (*Wigod*), a panel of this court held that if the borrower complies with all of the terms of the TPP, then the lender must offer the borrower a permanent loan modification. (*West*, *supra*, at pp. 796 799.) Although the TPP in *West*, unlike the one in *Wigod*, did not expressly include such a proviso, this court concluded it was imposed by the United States Department of the Treasury through HAMP supplemental directive 09-01. (*West*, *supra*, at p. 797.) To make the TPP lawful and enforceable, it had to be interpreted to include the requirements of that directive. (*Id.* at pp. 797-798.)

[221 Cal.App.4th 74] In *Corvello v. Wells Fargo Bank, NA* (9th Cir. 2013) 728 F.3d 878, 884, the Ninth Circuit Court of Appeals expressly agreed with *Wigod*and *West* to conclude: ";Where, as here, borrowers allege, and we must assume, that they have fulfilled all of their obligations under the TPP, and the loan servicer has failed to offer a permanent modification, the borrowers have valid claims for breach of the TPP agreement."; (See *Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1059 [162 Cal.Rptr.3d 382] [following *Corvello v. Wells Fargo Bank, NA*].) Even more recently, the Third District Court of Appeal also agreed with *West* and *Wigod*. (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th. 915.)

West dealt with a TPP under HAMP, and this case deals with a forbearance agreement under the HomeSaver Forbearance program. For that reason, Bank of America argues in its supplemental brief that *West* is inapplicable. While HAMP and the HomeSaver Forbearance program differ, the guiding principle of *West*—i.e., that a TPP under HAMP must be interpreted to include United States Department of the Treasury directives—is applicable here. Announcement 09-05R is similar to United States Department of the Treasury, HAMP supplemental directive 09 01 and sets forth ";policy clarification and instruction"; regarding the HomeSaver Forbearance program. (Announcement 09-05R, *supra*, at p. 1, boldface omitted <https://www.fanniemae.com/content/ announcement/0905.pdf> [as of Oct. 31, 2013].) Bank of America does not assert it was not required to follow Announcement 09-05R. Thus, ";the reasonable interpretation of the [Forbearance] Agreement—and the one necessary to make it lawful and in compliance with [the HomeSaver Forbearance program]"; is that the Forbearance Agreement includes the obligations imposed by Announcement 09-05R. (*West*, *supra*, 214 Cal.App.4th at p. 798.)

2. The Meaning of “ Should” in Announcement 09-05R

As quoted above, Announcement 09-05R states the lender ";*should work* with the borrower"; to identify and implement a permanent foreclosure prevention alternative, ";*should evaluate and identify*"; a permanent loan solution, and ";*should implement*"; the alternative by the end of the six month deferral period. (Announcement 09-05R, *supra*, at p. 32, italics added <https://www.fanniemae.com/content/announcement/0905.pdf> [as of Oct. 31, 2013].) Bank of America argues the word ";should"; is permissive rather than mandatory and, therefore, Announcement 09-05R imposed *no* obligation on them to offer a loan modification or other alternative to foreclosure. In his supplemental brief, Lueras argues the word ";should"; must be interpreted to mean Bank of America ";was obligated to evaluate and identify a permanent solution.";

[221 Cal.App.4th 75] What does ";should"; in this context mean? We start by consulting the dictionary.[10] According to Webster';s Third New International Dictionary, ";should"; in auxiliary function can be used (1) ";to express condition";; (2) ";to express duty, obligation, necessity, propriety, or expediency";; (3) ";to express futurity from a point of view in the past";; (4) in place of ";might"; or ";could"; (capitalization omitted) (archaic); (5) ";to express what is probable or expected";; or (6) ";to express a desire or request in a polite or unemphatic manner."; (Webster';s 3d New Internat. Dict. (2002) p. 2104, cols. 2 3.) Black';s Law Dictionary defines ";should"; to mean: ";[T]he past tense of ';shall, '; which ordinarily implies a command, but ';should'; used in the present or future tense, while not synonymous with and more forceful than ';may, '; can convey only a moral obligation or strong recommendation."; (*Boam v. Trident Financial Corp.* (1992) 6 Cal.App.4th 738, 745, fn. 6 [8 Cal.Rptr.2d 177], citing Black';s Law Dict. (6th ed. 1990) p. 1379.)

The California Rules of Court distinguish between the words ";must, "; ";may, "; ";may not, "; ";will, "; and ";should."; (Cal. Rules of Court, rule 1.5(b).) Under the California Rules of Court, ";';[s]hould';"; expresses a preference or a nonbinding recommendation, "; while ";';[m]ust'; is mandatory, "; ";';[m]ay'; is permissive, "; and ";';[w]ill expresses a future contingency."; (*Id.*, rule 1.5(b)(1), (2), (4) & (5).) Case law has defined ";should"; generally to mean a moral obligation or recommendation. (See *Kucera v. Lizza* (1997) 59 Cal.App.4th 1141, 1152 [69 Cal.Rptr.2d 582] ["The words ';may'; and ';should'; are ordinarily permissive . . ."]; *Boam v. Trident Financial Corp.*, *supra*, 6 Cal.App.4th at p. 745, fn. 6; *Cuevas v. Superior Court* (1976) 58 Cal.App.3d 406, 409 [130 Cal.Rptr. 238] [in Penal Code section 1538.5, subdivision (b), ";[t]he word ';should'; is used in a regular, persuasive sense, as a recommendation, not as a mandate";].)

We agree with Bank of America the word ";should"; in Announcement 09-05R is not mandatory; however, we reject the notion the word ";should"; in that announcement is entirely permissive and imposes no responsibilities or obligations whatsoever on loan servicers. Under the variety of definitions offered, ";should"; in the very least imposes a moral obligation or a strong recommendation, and can mean a duty or necessity. Interpreting ";should"; as imposing some obligation on the loan servicer is in keeping with the purpose of Announcement 09-05R, which was issued to provide policy clarification and instruction to loan servicers for implementation of the HomeSaver Forbearance program. The sense of moral obligation, strong recommendation, preference, or propriety imparted by the word ";should"; equates with good faith; that is, although Bank of America had no contractual duty to offer **[221 Cal.App.4th 76]** Lueras a loan modification or an alternative to foreclosure, it had a contractual duty to work with him to identify the feasibility of, and implement, a foreclosure prevention alternative, and to do so in good faith.

The duty to act in good faith in working with a borrower is imposed expressly in the Forbearance Agreement through Announcement 09-05R and by the implied covenant of good faith and fair dealing. Every contract imposes on each party a duty of good faith and fair dealing in contract performance and enforcement such that neither party may do anything to deprive the other party of the benefits of the contract. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371 [6 Cal.Rptr.2d 467, 826 P.2d 710]; *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 500 [220 Cal.Rptr. 818, 709 P.2d 837]; *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55 [122 Cal.Rptr.2d 267].) " 'This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose.';"; (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 798, p. 892.)

";The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith."; (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, *supra*, 2 Cal.4th at p. 372.) Accordingly, while the word ";should"; as used in Announcement 09-05R gives a loan servicer discretion to work with a borrower to identify the feasibility of a foreclosure prevention alternative, and to evaluate and implement a permanent solution, that discretionary power must be exercised in good faith.

As it stands, the First Amended Complaint alleged Bank of America ";never offered another resolution of any default such as a modification, pre foreclosure sale or deed in lieu of foreclosure."; Although the Forbearance Agreement did not impose on Bank of America the obligation to offer Lueras a loan modification or an alternative to foreclosure, we conclude Lueras should be given leave to amend to state a claim for breach of contract in light of our interpretation of the Forbearance Agreement.

D. *Damages*

Bank of America argues Lueras failed to allege damages from breach of the Forbearance Agreement. In the First Amended Complaint, Lueras alleged that, as a result of Bank of America';s breach of contract, he sustained damages of at least $25, 000, ";representing moni[e]s collected by Defendants **[221 Cal.App.4th 77]** during the ';special forbearance'; time period and on the sale plus the amount of late fees and charges incurred on the loan as a result of Defendants'; breach."; The payments made by Lueras during the deferral period do not constitute contractual damages because they would have been owed under the note and deed of trust in absence of the Forbearance Agreement.

In this opinion, the rights and obligations under the Forbearance Agreement are being identified and described in a definitive way for the first time. Lueras has not had the opportunity to formulate and allege a theory of damages based on our construction of the Forbearance Agreement. We certainly cannot say at this stage that Lueras is unable as a matter of law to allege breach of contract damages. As there is ";a reasonable possibility"; (*City of Dinuba v. County of Tulare*, *supra*, 41 Cal.4th at p. 865) that Lueras could amend to allege recoverable damages, leave to amend must be granted.

III.

Violation of Civil Code Section 2923.5

In his third cause of action of the First Amended Complaint, Lueras alleged Bank of America and ReconTrust violated Civil Code section 2923.5 because they ";did not initiate exploration of foreclosure alternatives with [him] until after a Notice of Default was recorded on the property placing [him] in imminent foreclosure."; In *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 213-214 [110 Cal.Rptr.3d 201], this court held: ";Civil Code section 2923.5 requires, before a notice of default may be filed, that a lender contact the borrower in person or by phone to ';assess'; the borrower';s financial situation and ';explore'; options to prevent foreclosure."; The only remedy afforded by section 2923.5 is, however, a one time postponement of the foreclosure sale before it happens. (*Mabry v. Superior Court*, *supra*, at pp. 214, 225, 235.)

The First Amended Complaint did not seek postponement of the foreclosure sale and alleged the sale had been conducted. The third cause of action therefore did not state and cannot as a matter of law state a claim for violation of Civil Code section 2923.5.

IV.

Fraud/Misrepresentation

In the fourth cause of action of the First Amended Complaint, Lueras alleged Bank of America committed fraud and ";led [him] to believe **[221 Cal.App.4th 78]** that [his] home would not be sold in May 2011 and that it wanted to help [him] maintain ownership of [his] home."; 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. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 [49 Cal.Rptr.2d 377, 909 P.2d 981].)

The First Amended Complaint alleged Bank of America made the following false representations:

1. ";Bank of America represented it wanted to help plaintiffs maintain ownership of their home through the language of the [Forbearance A]greement which states ';Under the HomeSaver Forbearance program, we are working with Fannie Mae, a government sponsored enterprise, to reduce your mortgage payment by up to 50% for up to 6 months while we work with you to find a long term solution. This is not a permanent payment reduction, but it will allow you to stay in your home as we work together to find a solution.';";

2. ";The [Forbearance] Agreement reinforced the representation that Bank of America and Fannie Mae would work with Mr. Lueras to find ';a long term solution'; on the second page where it stated the Deferral Period would continue until ';execution of an agreement with Servicer for another resolution of my default....';";

3. ";Bank of America led plaintiff to believe that defendants were going to work with [him] so [he] could stay in [his] home so long as [he] made the requested payments.";

4. ";[O]n May 5, 2011[,] Bank of America sent another letter stating it would contact Mr. Lueras in 10 days

to explore alternatives to foreclosure.";

5. ";Bank of America concealed the fact that it was not going to identify a long term solution in order to ';save'; Mr. Lueras';[s] home from foreclosure.";

The First Amended Complaint did not allege any misrepresentations attributed to Fannie Mae.

The First Amended Complaint alleged Lueras was led to believe ";a long term solution to keep [him] in [his] home was being worked on"; and that his ";home would not be sold in May 2011."; The First Amended Complaint alleged Lueras did the following in reliance on the alleged misrepresentations:

[221 Cal.App.4th 79] 1. Lueras ";continued to make the payments"; on the loan.

2. He ";[took] the time and t[ook] on the extra burden and expense of compiling and providing the information requested [in] which [he] had a right to privacy"; and he ";would not have spent [his] valuable money, time and efforts in attempting to modify [his] loan with Bank of America prior to default, if [he] had known that [he] would not have had a genuine opportunity to modify.";

These allegations do not allege detrimental reliance. Continuing to make payments on the loan (reduced under the Forbearance Agreement) does not constitute detrimental reliance because Lueras already had the obligation to make those payments. In *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172 [88 Cal.Rptr.2d 718], the plaintiffs asserted that a bank';s promise to engage in good faith negotiations to modify a loan caused the plaintiffs to continue making payments on a note secured by undervalued property. The court rejected that theory because the plaintiffs had a contractual obligation to make payments on the note, notwithstanding the bank';s promise to renegotiate its terms. (*Id.* at pp. 1185-1187.)

Time and effort spent assembling materials for an application to modify a loan is the sort of nominal damage subject to the maxim de minimis non curat lex—i.e., the law does not concern itself with trifles. (Black';s Law Dict. (9th ed. 2009) p. 496, col. 2; see Civ. Code, § 3533 [";The law disregards trifles";]; *Merrill v. Hurlburt* (1883) 63 Cal. 494, 497 [";Considering the amount involved in the action we cannot say we ought to affirm the judgment upon the maxim *de minimis*, etc.";]; *McAllister v. Clement* (1888) 75 Cal. 182, 184 [16 P. 775] [nominal damages not recoverable under maxim de minimis non curat lex]; *Wolff v. Prosser* (1887) 73 Cal. 219, 220 [14 P. 852] [maxim de minimis non curat lex applies to damages of $10]; *Harris v. Time, Inc.* (1887) 191 Cal.App.3d 449, 458 [237 Cal.Rptr. 584] ["the present action is ';de minimis'; in the extreme";].)

Nevertheless, the exhibits attached to the First Amended Complaint—including the Forbearance Agreement, the May 5, 2011 letter, and the May 6, 2011 letter—demonstrate there is a reasonable possibility the defects in the fraud cause of action can be cured by amendment. In the May 5, 2011 letter, Bank of America informed Lueras any pending foreclosure sale would be ";on hold"; while he was being considered for other foreclosure avoidance programs. Whitaker, a Bank of America representative, told him the May 5 letter was sent in error and he had been approved for a loan modification. In the May 6, 2011 letter, Bank of America informed Lueras it was reviewing his financial documents to determine whether he was eligible for a HAMP loan modification. When Lueras contacted Bank of America about the May **[221 Cal.App.4th 80]** 6 letter, Whitaker told him the trustee';s sale, which had been rescheduled for May 18, 2011, would be reset, pending approval by Fannie Mae of his loan modification. Despite the express representation in the May 5 letter that no foreclosure sale would proceed, and Whittaker';s oral representation that the sale would be reset, the foreclosure sale was conducted on May 18.[11]

As explained above, Bank of America argues the trustee';s sale conducted on May 18, 2011 was rescinded, and, therefore, Lueras suffered no damages. Even if we were to assume the trustee';s sale was rescinded, we could not say as a matter of law that Lueras suffered no damages as a result of Bank of America';s actions.

V.

Unfair and Unlawful Practices

In the fifth cause of action of the First Amended Complaint, Lueras alleged Bank of America engaged in ";deceptive business practices"; in violation of California';s unfair competition law (UCL), Business and Professions Code section 17200 et seq. He alleged Bank of America engaged in deceptive practices ";with respect to mortgage loan servicing, foreclosure of residential properties and related matters"; in violation of the UCL.

Bank of America argues Lueras failed to allege it engaged in any unlawful, unfair, or fraudulent practices. Bank of America also argues the trial court was correct in concluding Lueras lacked standing to sue under Business and Professions Code section 17204 (section 17204).

A. *The UCL*

The UCL permits civil recovery for ";any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising...."; (Bus. & Prof. Code, § 17200.) ";';Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or **[221 Cal.App.4th 81]** unfair, or fraudulent....';"; (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 [83 Cal.Rptr.2d 548, 973 P.2d 527].)

By defining ";unfair competition"; to include any unlawful act or practice, the UCL permits violations of other laws to be treated as independently actionable as unfair competition. (*Cel Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra,* 20 Cal.4th at p. 180.) ";';[A]n ";unfair"; business practice occurs when that practice ";offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."; [Citation.]'; [Citation.]"; (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 719 [113 Cal.Rptr.2d 399].) An unfair business practice also means ";';the public policy which is a predicate to the action must be ";tethered"; to specific constitutional, statutory or regulatory provisions.';"; (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940 [134 Cal.Rptr.2d 101].) A fraudulent practice under the UCL ";require[s] only a showing that members of the public are likely to be deceived"; and ";can be shown even without allegations of actual deception, reasonable reliance and damage."; (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 838 [51 Cal.Rptr.3d 118].)

B. *Standing*

Before addressing Lueras';s specific allegation of unlawful, unfair, or fraudulent practices, we address the threshold issue whether Lueras has alleged standing to assert a UCL claim. To have standing to sue under the UCL, a private plaintiff must allege he or she ";has suffered injury in fact and has lost money or property."; (§ 17204.) In *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322 [120 Cal.Rptr.3d 741, 246 P.3d 877] (*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."; 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,* at p. 327.)

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 **[221 Cal.App.4th 82]** 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.)

Bank of America argues Lueras cannot allege the threshold standing requirement because he had been in default for years before suing and his monthly payment under the Forbearance Agreement was less than his monthly payment under the note and deed of trust.[12] The First Amended Complaint failed to allege that Lueras lost any out of pocket money as a result of Bank of America';s acts of alleged deceptive practices, except for costs incurred in preparing and assembling materials for his application for a loan modification. We have deemed such costs to be de minimis, and they are not sufficient to qualify as injury in fact under section 17204.

But the allegation that Lueras';s home was sold at a foreclosure sale is sufficient to satisfy the economic injury prong of the standing requirement of section 17204. (See *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 522 [156 Cal.Rptr.3d 912] (*Jenkins*) [allegation of impending foreclosure and loss of home satisfies economic injury requirement].) Sale of a home through a foreclosure sale is certainly a deprivation of property to which a plaintiff has a cognizable claim. (See *Kwikset, supra,* 51 Cal.4th at p. 323.) Lueras must also satisfy the ";caused by"; prong of the section 17204 standing requirement—i.e., show ";plaintiff';s economic injury [occurred] ';as a result of'; the unfair competition. . . ." (*Kwikset, supra,* at p. 326.) The First Amended Complaint did not allege any such ";';causal connection';"; (*ibid.*) between Bank of America';s allegedly unlawful, unfair, or fraudulent conduct and Lueras';s economic injury.

The question is whether Lueras should be granted leave to amend to try to satisfy the ";caused by"; prong. We believe there is a reasonable possibility that Lueras can cure the defect in the First Amended Complaint. As we explained in addressing the fraud cause of action, Bank of America informed Lueras any pending foreclosure sale would be ";on hold"; while he was being considered for other foreclosure avoidance programs. Whitaker of Bank of America told him the May 5, 2011 letter was sent in error and he had been approved for a loan modification. Lueras was told the foreclosure sale was to be rescheduled pending Fannie Mae';s approval of his loan modification. Those allegations suggest Lueras can amend his UCL cause of action to **[221 Cal.App.4th 83]** allege Bank of America';s misrepresentations caused him to lose his home through foreclosure. In addition, Lueras might be able to allege Bank of America did not work with him in good faith to evaluate and try to identify and implement a permanent solution, as a consequence of which he lost his home through foreclosure.

In *Jenkins*, *supra*, 216 Cal.App.4th at pages 519-521, the plaintiff alleged the defendants'; unlawful, unfair, and fraudulent business practices caused her home to be subject to foreclosure. The Court of Appeal held the plaintiff failed to satisfy the ";caused by"; prong because she admitted in her complaint that she defaulted on her loan, thereby triggering the power of sale clause in the deed of trust that made her home subject to foreclosure. (*Id.* at pp. 522-523.) The court explained: ";As [the plaintiff]';s home was subject to nonjudicial foreclosure because of [the plaintiff]';s default on her loan, which occurred before Defendants'; alleged wrongful acts, [the plaintiff] cannot assert the impending foreclosure of her home (i.e., her alleged economic injury) was caused by Defendants'; wrongful actions. Thus, even if we assume [the plaintiff]';s third cause of action alleges facts indicating Defendants'; actions violated at least one of the UCL';s three unfair competition prongs (unlawful, unfair, or fraudulent), [the plaintiff';s complaint] cannot show any of the alleged violations have a causal link to her economic injury."; (*Id.* at p. 523.)

This case is similar to *Jenkins* in that Lueras';s default on the loan, not any conduct on the part of Bank of America, triggered foreclosure proceedings. *Jenkins* is distinguishable, however, because, in this case, Lueras might be able to allege that Bank of America';s alleged misrepresentations about his loan modification and the status of the foreclosure sale, or Bank of America';s failure to work with him in good faith to identify and to try to implement a permanent solution, caused him to lose his home through a foreclosure sale.

C. *Whether Lueras Alleged Unlawful, Unfair, or Fraudulent Practices*

1. *Allegations of UCL Violations*

Since, we conclude, Lueras should be given leave to amend to allege standing, we address whether he has alleged in the First Amended Complaint unlawful, unfair, or fraudulent practice on the part of Bank of America. Lueras alleged Bank of America violated the UCL in these nine ways:

1. ";Refusing to offer a ';resolution'; of the default after leading [Lueras] to believe that the ';HomeSaver'; agreement would lead to another agreement that would [c]ure the Arrearages (which they never disclosed in amount)....";

[221 Cal.App.4th 84] 2. ";Selling the home at foreclosure within 30 days of receiving the written denial of modification in violation of the Making Home Affordable Guidelines.";

3. ";Failing to stop the foreclosure process when Fannie Mae and Bank of America agreed to permanently modify Mr. Lueras[';s] loan in May 2011 in violation of federal regulations that prohibit dual tracking.";

4. ";Failing to explore foreclosure alternatives with Mr. Lueras prior to filing the Notice of Default in violation of Civ[il] Code §2923.5 and the HomeSaver plan guidelines....";

5. ";Inserting deceitful language in the forbearance plan using phrases such as ';HomeSaver'; ';long term solution[';] and ';resolution of my default'; leading the public and... Lueras to believe that they were going to be offered some type of permanent solution so that they could save their home if they signed the agreement, supplied the information requested and made all of the payments on time.";

6. ";Failing to make a determination or identify a permanent solution so that the public like... Lueras could save their home[s] by the third month of the plan in violation of the HomeSaver Guidelines quoted above in breach of industry standards set by 15 [United States Code section] 1639a.";

7. ";Falsely representing that... Lueras did not qualify for HAMP modification when, in fact... Lueras did qualify for a HAMP modification in breach of industry standards set by 15 [United States Code section] 1639a.";

8. ";Auctioning off the home for less than the amount owed, yet refusing to reduce the principal which would have resulted in a positive NPV [(net present value)] in breach of industry standards set by 15 [United States Code section] 1639a.";

9. ";Representing in the May 16, 2011[13] letter by Bank of America to Mr. Lueras that ';once we have finished reviewing your information, we will contact you within 10 days to let you know what other options are available to you and the next steps you need to take'; then selling the home within 10 days at foreclosure auction without contacting Mr. Lueras and providing other options in breach of industry standards set by 15 [United States Code section] 1639a.";

2. *Sufficiency of the Allegations of UCL Violations*

Numbers 1, 4, 5, 6, and 8 do not constitute unlawful, unfair, or fraudulent practices. As to numbers 1, 5, and 6, the Forbearance Agreement did not require **[221 Cal.App.4th 85]** Bank of America to offer Lueras a loan modification or other alternative to foreclosure. We find nothing in the Forbearance Agreement or the HomeSaver Forbearance program, which would mislead a borrower into believing ";they were going to be offered some type of permanent solution"; merely by signing the agreement and making the deferral period payments. Bank of America';s August 2009 letter informed Lueras the bank was working with Fannie Mae to reduce his mortgage payment by up to 50 percent ";for up to 6 months."; The Forbearance Agreement explicitly stated that, at the end of the deferral period, Bank of America could resume foreclosure. The Forbearance Agreement explicitly stated, ";I understand that the Agreement is not a forgiveness of payments on my Loan or a modification of the Loan Documents."; (Boldface omitted.) Nothing in the Forbearance Agreement would mislead a borrower into believing Bank of America would always determine or identify a permanent solution to ";save"; the borrower';s home.

Although the Forbearance Agreement did not require Bank of America to offer Lueras a loan modification, we concluded above that the Forbearance Agreement did impose on Bank of America the duty to act in good faith to evaluate and try to identify a permanent solution during the first three months of the forbearance period, and to implement an identified alternative by the end of the sixth month. In light of this interpretation of the Forbearance Agreement, Lueras should be given leave to amend his UCL cause of action.

As to number 4—failure to explore foreclosure alternatives—we concluded above that Lueras failed to state a cause of action for violation of Civil Code section 2923.5. Number 8—selling Lueras';s home for less than the amount owed—does not state a UCL claim because Lueras alleged in the breach of contract cause of action that Bank of America sold his home for more than the amount of the indebtedness and failed to tender him the difference. The breach of contract allegations were incorporated into the UCL cause of action.

Numbers 2, 3, 7, and 9 do allege facts which, if true, would constitute fraudulent and/or unfair practices. It is fraudulent or unfair for a lender to proceed with foreclosure after informing a borrower he or she has been approved for a loan modification, or telling the borrower he or she will be contacted about other options and the borrower';s home will not be foreclosed on in the meantime, as represented in the May 5 letter. It is fraudulent or unfair for a lender to misrepresent the status or date of a foreclosure sale. In this case, Lueras alleged he contacted Bank of America about the May 6, 2011 letter, was informed he had already been approved for a loan modification, and was told the trustee';s sale, which had been rescheduled for May 18, 2011, would be reset pending approval by Fannie Mae of the loan modification.

[221 Cal.App.4th 86] Bank of America argues that recent legislation (known as the ";California Homeowner Bill of Rights";) that prohibits the practice of ";dual tracking"; was not effective in 2011 and is not to be applied retroactively.[14] Lueras argues the California Homeowner Bill of Rights demonstrates that Bank of America';s conduct, though not unlawful at the time, ";was unfair and/or fraudulent."; We do not address either argument because Lueras alleged that Bank of America engaged in conduct that amounted to fraudulent practices, independent of the California Homeowner Bill of Rights.

VI.

Quiet Title

In the sixth cause of action of the First Amended Complaint, Lueras sought to quiet title to the property and alleged, ";[t]he claims of defendants are without any right whatever and such defendants have no right or interest in the Subject Property."; A borrower may not, however, quiet title against a secured lender without first paying the outstanding debt on which the mortgage or deed of trust is based. (*Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707 [33 Cal.Rptr.2d 288] ["mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee";]; *Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477 [114 Cal.Rptr. 91] [borrower cannot quiet title without discharging the debt].) The cloud on title remains until the debt is paid. (*Burns v. Hiatt* (1906) 149 Cal. 617, 620-622 [87 P. 196].)

Lueras does not challenge the validity of the underlying debt. He alleged he refinanced his home for $385, 000 in 2007 and he executed a deed of trust to secure the loan. Instead, he argues tender of the indebtedness is not required to quiet title because (1) making payments under the Forbearance Agreement constituted a tender of the debt, and (2) tender would not have been required to halt or set aside a foreclosure sale.

As to the first argument, making the monthly payments required under the Forbearance Agreement would not constitute full payment of the **[221 Cal.App.4th 87]** outstanding loan. As to the second argument, full tender of the indebtedness must be made to set aside a foreclosure sale based on irregularities in the foreclosure procedure. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 103-104 [134 Cal.Rptr.3d 622].) Full tender of the indebtedness is not required if the borrower attacks the validity of the underlying debt. (*Id.* at pp. 112-113.) Lueras is not seeking to set aside the foreclosure sale, nor is he challenging the validity of the underlying debt.

In his supplemental brief, Lueras argues *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th

1250 [150 Cal.Rptr.3d 673] supports his contention that tender of the indebtedness was unnecessary to maintain the quiet title action. In *Pfeifer*, the Court of Appeal held that the borrowers stated a claim for wrongful foreclosure and declaratory and injunctive relief, based on allegations the lenders failed to comply with certain face to face interview requirements imposed by the Federal Housing Administration deed of trust before conducting an otherwise valid nonjudicial foreclosure. (*Id.* at p. 1255.) The face-to-face interview and other servicing requirements imposed by federal regulations were conditions precedent to acceleration of the debt and foreclosure. (*Ibid.*) The Court of Appeal concluded the borrowers were not required to tender the indebtedness before seeking to enjoin the foreclosure sale because ";to permit a foreclosure when the lender has not complied with the requirements that may have prevented any need for a foreclosure would defeat a salient purpose of the... regulations."; (*Id.* at p. 1280.) In addition, tender of the indebtedness is required only to set aside a completed sale, and is not required in an action to prevent a foreclosure sale. (*Ibid.*)

Pfeifer v. Countrywide Home Loans, Inc. and the other tender cases are inapplicable here because Lueras has not sued to set aside or prevent a foreclosure sale. In the sixth cause of action, he sought to quiet title to the property, which he cannot do without paying the outstanding indebtedness.

Disposition

The judgment in favor of Fannie Mae is affirmed. The judgment as to the causes of action for violation of Civil Code section 2923.5 and to quiet title is affirmed. In all other respects, the judgment in favor of Bank of America and ReconTrust is reversed and the matter is remanded to the trial court with directions to grant Lueras leave to file an amended complaint. Lueras shall recover costs incurred on appeal.

Ikola, J., concurred.

THOMPSON, J., Concurring and Dissenting

I concur in those portions of the majority opinion which conclude the trial court correctly sustained the **[221 Cal.App.4th 88]** demurrers to the first amended complaint, because Lueras did not state any viable cause of action. I respectfully dissent from those portions of the majority opinion which conclude the trial court incorrectly denied leave to amend, because Lueras did not demonstrate a reasonable possibility he can state any viable cause of action. Therefore, the trial court did not abuse its discretion and the judgment should be affirmed in all respects.

INTRODUCTION

There are three core areas of disagreement between my views and the views expressed by my colleagues in the majority opinion.

First, the majority refuses to acknowledge what the parties themselves do not dispute—there is no foreclosure upon which this wrongful foreclosure action can be based. Lueras admitted the trustee';s sale was rescinded before the trustee';s deed was recorded, and Lueras alleged he was never deprived of ownership or possession of his home. The trial court properly considered these facts when ruling on the demurrers and we are required to do the same when reviewing the propriety of those rulings. The consequence of the majority';s refusal to do so is akin to allowing a wrongful death action to proceed when the alleged victim did not die.

Second, despite recognizing the long-standing rule that a residential lender does not owe any duty of care to a borrower, the majority stretches to create an exception, and concludes a residential lender does owe a duty of care to not make misrepresentations about the status of an application for a loan modification or about the date, time, or status of a foreclosure sale. There is no such exception. Furthermore, the majority fails to analyze whether Lueras pleaded or demonstrated a reasonable possibility he can plead facts sufficient to establish the elements of a negligent misrepresentation cause of action against Bank of America. Lueras did not and cannot plead any such facts.

Third, the majority concedes the breach of contract cause of action is hopelessly deficient, but asserts the provisions of Fannie Mae Announcement 09-05R (Announcement 09-05R) must be ";read into"; the forbearance agreement to circumvent those deficiencies. The majority cites no case which has followed this approach or found a borrower has a private contractual right to sue a lender for money damages based upon alleged noncompliance with Announcement 09-05R. Moreover, this approach violates basic principles of contract law and injects uncertainty into California residential lending.

[221 Cal.App.4th 89] FACTS

A. Lueras';s Factual Allegations

The majority summarizes some of the factual allegations, and fails to note many of the glaring factual omissions in the verified first amended complaint. All of the factual allegations and omissions I find material are set out below. Of necessity there is some repetition, but only to keep everything in proper context.

Lueras owned the property (Property) and occupied it as his primary residence at all relevant times, through and including the date on which the first amended complaint was filed. Lueras did not allege he ever was deprived of ownership or possession of the Property.

In March 2007, Lueras refinanced the Property with a 30-year adjustable rate $385, 000 loan (Loan) originated by Gateway Business Bank (Gateway). Gateway, a potentially indispensible party, was not named as a defendant in the first amended complaint and is not a party to this appeal.

The Loan was evidenced by a promissory note (Note) and secured by a deed of trust (Deed of Trust) which encumbered the Property. The Deed of Trust was attached to the first amended complaint.

Lueras did not allege Gateway subsequently retained or sold the Note and the beneficial interest under the Deed of Trust. Thus, the identity of the current lender under the Note and Deed of Trust (collectively Loan Documents) is uncertain.

Bank of America (as successor to Countrywide Home Loans Servicing) was the servicer of the Loan. Lueras did not allege Bank of America was a party to the Loan Documents.

Lueras did not allege Fannie Mae was a party to the Loan Documents. Moreover, Lueras did not allege the Loan was owned or insured by Fannie Mae.

Lueras';s regular monthly payment on the Loan was $1, 965.10. Lueras has not made a full regular monthly payment on the Loan since December 2008.

In August 2009, more than eight months after Lueras stopped making regular monthly payments on the Loan, Bank of America offered him a forbearance agreement (Forbearance Agreement) and Lueras accepted.

[221 Cal.App.4th 90] Fannie Mae is not a party to the Forbearance Agreement.

The Forbearance Agreement required Lueras to make reduced monthly payments on the Loan in the amount of $1, 101.16 during the deferral period. Bank of America agreed to apply these reduced monthly payments to the delinquent full regular monthly payments on the Loan.

The Forbearance Agreement provides, ";The Servicer will suspend any scheduled foreclosure sale, provided I continue to meet the [reduced monthly payment] obligations under this [Forbearance] Agreement.";

The Forbearance Agreement also provides, ";If this Agreement terminates, however, then any pending foreclosure action... may be immediately resumed from the point at which it was suspended, and no new notice... will be necessary to continue the foreclosure action, all rights to such notices being hereby waived....";

Lueras agreed, ";Upon termination of this [Forbearance] Agreement, if I have not entered into another agreement with Servicer to cure or otherwise resolve my default under the Loan Document [*sic*] or reinstated my Loan in full, the Servicer will have all of the rights and remedies provided by the Loan Documents....";

Lueras acknowledged, ";I further understand and agree that the Servicer is not obligated or bound to make any modification of the Loan Documents or provide any other alternative resolution of my default under the Loan Documents.";

Lueras made reduced payments on the Loan during the six-month deferral period under the Forbearance Agreement beginning in September 2009 and ending in March 2010, and ";beyond for four more months.";

Lueras has not made any payment on the Loan since July 2010.

In October 2010, more than three months after Lueras stopped making reduced monthly payments, and more than twenty-two months after he stopped making regular monthly payments, ReconTrust Company (ReconTrust) recorded and served a Notice of Default (the Notice of Default) on Lueras.

The Notice of Default advised Lueras of his rights under the Loan Documents to cure the payment default and reinstate the Loan to avoid acceleration and sale. Lueras did not allege he exercised his right to pay the delinquent amount, cure the default, and reinstate the Loan.

[221 Cal.App.4th 91] The Notice of Default also advised Lueras, ";Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure."; Lueras did not allege he tried to sell the Property prior to the trustee';s sale.

In February 2011, more than six months after Lueras stopped making reduced monthly payments, and more than twenty-five months after Lueras stopped making regular monthly payments, ReconTrust recorded and served a Notice of Trustee';s Sale (Notice of Sale).

The trustee';s sale was originally set for February 22, 2011, and was subsequently postponed three times to ";3/2/11, 4/1/11, and 5/4/11.";

On May 5, 2011 Bank of America sent Lueras a letter stating he did not qualify for a modification under the Home Affordable Modification Program (HAMP).

Immediately after receiving the May 5 letter, ";[Lueras] contacted Nancy Whitaker at Bank of America who advised plaintiffs [*sic*] that that letter was sent by a third party ';home retention'; vendor and was an error. Ms. Whitaker further advised that plaintiffs were put into a program that was already approved... [and s]he just needed Fannie Mae';s approval.";

On May 6, 2011 Bank of America sent Lueras another letter stating his financial documents were being reviewed to determine if he qualified for a HAMP modification.

Immediately after receiving the May 6 letter, Lueras contacted Bank of America and was ";informed this letter was sent in error as plaintiffs [*sic*] had already ';been approved'; by the bank. Nancy Whitaker of Bank of America advised that the scheduled Trustee';s Sale of May 18, would be reset, pending approval of FANNIE MAE.";

Lueras implied but did not allege there was an ";actual sale"; on May 18, 2011. Lueras also did not allege he was deprived of ownership or possession of the Property as a result of that sale.

Lueras did allege he retained ownership and possession of the Property at all relevant times up to and including the date the first amended complaint was filed.

B. Lueras';s Factual Admissions

Lueras repeatedly admitted the trustee';s sale was rescinded before the trustee';s deed was recorded. These admissions were made in his written briefs and oral arguments both in the trial court and in this court, all as described below.

[221 Cal.App.4th 92] In his opposition to the demurrers to the original complaint, Lueras admitted ";after this lawsuit was filed the trustee was able to rescind"; the trustee';s sale.

At the hearing on the demurrers to the original complaint, counsel for Lueras admitted, ";I should inform the court that the sale was rescinded, so we are now at pre-foreclosure status. ";

Similarly, in his opposition to the demurrers to the first amended complaint, Lueras again admitted ";after this lawsuit was filed the trustee was able to rescind"; the trustee';s sale.

And, at the hearing on the demurrers to the first amended complaint, counsel for Lueras admitted, ";as the court properly noted in the tentative ruling, there was a rescission in this case.";

In his opening brief on appeal, Lueras admitted, ";after this lawsuit filed, the trustee was able to rescind"; the trustee';s sale; ";the [trial] court focused on the sale that was rescinded after the litigation ensued";; and ";as the [trial c]ourt noted, the sale had been rescinded.";

Likewise, in his reply brief on appeal, Lueras admitted and argued, ";[t]he rescission of the trustee';s deed upon [*sic*] does not moot Mr. Lueras'; claims";; ";after the lawsuit was filed, BANA [Bank of America] rescinded the trustee';s deed upon sale";; and ";the trustee';s deed upon sale was not recorded....";

Finally, at oral argument in this court, counsel for Lueras admitted there is no record of the trustee';s sale, the trustee';s deed was never recorded, and Lueras still has title to and possession of the Property.

DISCUSSION

A. Standard of Review and Lueras';s Burden on Appeal

";When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] 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* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].)

";';To satisfy that burden on appeal, a plaintiff ";must show in what manner he can amend his complaint and how that amendment will change the legal **[221 Cal.App.4th 93]** effect of his pleading."; [Citation.].... The plaintiff must clearly and specifically set forth the ";applicable substantive law"; [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.]';"; (*Rossberg v. Bank of America , N.A.* (2013) 219 Cal.App.4th 1481, 1491 [162 Cal.Rptr.3d 525].)

No authority commands or even suggests these pleading requirements do not apply unless the plaintiff has been given more than two bites at the apple. We are required to affirm the ruling if there is any ground on which the demurrer could have been properly sustained. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752 [154 Cal.Rptr.3d 394].) Also, leave to amend should not be granted where an amendment would be futile. (*Newell v State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1100 [13 Cal.Rptr.3d 343].) It is axiomatic, ";The law neither does nor requires idle acts."; (Civ. Code, § 3532.).

B. Factual Allegations, Judicial Notice and Factual Admissions

We accept the factual allegations of the verified first amended complaint as true. ";';We also consider matters which may be judicially noticed.'; (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241].)" (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) To that end, I take judicial notice (Evid. Code § 452, subd. (d)) the trial court';s final minute order ruling on the demurrers expressly relied upon the fact that, ";plaintiff admits in the Opposition that the foreclosure sale was rescinded.";

We also take into account briefs and arguments, which are ";reliable indications of a party';s position on the facts as well as the law, and a reviewing court may use statements in them as admissions against the party. [Citations.]"; (9 Witkin, California Procedure (5th ed. 2008) Appeal, § 335, p. 386.) Likewise, ";[a]n express concession or assertion in a brief is frequently treated as an admission of a legal or factual point, controlling in the disposition of the case. [Citations.]"; (*Id*., § 704, p. 773.).

One court citing Witkin held an admission in the opening brief was ";the equivalent of a concession, "; which, taken together with the failure to allege a necessary element, ";controls the disposition of the case."; (*Federer v. County of Sacramento* (1983) 141 Cal.App.3d 184, 186 [190 Cal.Rptr. 187].) Another court also citing Witkin relied on concessions made by the plaintiffs counsel during oral argument to show there was no basis for a cause of action. (*DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019, fn. 3 [242 Cal.Rptr. 368], superseded by statute on another ground as stated in *Ramona v. Superior Court* (1997) 57 Cal.App.4th 107, 112-113, fn. 6 [66 Cal.Rptr.2d 766].).

[221 Cal.App.4th 94] In *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485 [161 Cal.Rptr.3d 728] the court affirmed an order sustaining a demurrer without leave to amend, and expressly relied on the factual allegations and omissions in the complaint, together with factual admissions in the trial court and in appellant';s briefs. (*Id*. at p. 1515, fn. 19, citing, inter alia, *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 725 [60 Cal.Rptr.3d 375] [oral statement by counsel in same action is binding judicial admission] & *Electric Supplies Distributing Co. v. Imperial Hot Mineral Spa* (1981) 122 Cal.App.3d 131, 134 [175 Cal.Rptr. 644] [stipulations in brief constitute binding judicial admissions].)

Similarly, in *Setliff v. E. I. Du Pont de Nemours & Co.* (1995) 32 Cal.App.4th 1525 [38 Cal.Rptr.2d 763] the court affirmed an order sustaining a demurrer without leave to amend and stated, ";Plaintiff';s papers in opposition are reliable indications of his position on the facts and we may use these statements as admissions against him. [Citation.]"; (*Id*. at p. 1536.) Likewise, in *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513 [104 Cal.Rptr.2d 439], the court declared, ";We also may, and shall, take judicial notice of admissions in plaintiff';s opposition to the demurrer. (Evid. Code, § 452, subd. (d).)"; (*Id*. at p. 518.)

In sum, we are not permitted to turn a blind eye to Lueras';s admissions the trustee';s sale was rescinded before the trustee';s deed was recorded. These admissions are consistent with his verified affirmative allegations he was never deprived of ownership or possession of the Property. These admissions were properly considered by the trial court when ruling on the demurrers, without any objection by Lueras. We are required to do the same when reviewing the propriety of those rulings.

C. Negligence and Negligent Misrepresentation

The long-standing rule that a residential lender does not owe any duty of care to a borrower is well settled and summarized in the majority opinion. I would only add that all of the reasons why a residential lender owes no such duty to a borrower apply with even greater force to a servicer, even though courts are not always careful to differentiate between the duties of lenders and the duties of servicers. (*Somera v. IndyMac Fed. Bank, FSB* (E.D.Cal., Mar. 3, 2010, No. 2:09-cv-01947-FCD-DAD) 2010 WL 761221, p. *5].)

Applying the no-duty rule to the negligence claim, the majority recognizes Bank of America did not owe Lueras a duty to offer, consider, or approve a loan modification, or to explore and offer foreclosure alternatives, or to handle the Loan in any other way so as to prevent foreclosure. I agree. These are all core functions well within the scope of the conventional role of a residential lender and the no-duty rule applies.

[221 Cal.App.4th 95] Despite recognizing the no-duty rule, the majority stretches to create an exception, and concludes Bank of America ";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." (Maj. opn., ante, at p. 68.) I disagree. There is no such exception. No duty is owed for purposes of negligent misrepresentation or negligence. (*Aspiras v. Wells Fargo Bank, N.A.* (2013) 219 Cal.App.4th 948, 963-964 [162 Cal.Rptr.3d 230].)

";As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty...

owed by a defendant to the injured person. [Citation.] The determination of whether a duty exists is primarily a question of law. [Citation.]"; (*Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864 [245 Cal.Rptr. 211].) "[T]he test for determining whether a financial institution owes a duty of care to a borrower-client ';";involves the balancing of various factors....";'; [Citations.]"; (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1098 [283 Cal.Rptr. 53].)

Without balancing the various factors discussed in *Nymark,* the majority discovers a duty which has never before been recognized. But there is no reasoned basis for making any distinction between these residential lender-borrower communications and other residential lender-borrower communications. Communications about the status of a modification application or a trustee';s sale are also core functions well within the scope of the conventional role of a residential lender. Hence, the no-duty rule applies equally to negligence and negligent misrepresentation claims in this situation.

Furthermore, the rights and duties of lenders and borrowers regarding these communications are set forth in the Loan Documents and applicable law, including the Federal Truth in Lending Act (15 U.S.C. § 1601 et seq.) and the California statutory nonjudicial foreclosure statutes (Civ. Code, §§ 2924 through 2924k.). It is inconsistent with these comprehensive and exhaustive statutory schemes to incorporate common law negligent misrepresentation claims in this context. (Cf. *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154 [121 Cal.Rptr.3d 819]; *Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 824-829 [134 Cal.Rptr.2d 162].)

Leaving aside the duty question, Lueras did not request leave to plead a negligent misrepresentation cause of action. But even if he had, Lueras also did not demonstrate a reasonable possibility he can plead ";';";(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another';s reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5)

[221 Cal.App.4th 96] resulting damage.";'; [Citation.]"; (*Wells Fargo Bank, N.A. v. FSI, Financial Solutions, Inc.* (2011) 196 Cal.App.4th 1559, 1573 [127 Cal.Rptr.3d 589].)

Lueras alleged both oral and written misrepresentations by Bank of America about the status of the loan modification application and the trustee';s sale.

The alleged oral misrepresentations were all made by Whitaker in early May 2011 and may be summarized as follows. First, Whitaker told Lueras the May 5 and May 6 letters had been sent in error. Second, she told him the loan modification application had been approved by Bank of America, subject to Fannie Mae approval. Third, she told him the trustee';s sale would be reset, again pending Fannie Mae approval.

Regarding the statements the May 5 and 6 letters had been sent in error, Lueras did not allege and cannot allege these statements were untrue or that Whitaker had no reasonable ground for believing them to be true. Obviously, his entire case is predicated upon his alleged reliance on the truth of these statements.

Regarding the statement Bank of America had approved the loan modification application, subject to Fannie Mae approval, again Lueras did not allege this statement was untrue or Whitaker had no reasonable ground for believing it to be true. Besides, this statement is conditional, and he did not allege that condition was satisfied.

Regarding the statement the trustee';s sale would be reset, while Lueras did allege this was untrue, he did not allege Whitaker said the trustee';s sale *had been* reset. Instead he alleged she said it *would be* reset. So this statement is really a prediction about a future event, not a misrepresentation about a past or existing fact.

Lueras also did not allege any facts showing he justifiably relied on the statement the trustee';s sale would be reset. In particular, Lueras did not allege he did or refrained from doing anything after this statement was made (on May 6, 2011) and before the trustee';s sale occurred (on May 18, 2011). All of the alleged actions or inactions took place well before this statement was made.

Regarding all of these statements, Lueras did not allege and cannot allege any resulting damage. Again the trustee';s sale was rescinded so Lueras was never deprived of ownership or possession of the Property.

Regarding the alleged written misrepresentations in the May 5 and 6 letters, Lueras cannot allege he reasonably relied on the contents of those **[221 Cal.App.4th 97]** letters, and at the same time allege he relied on the statements that those letters had been sent in error. He cannot have it both ways. But even if he could, again Lueras did not allege and cannot allege he suffered any resulting damage, because the trustee';s sale was rescinded.

In conclusion, Lueras did not plead or demonstrate a reasonable possibility he can plead sufficient facts to establish the elements of a negligent misrepresentation cause of action against Bank of America based upon communications concerning the status of the loan modification application or the trustee';s sale. Hence, there is no basis for granting Lueras';s leave to allege a negligent misrepresentation cause of action.

D. Breach of Contract

Lueras alleged Bank of America breached the Forbearance Agreement by terminating the deferral period, and by failing to offer him a loan modification or some other resolution before commencing or resuming the foreclosure process. But Lueras did not plead sufficient facts to establish the elements of this claim.

1. Breach

Lueras did not plead any facts showing Bank of America breached the Forbearance Agreement ";by terminating the ';Deferral Period';...."; Actually, Lueras did not plead any facts showing Bank of America terminated the deferral period at all. On this point, I agree with the majority opinion. Examining the first amended complaint as a whole reveals the parties intended the deferral period to terminate and it did terminate by its own terms no later than March 16, 2010.

Lueras also did not plead any facts showing Bank of America breached the Forbearance Agreement by failing to offer him a loan modification or some other resolution before commencing or resuming the foreclosure process. The Forbearance Agreement simply did not require Bank of America to do or abstain from doing any of the things Lueras complained of. Thus, Bank of America did not breach the Forbearance Agreement by failing to offer Lueras a loan modification or some other resolution before commencing or resuming the foreclosure process.

Recognizing the inevitability of this conclusion, the majority asserts the ";provisions of [Fannie Mae] Announcement 09-05R must be read into"; the Forbearance Agreement to circumvent these deficiencies. (Maj. opn., ante, at p. 73.) The majority has not cited any case which has followed this approach or found a borrower has a private contractual right to sue a lender for money **[221 Cal.App.4th 98]** damages based upon alleged noncompliance with Announcement 09-05R. (Cf. *Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1399 [159 Cal.Rptr.3d 345] [HAMP and programs like HAMP consistently construed to create no private rights or private causes of action for borrowers].) One can easily see why.

To begin with, the Forbearance Agreement is a contract between Lueras, as the borrower under the Loan Documents, and Bank of America, as the servicer and the ostensible agent of the lender under the Loan Documents. Fannie Mae is not a party to the Forbearance Agreement and Lueras did not allege the Loan is owned or insured by Fannie Mae. In short, it appears Fannie Mae is a complete stranger to the Forbearance Agreement with no contractual rights or obligations thereunder vis-à-vis the Loan.

Next, reading Announcement 09-05R into the Forbearance Agreement violates basic principles of contract formation and interpretation. Announcement 09-05R was not part of the Forbearance Agreement offer or acceptance. In fact, there is no reference to Announcement 09-05R in the Forbearance Agreement, and there is no ambiguity in the Forbearance Agreement which requires or even permits resort to this extrinsic evidence for interpretation. Doing so contradicts some of the express terms of the Forbearance Agreement, and renders other express terms meaningless.

The only case cited by the majority to support this radical departure from established law is *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780 [154 Cal.Rptr.3d 285]. *West* is legally and factually inapposite.

The contract at issue in *West* was a trial period plan (TPP) under HAMP, while the Forbearance Agreement at issue here is not. Indeed, the Forbearance Agreement bears no resemblance in form or function to a TPP under HAMP. They are different creatures which serve different purposes. A TPP tests the viability of an identified and agreed upon long-term solution. The Forbearance Agreement merely provides time to see if a viable long-term solution can be identified and agreed upon.

In addition, the TPP in *West* was still in effect, and the borrower tendered a timely reduced monthly payment just two days before the trustee';s sale. (*West v. JPMorgan Chase Bank, N.A.*, *supra*, 214 Cal.App.4th at p. 790.) Here, the Forbearance Agreement ended no later than March 16, 2010, and Lueras stopped making reduced monthly payments on July 1, 2010, more than nine months before the trustee';s sale.

Lastly, the majority suggests the implied covenant of good faith and fair dealing may also be used to circumvent these deficiencies. Not so. ";[A]n **[221 Cal.App.4th 99]** implied covenant of good faith and fair dealing cannot contradict the express terms of a contract."; (*Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1014 [146 Cal.Rptr.3d 90].) Similarly, the implied covenant cannot be used to create additional obligations not present in a contract, and cannot be used to vary the terms of an unambiguous contract. (*21st Century Ins. Co. v. Superior Court* (2009) 47 Cal.4th 511, 527 [98 Cal.Rptr.3d 516, 213 P.3d 972].)

2. Damages

Lueras did not plead any facts showing he was damaged by Bank of America';s alleged termination of the deferral period or failure to offer him a loan modification or some other resolution before commencing or resuming the foreclosure process. Lueras was always obligated to repay the Loan, and the reduced monthly payments allegedly made during and after the deferral period, together with any late fees and charges resulting from his payment default, were always owed under the Loan Documents, separate and apart from the Forbearance Agreement.

3. Leave to Amend

Lastly, Lueras did not demonstrate a reasonable possibility he can plead sufficient facts to establish the elements of a breach of contract cause of action against Bank of America. It is not sufficient for Lueras to assert ";an abstract right to amend."; (*Rakestraw v. California Physicians'; Service* (2000) 81 Cal.App.4th 39, 43 [96 Cal.Rptr.2d 354].) Again, he must set forth the legal authority for the claim, the elements of the claim, and the specific factual allegations that would establish each of those elements. (*Rossberg v. Bank of America*, *supra*, 219 Cal.App.4th at p.1491.) Lueras made no attempt to meet this burden. Therefore, the demurrers to the breach of contract cause of action based upon the Forbearance Agreement were properly sustained without leave to amend. On this point the majority opinion';s reliance upon the liberal policy regarding amendments to justify a contrary result is misplaced. (*Id.*, at p. 1503.)

E. Fraud

The majority states the elements of a fraud cause of action. They are the same as the elements of a negligent misrepresentation cause of action discussed above, with the exception of the knowledge element. (*Aspiras v. Wells Fargo Bank, N.A.*, *supra*, 219 Cal.App.4th at p. 963, fn. 4.) Since the elements are essentially the same, all of the deficiencies in the negligent misrepresentation claim discussed above are also deficiencies in the fraud claim. There are additional deficiencies as well.

[221 Cal.App.4th 100] Lueras alleged, based upon the Forbearance Agreement, Bank of America led him to believe it was going to work with him so he could stay in his home as long as he made the requested (i.e. reduced) monthly payments, but instead Bank of America concealed the fact it was not going to identify a long-term solution. Yet, Lueras did not allege any part of the Forbearance Agreement was false. And, once again, nothing in the Forbearance Agreement required Bank of America to offer Lueras a loan modification or identify another resolution.

Lueras also alleged the May 5 letter stated Bank of America would contact Lueras in 10 days to explore foreclosure alternatives, but this statement was false, because the trustee';s sale occurred before the 10 days had elapsed. Then again, Lueras alleged he relied on the fact he was told the May 5 letter had been sent in error, so any alleged reliance on the contents of that letter was unreasonable. Once more, he cannot have it both ways. Plus, his alleged reliance in making the reduced monthly payments ended in July 2010, more than 10 months before the May 5 letter was sent.

For all of these reasons, I agree with the majority the demurrers to the fraud cause of action were properly sustained. On the other hand, I do not agree with the majority, ";the exhibits attached to the First Amended Complaint... demonstrate there is a reasonable possibility the defects in the fraud cause of action can be cured by amendment." (Maj. opn., ante, at p. 79.) The exhibits at issue are the May 5 and 6 letters.

On this point, the majority relies on the same faulty logic as Lueras.[15] But any alleged reliance on the May 5 and 6 letters was patently unreasonable because Lueras pled he relied on the oral representation those letters had been sent in error.

And at any rate, Lueras did not and cannot allege any ";specific damages"; he suffered, because the trustee';s sale was rescinded. (*Rossberg v. Bank of America*, *supra*, 219 Cal.App.4th at p. 1499.) Consequently, the demurrers to the fraud cause of action were properly sustained without leave to amend.

F. Business and Professions Code Section 17200

Finally, I disagree with the majority statement, ";the allegation that Lueras';s home was sold at a foreclosure sale is sufficient to satisfy the economic injury **[221 Cal.App.4th 101]** prong of the standing requirement of section 17204." (Maj. opn., ante, at p. 82.) There is no such allegation in the first amended complaint. And, in any event, the exact opposite is true. Lueras has not suffered any legally cognizable harm. Rather, he has experienced an incredible windfall. Lueras has avoided foreclosure on the Property even though he has not made any payment on the Loan since July 2010. Hence, Lueras has no standing and the demurrers to the unfair competition claim were properly sustained without leave to amend.

CONCLUSION

The trial court correctly sustained the demurrers to the first amended complaint and did not abuse its discretion by denying leave to amend. The contrary decision by the majority represents a departure from settled law and creates uncertainty which may disrupt California residential lending. The judgment should be affirmed.

Notes:

[1] ";[T]he United States Department of the Treasury implemented the Home Affordable Mortgage Program (HAMP) to help homeowners avoid foreclosure during the housing market crisis of 2008. ';The goal of HAMP is to provide relief to borrowers who have defaulted on their mortgage payments or who are likely to default by reducing mortgage payments to sustainable levels, without discharging any of the underlying debt.'; [Citation.]"; (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 785 [154 Cal.Rptr.3d 285] (*West*).)

[2] United States Department of the Treasury, Announcement 09-05R, Reissuance of the Introduction of the Home Affordable Modification Program, HomeSaver Forbearance, and New Workout Hierarchy (Apr. 21, 2009), available at <https://www.fanniemae.com/content/announcement/0905.pdf> [as of Oct. 31, 2013] (Announcement 09-05R).

[3] The trial court sustained the demurrer without leave to amend as to plaintiff Mary Lueras, and that ruling has not been challenged.

[4] In the appellant';s opening brief, Lueras argues that Bank of America';s ";unreasonable delay in the loan modification process"; led to the foreclosure of his home. No such allegation appears in the First Amended Complaint.

[5] Nothing we say is intended to alter the rights, obligations, and duties created by the Truth in Lending Act, 15 United States Code section 1601 et seq. or other statutes.

[6] ReconTrust was not named as a defendant in the breach of contract cause of action.

[7] Lueras also alleged: ";Bank of America never [(1)] offered another resolution of Mr. Lueras';[s] default; (2) informed Mr. Lueras if he was approved or denied a loan modification as he requested at the end of the 6th month; (3) disclosed the amount his loan was in arrears on the 6th month when no other form of relief was forthcoming from Bank of America...; and (4) by commencing or resuming the foreclosure process by filing a Notice of Default and setting an auction date without providing the HomeSaver resolution Bank of America was required to identify and provide.";

[8] The letter from Bank of America notifying Lueras he was eligible for the HomeSaver Forbearance program stated, ";[y]ou are eligible for a reduced mortgage payment for *up to six months*."; (Boldface omitted, italics added.)

[9] Defined in the Forbearance Agreement as BAC Home Loans Servicing, LP, ";the subsidiary of Bank of America that services your mortgage.";

[10] A court may refer to dictionaries as sources of a word';s ordinary, usual meaning. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122 [29 Cal.Rptr.3d 262, 112 P.3d 647].)

[11] *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481 [162 Cal.Rptr.3d 525] is distinguishable and does not change our conclusion that Lueras should have leave to amend the fraud cause of action. The First Amended Complaint, including the attached exhibits, alleged that Bank of America misrepresented not only that it had approved a loan modification, but also that the pending foreclosure sale had been postponed. We cannot say as a matter of law that Lueras suffered no damages as a result of such misrepresentations. Unlike the situation in *Rossberg*, here, more than ";';an abstract right to amend';"; (*Rossberg v. Bank of America, N.A.*, *supra*, at p. 1504) has been shown.

[12] Bank of America also asserts that Lueras ";conceded that Bank of America rescinded the May 2011 foreclosure sale."; As we explained above, the First Amended Complaint did not allege rescission of the foreclosure sale, and no party has requested we take judicial notice of anything establishing such rescission. In reviewing the judgment, we are limited to the well pleaded facts of the complaint and matters subject to judicial notice. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126.)

[13] The First Amended Complaint does not include this letter as an exhibit.

[14] On July 11, 2012, the Governor approved legislation known as the ";California Homeowner Bill of Rights"; (Sen. Bill No. 900 (2011-2012 Reg. Sess.); Assem. Bill No. 278 (2011-2012 Reg. Sess.)). (Governor Brown';s signing message on Assem. Bill No. 278 (2011-2012 Reg. Sess.) July 11, 2012.) The California Homeowner Bill of Rights prohibits, among other things, ";dual track"; foreclosures, which occur when a servicer continues foreclosure proceedings while reviewing a homeowner';s application for a loan modification; requires a single point of contact for homeowners who are negotiating a loan modification; and expands notice required to be given to the borrower before the lender can take action on a loan modification or pursue foreclosure. (Governor Brown';s signing message; see Stats. 2012, ch. 86, §§ 1-25; Stats. 2012, ch. 87, §§ 1-25.) The California Homeowner Bill of Rights became effective on January 1, 2013. (Cal. Const., art. IV, § 8, subd. (c)(1) [effective date of new statutes is January 1, following 90 days after enactment].)

[15] For example, the majority states: ";In the May 5, 2011 letter, Bank of America informed Lueras any pending foreclosure sale would be ';on hold';.... Whitaker... told him the May 5 letter was sent in error.... Despite the express representation in the May 5 letter that no foreclosure sale would proceed, ... the foreclosure sale was conducted on May 18." (Maj. opn., ante, at p. 80.)

APPENDIX F

APPENDIX F

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186 P.2d 452

82 Cal.App.2d 408

CARLO PANNO, Respondent,

v.

MARY RUSSO, as Administratrix, etc., et al., Appellants.

Civ. No. 15722.

California Court of Appeal, Second District, First Division

Nov. 17, 1947

[82 Cal.App.2d 409] COUNSEL

John Van Aalst and Whitelaw &amp Whitelaw for Appellants. Henry O. Wackerbarth and Edward J. Cotter for Respondent

OPINION

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WHITE, J.

This is an action for damages arising out of the alleged breach by a partnership of a contract to sell to plaintiff a crop of oranges. Louis Russo, the active member of the partnership, and who conducted the transaction here involved, died prior to the commencement of the action. Plaintiff joined as defendants the surviving partners, the administratrix of the estate of the deceased partner, and others. From a judgment in favor of plaintiff and against the surviving partners and the administratrix, this appeal is prosecuted.

In his complaint plaintiff alleged that on November 23, 1943, Russo Brothers, a copartnership composed of Louis, Joseph and Tony Russo, entered into a written agreement, entitled "Bill of Sale," the pertinent portions of which are as follows:

[82 Cal.App.2d 410]

"We, Russo Bros. agree to sell and Carlo Panno agrees to buy the entire crop of 160 acres, or approximately 55,000 boxes of Valencia oranges ... for the purchase price of Three and One Quarter (.03 1/4) cents per pound FOB roadside in buyer's containers.

"... The sellers agree to irrigate and take care of the crop to maturity in a good and farmerlike manner, but are not to be held responsible for any damage done by wind, or any other act beyond their control.

"The sellers hereby acknowledge the deposit payment of Five Thousand ($5,000.00) Dollars.

"The Buyer agrees to pay an additional advance of Twenty Thousand ($20,000.00) Dollars, January 1st, 1944, and pay weekly for all oranges delivered to him. ..."

This agreement was executed by Louis Russo, now deceased, on behalf of the partnership, Russo Brothers.

Plaintiff further alleged that on January 3, 1944, he paid to Russo Brothers the sum of $10,000, being one-half the payment required by the contract, which sum Russo Brothers accepted and "thereupon waived the payment, at that time, of the remaining sum of $10,000 due on said 1st day of January, 1944, and agreed that said additional sum of $10,000 need not be paid ... until demand therefore was made ..." That Russo Brothers never at any time demanded payment of the $10,000 balance, but on February 3, 1944, sold the orange crop in question to other parties, and on February 4, 1944, notified plaintiff that they had canceled their agreement with him; whereupon plaintiff offered to pay the balance of $10,000 and made a tender thereof to Russo Brothers, which tender was refused.

The theory of plaintiff's first cause of action is that payment of the full $20,000 as required by the agreement was waived by the partnership, acting through Louis Russo, and the second cause of action alleges that Russo Brothers and plaintiff made an oral agreement permitting a delay in payment of the second $10,000 until requested; that pursuant to such oral agreement plaintiff paid the sum of $10,000 and Russo Brothers accepted the same, and that Russo Brothers are estopped from denying the validity of such oral agreement for the

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reason that Louis Russo told plaintiff he "would let the plaintiff know when he needed the balance of said payment," and that thereafter no demand was made for such balance. Plaintiff testified to conversations with the deceased Louis Russo subsequent to the execution of the **[82 Cal.App.2d 411]** agreement in support of the allegations above set forth. On January 1, 1944, when the $20,000 payment was due, plaintiff forwarded a check for $10,000, bearing the indorsement, "2nd dep Cudahy Val

Crop 10,000," which check was accepted and cashed by the partnership.

The first point relied upon for reversal is that respondent failed "to establish a waiver or an estoppel of the right to rescind" the contract for failure to make the full payment of $20,000 as required by the terms of the contract. In this connection appellants urge that the testimony of plaintiff as to the statements of the deceased partner, Louis Russo, and the oral understanding between plaintiff and Louis Russo that payment of the full $10,000 balance need not be made until requested, violated the parol evidence rule; that such oral agreement was not an "executed oral agrement," as required by section 1698 of the Civil Code; and that the evidence does not support a finding that there was a waiver--that is, an intentional relinquishment of the right to insist upon payment in accordance with the terms of the agreement. This contention may not be sustained. In addition to the testimony of plaintiff as to his conversations and understanding with Louis Russo contemporaneously with the execution of the agreement and thereafter, the evidence showed that when the $20,000 payment became due on January 1, 1944, Russo Brothers accepted a payment of only $10,000, made no demand for further payment, and did not give notice of rescission for failure to make such further payment for a period of a month, attempting to rescind only after they had sold the crop to another purchaser at a more profitable figure than was called for by their contract with plaintiff. When Louis Russo returned to plaintiff the $15,000 he had paid on the contract, he accompanied the check with a letter which contained the statement, "However, I did verbally extend the date on the last advance payment until January 10th." There was also testimony by a witness present at conversations between plaintiff and Russo after the attempted rescission, in which plaintiff asked Russo, "Didn't we agree that you would call up when you were in need of money?" to which Russo replied, "I have been so sick I don't know what I am doing half the time." In these conversations Russo did not deny the understanding as to delay in payment. There was also evidence that during the period of approximately one month after the payment of the $10,000, plaintiff and defendant met on several occasions, had other business dealings for the purchase **[82 Cal.App.2d 412]** and sale of fruit, and that not only was it agreed that plaintiff would pay the additional $10,000 when demanded, but also that plaintiff would, if requested, advance further sums above those required by the contract if needed by Louis Russo in the conduct of his business. In the circumstances above narrated, it cannot be held that the conclusion of the trial court that the partnership waived the right to rescind and was estopped to deny the agreement to postpone payment are without substantial support in the evidence.

It is well settled that the rule against varying the terms of a written instrument by parol or seeking to alter a contract in writing other than by a contract in writing or an executed oral agreement, is subject to the exception that a party to a contract may by conduct or representations waive the performance of a condition thereof or be held estopped by such conduct or representations to deny that he has waived such performance. Whether the established facts in any given case constitute an estoppel or a waiver is not always easily distinguishable. (Bastanchury v. Times-Mirror Co., 68 Cal.App.2d 217, 240 .) "Waiver" has been repeatedly defined as "the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances indicating an

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intent to waive." (Bastanchury v. Times-Mirror Co., supra, p. 240; Johnson v. De Waard, 113 Cal.App. 417 .) The language used in Sessions v. Southern Cal. Edison Co., 47 Cal.App.2d 611, 619 , with reference to promissory estoppel, is here applicable: "That doctrine is 'distinct from the ordinary equitable estoppel, since the representation is promissory, not a misstatement of an existing fact. The promisor misstates no facts; he says, at most, simply, "I will perform though you do not comply with the condition," or, "though you subject yourself to a legal defense." To bring the case within the reason of the rule it is essential that the promisee could and would have performed the condition, or would not have allowed the defense to arise, had it not been for the promisor's waiver.' (3 Williston on Contracts, sec. 689.)" So here, there was evidence that respondent could and would have paid the $10,000 balance upon demand, but that no demand was made, and approximately a month after receiving and accepting a check for one-half the amount due, Louis Russo, in behalf of the partnership,

[82 Cal.App.2d 413] tendered back all that plaintiff had paid and gave him no opportunity to cure the alleged default in payment.

There is ample evidence to support the findings that the deceased partner, in behalf of the partnership, waived a provision of the contract made for the benefit of the partnership and that by reason of the conduct of the deceased partner the doctrine of estoppel was properly invoked against the appellants.

It is next asserted that plaintiff was not competent to testify to facts which took place prior to the death of Louis Russo.

In the case at bar it is manifest that the administratrix of the estate of the deceased partner, Louis Russo, was "a necessary party to a complete determination or settlement of the question involved therein." (Code Civ. Proc., section 379.)

Concerning the effect of the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure, it must be borne in mind that the claim of respondent was not a claim against the estate of the deceased partner, but a claim against the partnership of which he was a member. That the inhibitions of subdivision 3 of section 1880 of the Code of Civil Procedure are not under the circumstances here present applicable, was the clear and decisive holding in the case of Cullinan v. McColgan, 87 Cal.App. 684 , where, at page 699, it is said:

"Appellant objected to Mr. Cullinan testifying to declarations made to him by D. A. McColgan, who died prior to the commencement of the action, in the absence of appellant, which objections were overruled by the court, appellant claiming that the estate of the decedent would be adversely affected by a judgment against the surviving partner. This is an action against a surviving partner and is neither against 'an executor or administrator' nor 'upon a claim or demand against the estate of a deceased person.' So far is a surviving partner from being the same as an executor or administrator of a decedent's estate that he is barred from appointment as such (Code Civ. Proc., section 1365), and the executor or administrator has no voice in the settlement of the partnership affairs (Code Civ. Proc., section 1585). Subdivision 3 of section 1880 of the Code of Civil Procedure has always been strictly and literally construed and has never been extended to cover cases nor parties not within the express terms of the statute ... (citing cases) ...."

[82 Cal.App.2d 414]

The view expressed in the case just referred to, that subdivision 3 of section 1880 of the Code of Civil Procedure is not to be extended to cover cases or parties not within its express terms, has been followed in numerous cases and under varying factual situations. In Streeter v. Martinelli, 65 Cal.App.2d 65, 71 , in holding that the statute does not apply to actions seeking to recover property or establish title thereto as against an estate, it was said (quoting from Cal.Jur., vol. 11A, pp. 888, 889): "The statute is not extended by construction to apply to cases not within its terms or to apply to all actions brought against an executor or administrator, although the reason for the rule might

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be as applicable to other cases as to the case of a money claim against the estate." See, also, Jones v. Clark, 19 Cal.2d 156, 161 , an action for specific performance of a contract to devise property. The authorities base their decisions upon the ground that the claim is not one against the estate, but to recover property which does not belong to the estate.

There is no difficulty in holding, under the authorities cited, that in an action against surviving partners a plaintiff may testify to matters occurring prior to the death of a deceased partner, whether such testimony relates to transactions with the deceased partner or with others. However, in the cases called to our attention or found by our own research, either no judgment was sought against the estate or the court held that no such judgment could be rendered. In the present action judgment was sought and obtained jointly against the administratrix (payable "in due course of administration") and the surviving partners.

To us it seems clear that in a situation such as is here presented the claim must be viewed as one against the firm, the partnership entity, rather than against the estate. The testimony of plaintiff established the debt or liability of the firm of which decedent was a member. That the establishment of such debt operated indirectly to diminish the assets of the estate does not justify relieving the estate of liability by invoking the code section in question. Although in the cited cases it was held that the action was not against the estate because no recovery was sought against it and no claim filed, we perceive no reason for a different rule in the two situations--the one where recovery against the partnership may presumably operate to diminish the estate as and when an accounting is had between the estate and the surviving partners, and the other, where, after partnership property **[82 Cal.App.2d 415]** is exhausted, resort is had to other assets of the decedent. In either event, the foundation of liability is a claim against the firm of which decedent was a member.

Appellants' contention that the evidence produced in support of damages is speculative and not in accordance with the principles laid down for the determination of the measure of damages cannot be sustained. There was ample evidence to show that respondent was unable to procure other desert Valencia oranges; that while there were other crops in the Coachella Valley, such crops had all been sold or were under contract of sale to other parties at the time appellants breached the contract. The measure of damages was the loss directly and naturally resulting from the seller's breach of contract, which would be the loss of the profit which respondent would have made had the fruit been delivered and had he been permitted to resell the same. (Civ. Code, sections 1786, 1787; Coates v. Lake View Oil & Refining Co., 20 Cal.App.2d 113, 116 .)

We find no error in the record.

The judgment is affirmed.

York, P. J., and Doran, J., concurred.

APPENDIX G

APPENDIX G

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183 Cal.App.4th 1031

FRANCISCO GARCIA et al., Plaintiffs and Appellants,

v.

WORLD SAVINGS, FSB, Defendant and Respondent.

B214822

California Court of Appeal, Second District, Fourth Division

April 9, 2010

APPEAL from a judgment of the Superior Court of Los Angeles County, No. VC049643 Raul A. Sahagun, Judge.

[183 Cal.App.4th 1032] [Copyrighted Material Omitted]

[183 Cal.App.4th 1033] [Copyrighted Material Omitted]

[183 Cal.App.4th 1034] **COUNSEL**

Creed & Elliott, Joseph W. Creed and Lisa R. Elliott for Plaintiffs and Appellants.

Anglin, Flewelling, Rasmussen, Campbell & Trytten, Robin C. Campbell, Mark T. Flewelling and Robert A. Bailey for Defendant and Respondent.

OPINION

MANELLA, J.

Appellants Francisco and Maria Elena Garcia brought suit against their lender, respondent World Savings, FSB,[1] for wrongful foreclosure, breach of contract promissory estoppel, and unfair business practices.[2] The trial court granted respondent';s motion for summary judgment, concluding that the foreclosure was valid, that the breach of contract claim was unsupported by consideration, that the promise allegedly made was insufficiently specific to support promissory estoppel and that the unfair business practices claim had no basis. We reverse with respect to the claim for promissory estoppel, but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Undisputed Facts*

Most of the essential facts were not disputed for purposes of summary judgment. In September 2004, appellants purchased a residential property in Artesia using funds obtained from respondent.[3] The property was subject to a **[183 Cal.App.4th 1035]** deed of trust. Between October 2006 and August 2007, appellants failed to make payments on the loan.[4] In January 2007, respondent sent appellants a notice of default. In May 2007, respondent sent appellants a notice of trustee';s sale to take place June 21, 2007, later continued by respondent to July 20, 2007.

In July 2007, respondent postponed the trustee';s sale to August 20, 2007.[5] That same month, appellants retained Cal Ravana, a mortgage broker, to obtain funds to cure the default by refinancing other property owned by appellants. In mid-August, Ravana spoke with Mike Lara, one of the managers of respondent';s foreclosure department, and informed him that appellants had obtained a written conditional loan approval. Ravana faxed the approval to Lara and asked for another postponement. Lara agreed to postpone the sale to August 29.[6] Respondent provided Ravana a reinstatement quote of $26,596.37, the amount which if paid by August 29, would cure the default on the loan.

On August 27, Ravana called Lara to ask for an extension of time until the first week of September. According to Ravana, Lara stated that he would postpone the sale until August 30 and ";see where [they] were at after that."; When Ravana asked what would happen if appellants'; new loan did not close by the 30th, Lara responded that the property ";won';t go to sale because I have the final say-so and as long as I know that you could close it the first week of August [sic], I';ll extend it.";[7]

[183 Cal.App.4th 1036] On August 29, Ravana called Lara';s office several times and left messages on his direct line, letting him know that the loan would not close for another week. Lara did not return any of the calls or respond to any of the messages.

The trustee on the deed of trust sold the property at a foreclosure sale on August 30, 2007. Unaware of the foreclosure sale, appellants went forward with the refinancing of their other property. The loan closed on September 7, 2007, a Friday. The company handling the closing sent respondent a check for $26,596.37, which respondent received the following Monday, September 10. Respondent returned the check uncashed.

Upon receiving the check, Ravana called Lara and learned for the first time that the foreclosure sale had gone forward on August 30. According to Ravana, Lara said there had been a ";mistake."; In a subsequent conversation with Mrs. Garcia, Lara reiterated that a mistake had been made and said that appellants'; property was not supposed to have been sold. Lara also told Mrs. Garcia that the matter would be ";cleared up"; in a few days. Lara acknowledged at his deposition that he spent almost a month in communication with Ravana, Mrs. Garcia and the purchaser ";try[ing] to resolve [the] issue.";[8]

B. *Complaint*

In the first cause of action of their complaint, appellants alleged that the foreclosure sale of the property was ";wrongful"; in violation of Civil Code section 2924 et seq. and that it was ";an illegal, fraudulent, and willingly oppressive sale of property under a power of sale contained in a deed of trust."; In the third cause of action for breach of contract, appellants alleged that they and respondent ";on valuable consideration"; entered into an oral agreement whereby respondent agreed to postpone the foreclosure sale of the property. In their sixth cause of action for promissory estoppel, appellants alleged that respondent orally promised to postpone the foreclosure sale and In reliance on that promise, appellants refinanced other property they owned in order to obtain the funds necessary to cure the default and reinstate the loan.

[183 Cal.App.4th 1037] C. *Respondent';s Motion for Summary Judgment*

Respondent moved for summary judgment, contending that (1) there was no agreement to postpone the foreclosure sale past August 30, 2007; (2) appellants gave no consideration for any alleged agreement; (3) the statute of frauds barred the claim; (4) the promise on which appellants allegedly relied was not clear and unambiguous; (5) appellants could not establish reasonable reliance or detriment; (6) appellants did not tender the funds necessary to reinstate the loan; and (7) appellants'; unclean hands barred declaratory relief.

D. *Trial Court';s Order*

The trial court found that the foreclosure sale was procedurally valid and that the failure of appellants to tender an amount sufficient to cure the default barred their cause of action for wrongful foreclosure. With respect to the cause of action for breach of contract, the court found that appellants'; efforts to obtain a loan in order to pay what was due under the deed of trust was not sufficient consideration because it ";add[ed] nothing new to the original bargain between the parties."; Distinguishing the case of *Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665 [111 Cal.Rptr. 693, 517 P.2d 1157] (*Raedeke*), in which the Supreme Court held that the defaulting borrowers'; procurement of a prospective buyer for the property constituted good consideration, the court stated: ";[U]nlike the [borrowers';] procurement [of a buyer] in *Raedeke*, [appellants] and [respondent';s] original bargain merely contemplated [appellants';] continued payments under the loan, regardless of the source of the funds. Moreover, [appellants] [] offered no evidence of benefit to [respondent] under the alleged agreement.";

With respect to the cause of action for promissory estoppel, the court stated: ";To prevail on this claim, [a] plaintiff must prove (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. [Citation.] [¶] [Appellants have] offered evidence to show that, at best, a conditional promise was made by Mr. Lara regarding the alleged oral agreement to postpone. [Appellants] have failed to meet their burden of showing a promise by Lara ';clear and unambiguous in its terms.';"; With respect to the claim for unfair business practices, the court stated: ";Given that [appellants';] Wrongful Foreclosure Cause of Action fails as a matter of law, [appellants] are unable to prove any unfair, unlawful or fraudulent conduct by [respondent] to support a cause of action under Business and Profession Code § 17200.";

[183 Cal.App.4th 1038] The court granted respondent';s motion for summary judgment. Judgment was entered and this appeal followed.

DISCUSSION

A. *Standard of Review*

";Summary judgment is proper when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law."; (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208 [45 Cal.Rptr.3d 692].) "In reviewing an order granting summary judgment, we exercise our independent judgment, applying the same analysis as the trial court to determine ';whether the moving party established undisputed facts that negate the opposing party';s claim or state a complete defense.';"; (*Ibid*., quoting *Romano v. Rockwell Internal, Inc*. (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

";In independently reviewing a motion for summary judgment, we apply the same three-step analysis used by the superior court. We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent';s claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue. [Citation.] Because of the drastic nature of the summary judgment procedure and the importance of safeguarding the adverse party';s right to a trial, the moving party must make a strong showing. His affidavits are strictly construed and the opposing party';s are liberally construed."; (*Silva v. Lucky Stores, Inc*. (1998) 65 Cal.App.4th 256, 261 [76 Cal.Rptr.2d 382].)

B. *Consideration/Reliance*

Before we discuss whether Lara';s statements to Ravana in their August 27 conversation were sufficiently specific to support either a breach of contract or promissory estoppel, we first discuss whether appellants supplied evidence of consideration -- a necessity for a true breach of contract claim. Respondent contends, and the trial court concluded, that the alleged promise to postpone the foreclosure sale was not supported by consideration. Appellants contend that their efforts in obtaining financing on separate property was a detriment to them and a benefit to respondent, ensuring that respondent would be spared the expense of a foreclosure sale. For the reasons discussed, we conclude that although the facts presented established detrimental reliance sufficient to support a claim based on promissory estoppel, there was no exchange of true consideration.

[183 Cal.App.4th 1039] As a general rule, a gratuitous oral promise to postpone a foreclosure sale or to allow a borrower to delay monthly mortgage payments is unenforceable. (*Raedeke*, *supra*, 10 Cal.3d at p. 673; *California Securities Co. v. Grosse* (1935) 3 Cal.2d 732, 733 [46 P.2d 170]; *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 547 [84 Cal.Rptr.3d 275]; *Sutherland v. Barclays American/Mortgage Corp*. (1997) 53 Cal.App.4th 299, 312 [61 Cal.Rptr.2d 614]; *Karlsen v. American Sav. & Loan Assn*. (1971) 15 Cal.App.3d 112, 121 [92 Cal.Rptr. 851]; *Stafford v. Clinard* (1948) 87 Cal.App.2d 480, 481 [197 P.2d 84].)[9] In *Raedeke*, the case on which appellants rely to support their claim to have provided consideration for the alleged promise to postpone the foreclosure sale, the defaulting borrowers/plaintiffs promised to undertake efforts to find, and did find, a person to buy their property and pay off their loan. If their promise constituted consideration, their claim was for breach of contract, a legal claim to be determined entirely by the jury. The trial court concluded that their claim was equitable because it was dependent on promissory estoppel, and treated the jury';s verdict in favor of the plaintiffs as advisory. (See 10 Cal.3d at p. 670.) The Supreme Court concluded that the evidence established a true contract supported by consideration on both sides. Noting that although the plaintiffs ";appeared to rely almost exclusively upon a promissory estoppel theory [at trial], namely, that [the lender] made a promise to postpone the sale, that plaintiffs relied thereon to their detriment, being misled and lulled into a course of inaction, and that it would be unjust to allow [the lender] to avoid its promise,"; the pleadings and proof actually supported breach of contract: ";Plaintiffs'; alleged procurement of a responsible, prospective purchaser at [the lender';s] request would constitute good consideration for [the lender';s] promise [to postpone the sale], since such procurement was not originally part of the bargain between plaintiffs and [the lender], and constituted both detriment to plaintiffs (through the expenditure of time and energy negotiating with possible purchasers) and benefit to [the lender] (through the potential substitution of a solvent purchaser in place of plaintiffs, rendering **[183 Cal.App.4th 1040]** foreclosure unnecessary). Such detriment and benefit each would constitute ';good consideration for a promise'; in this state."; (*Id*. at pp. 672, 673-674, quoting Civ. Code, § 1605.) Accordingly, ";the plaintiffs were entitled to a jury determination of the issues raised"; and ";the trial court erred in treating the jury';s special findings and verdict as advisory only and in entering its own findings, conclusions and judgment thereon."; (*Raedeke*, at p. 675.)

Appellants purport to rely on *Raedeke*, but misunderstand its point. Appellants contend that it stands for the proposition that ";either a benefit to the promisor or a detriment to the promisee is sufficient to constitute consideration."; *Raedeke* stands for the proposition that where the evidence introduced by the plaintiff establishes the existence of true consideration, the issue presented is one of law. As the court below noted, unlike the plaintiffs in *Raedeke* who agreed to locate a solvent purchaser and pay off the loan, appellants promised nothing more than respondent was due under the original loan agreement -- monthly payments, plus interest and late fees. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 218, p. 251 [";[D]oing or promising to do what one is already legally bound to do cannot be consideration for a promise.";].)

The absence of consideration or benefit to the promisor does not, however, defeat a claim based on promissory estoppel.[10] The doctrine of promissory estoppel ";make[s] a promise binding under certain circumstances, without consideration in the usual sense of something bargained for **[183 Cal.App.4th 1041]** and given in exchange."; (*Youngman v. Nevada Irrigation Dist*. (1969) 70 Cal.2d 240, 249 [74 Cal.Rptr. 398, 449 P.2d 462]; accord, *Raedeke*, *supra*, 10 Cal.3d at p. 672.) ";Under this doctrine a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement."; (*Youngman v. Nevada Irrigation Dist*., *supra*, 70 Cal.2d at p. 249.) ";';The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.';"; (*Wilson v. Bailey* (1937) 8 Cal.2d 416, 423 [65 P.2d 770], quoting *Carpy v. Dowdell* (1897) 115 Cal. 677, 687 [47 P. 695].) " 'In such a case, although no consideration or benefit accrues to the person making the promise, he is the author or promoter of the very condition of affairs which stands in his way; and when this plainly appears, it is most equitable that the court should say that they shall so stand. [Citations.]';"; (*Wade v. Markwell & Co*. (1953) 118 Cal.App.2d 410, 420 [258 P.2d 497].)

Appellants'; actions in procuring a high cost, high interest loan by using other property they owned as security is sufficient to support detrimental reliance, although it provided no particular benefit to respondent. In numerous cases, similar actions on the part of borrowers have been held to support promissory estoppel. (See, e.g., *Wilson v. Bailey*, *supra*, 8 Cal.2d at p. 424 [where prior to expiration of option to reconvey property, ";at a time when the plaintiff was negotiating with interested third parties for an advance to enable her to exercise the option for the repurchase of property worth five or six times the amount necessary to redeem,"; defendant assured her ";it would not be necessary for her to exercise her option within the given time but that for thirty days he would do nothing in the matter,"; court found ";[t]he irremediable change of position by the plaintiff in reliance upon the promise of the defendant justified the trial court in refusing to listen to the defendant seeking to deny the truth of his own representations";]; *Sutherland v. Barclays American/Mortgage Corp*., *supra*, 53 Cal.App.4th at pp. 305-306, 312 (Sutherland) [where borrower relied on lender';s agent';s statement that she could skip three mortgage payments and thereafter used funds that would otherwise have been used to pay mortgage to make necessary earthquake repairs, lender could not insist that missed payments be made in a lump sum at the end of three months]; *Wade v. Markwell & Co*., *supra*, 118 Cal.App.2d at pp. 419-420 [where plaintiff pledged mink coat to pawnshop as collateral for loan and after redemption period expired, pawnshop employees told plaintiff she could have an additional week to redeem but sold it within that week, promise was binding without consideration]; *Bank of Fairbanks v. Kaye* (9th Cir. 1955) 227 F.2d 566, 567-568 [where defaulting borrowers procured new purchaser and bank vice president orally agreed to accept smaller **[183 Cal.App.4th 1042]** monthly payments from new purchaser, bank could not foreclose as long as agreed payments were being made].)

Respondent contends that appellants'; actions in going forward with the high interest, high cost loan cannot constitute detrimental reliance, because ";[appellants] admitted that they ';proceeded with refinancing proceedings'; to obtain the funds needed to cure their default in reliance upon two earlier postponements of the trustee';s sale by [respondent] until August 20 and August 29."; The fact that appellants commenced the application process to obtain a loan on their separate property when they believed the foreclosure would take place in August does not establish that they would have completed the loan had they been aware that the foreclosure sale had not been further postponed. In a similar vein, respondent contends that appellants could not have relied on Lara';s alleged promise because appellants were not aware ";that Ravana was claiming that Lara had promised a further postponement until the first week of September."; Ravana was appellants'; agent, dealing with respondent on their behalf. His testimony indicated that he was persuaded Lara had postponed the foreclosure. The fact that Ravana may not have shared with appellants the details of his conversations with Lara does not mean that he and appellants did not continue to believe, as of the date the loan closed, that respondent was complying with its promise to forebear.

Respondent contends that appellants will be unable to establish causation or damage because (1) the check sent to respondent on Friday, September 7, did not reach its offices until the following Monday, September 10; and (2) the amount of the check was insufficient to cure the default as of September 7 or 10 because additional sums were then due. According to respondent, these facts establish that ";[e]ven if the foreclosure had been rescheduled [to] September 7, [appellants] would still be in exactly the same position they are today."; A somewhat similar situation arose in *Sutherland*, *supra*, 53 Cal.App.4th 299, where the lender, after allowing the borrower to skip three mortgage payments, returned her next mortgage payment uncashed because it did not include a lump sum for the three additional payments the lender contended were due. Noting that the law does not require a party to engage in futile or useless acts (see Civ. Code, § 3532), the court concluded: ";[H]aving returned [the plaintiff';s] May 1994 payment, informed her that such ';partial'; payments would not be accepted, and declared her in default on May 12, 1994, [the lender] can hardly maintain that [the borrower] should have been making regular payments after the three-month ';stop'; period."; (53 Cal.App.4th at p. 313; see also *Wade v. Markwell & Co*., *supra*, 118 Cal.App.2d at p. 430 [plaintiff, who had been informed her pledged mink coat had been sold, was ";excused [] of the necessity of making a tender of an amount sufficient to cover the loan, interest and charges because the law **[183 Cal.App.4th 1043]** does not require the doing of an idle act";].) Unlike the plaintiffs in *Sutherland* and *Wade v. Markwell & Co*., appellants were not on notice that respondent would refuse any payment from them. However, as the property had been sold August 30, appellants'; tender of any sum in an attempt to cure the default and reinstate the loan would have been a ";futile or useless act."; Having committed a material breach of its alleged promise by failing to postpone the foreclosure sale, respondent cannot be heard to complain that appellants'; attempted performance a week later was marginally inadequate. (See *Vineland Homes, Inc. v. Barish* (1956) 138 Cal.App.2d 747, 759 [292 P.2d 941], quoting *Central Oil Co. v. Southern Refining Co*. (1908) 154 Cal. 165, 167 [97 P. 177] [" 'Performance by the party not in fault is always excused by the wrongful refusal to perform by the other party. The rights of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent party.';";].) Appellants tendered the last amount respondent had said would be sufficient to cure the default and reinstate the loan and presented evidence that they had the funds to pay any additional amounts that may have become due by September 7 or 10. Respondent, however, lacked the ability to perform, having transferred the property to a third party through the foreclosure sale.

Raising an argument not made in the trial court, respondent contends that appellants cannot prove detrimental reliance because the preliminary loan documentation attached to the parties'; moving and opposition papers below ";shows that [appellants] intended to use the proceeds of the refinancing for multiple purposes beyond simply curing the [] default [to respondent]."; It is true that the preliminary settlement statement faxed to Lara along with the conditional loan approval indicated that other creditors were to be paid out of the loan proceeds. However, respondent did not raise this fact in support of its motion for summary judgment and appellants had no reason to present countervailing evidence on this point. Appellants might have obtained a loan on more favorable terms at a later time had they not been faced with the need to move quickly to cure the default on the Artesia property. At a minimum, appellants could have borrowed a lesser amount had they known that respondent did not intend to delay the foreclosure and that the Artesia property was already lost.

Finally, respondent contends that appellants are precluded from pursuing their claim for promissory estoppel by unclean hands.[11] Respondent asserts that appellants misrepresented in their loan application that they **[183 Cal.App.4th 1044]** intended to reside in the Artesia property. ";The doctrine of unclean hands does not deny relief to a plaintiff guilty of any past misconduct; only misconduct directly related to the matter in which he seeks relief triggers the defense."; (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 974 [90 Cal.Rptr.2d 743].) "The misconduct that brings the unclean hands doctrine into play must relate directly to the transaction concerning which the complaint is made. It must infect the cause of action involved and affect the equitable relations between the litigants."; (*Id*. at p. 984.) Neither in its brief on appeal nor in its moving papers below has respondent made clear the connection, if any, between any possible misrepresentation in the loan application and the claims asserted here. Moreover, the decision whether to apply the defense based on the facts presented is a matter within the trial court';s discretion. (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 447 [99 Cal.Rptr.2d 678].) The trial court issued no ruling on this point, and we will not do so for the first time on appeal.

Having concluded that appellants sufficiently established detrimental reliance, we now turn to whether Lara';s statements to Ravana constituted a sufficiently specific promise to support promissory estoppel.

C. *Sufficiency of Promise to Postpone Foreclosure*

";[A] promise is an indispensable element of the doctrine of promissory estoppel. The cases are uniform in holding that this doctrine cannot be invoked and must be held inapplicable in the absence of a showing that a promise had been made upon which the complaining party relied to his prejudice. . . ."; (*Division of Labor Law Enforcement v. Transpacific Transportation Co*. (1977) 69 Cal.App.3d 268, 277 [137 Cal.Rptr. 855].) The promise must, in addition, be ";clear and unambiguous in its terms."; *Laks v. Coast Fed. Sav. & Loan Assn*. (1976) 60 Cal.App.3d 885, 890 [131 Cal.Rptr. 836].) "Estoppel cannot be established from... preliminary discussions and negotiations."; (*National Dollar Stores v. Wagnon* (1950) 97 Cal.App.2d 915, 919 [219 P.2d 49].) Moreover, unlike a party seeking to establish a promise in a pure breach of contract context, a party seeking to establish promissory estoppel cannot rely on extrinsic evidence to explain an ambiguous statement. (Compare *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141-144 [127 Cal.Rptr.2d 145] [issue of parties'; manifestation of mutual assent to contract to grant stock options presented questions of fact not susceptible to summary judgment], with *Lange v. TIG Ins. Co*. (1998) 68 Cal.App.4th 1179, 1186 [81 Cal.Rptr.2d 39] [where plaintiffs contended ambiguous statement in letter from defendant constituted a binding promise under theory of promissory estoppel, trial court properly granted summary **[183 Cal.App.4th 1045]** judgment].) As the appellate court explained in *Lange*, ";[e]xtrinsic evidence is relevant... in interpreting a written instrument only if the instrument';s language is ambiguous.... It follows that if extrinsic evidence is needed to interpret a promise, then obviously the promise is not clear and unambiguous." (68 Cal.App.4th at p. 1186, citations omitted.)

Here, Ravana testified that he called Lara in the last week of August, expressly requesting an extension to the first week in September, when the Garcias'; pending loan was set to close. When Lara agreed to postpone the sale for a day and Ravana expressed concern that the loan would not close by then, Lara responded by assuring Ravana that the property would not be sold, as he (Lara) had the final say-so and would extend any sale, so long as the loan closed in the first week of September.[12] A day or two later, Ravana called Lara';s direct line and left several messages informing him that appellants would, indeed, need the additional time, as the loan would likely close the first week of September as Ravana had earlier predicted. Under these circumstances, we conclude Lara';s promise was sufficiently definite to support promissory estoppel. To be enforceable, a promise need only be ";';definite enough that a court can determine the scope of the duty[,] and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages.';"; (*Bustamante v. Intuit, Inc.*, *supra*, 141 Cal.App.4th at p. 209, quoting *Ladas v. CaliforniaState Auto. Assn.* (1993) 19 Cal.App.4th 761, 770 [23 Cal.Rptr.2d 810].) It is only where ";';a supposed ";contract"; does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, [that] there is no contract.';"; (*Bustamante v. Intuit, Inc.*, *supra*, at p. 209, quoting *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 [71 Cal.Rptr.2d 265].) Lara';s alleged statement that if the Garcias needed additional time in the first week of September to close the loan, he would postpone the sale to permit them to do so was sufficiently definite to determine the scope of the promise and respondent';s obligation. (See *US Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 131 [111 Cal.Rptr.2d 689] [promise to use ";best efforts"; to acquire land sufficient to support promissory estoppel].)

The trial court relied on the fact that the promise was ";conditional"; to support its conclusion. However, the fact that a promise is conditional does not render it unenforceable or ambiguous. (See, e.g., *Martin v. World Savings & Loan Assn*. (2001) 92 Cal.App.4th 803, 809 [112 Cal.Rptr.2d 225] [court **[183 Cal.App.4th 1046]** enforced borrower';s promise that ";if"; he obtained earthquake insurance, lender would be loss payee]; *Anchor Cas. Co. v. Surety Bond* (1962) 204 Cal.App.2d 175, 179, 182 [22 Cal.Rptr. 278] [where lender stated to surety that ";if"; it made construction loan to developer, lender would withhold $55,000 of funds and disburse only for city-required improvements, once loan was made, ";th[e] promise became absolute";].) Here, the only condition precedent to Lara';s alleged promise to postpone the sale was the Garcias'; need for additional time to close the pending loan. That the condition might not occur did not render the promise unenforceable.

Respondent emphasizes that Ravana did not speak with Lara on the 29th and contends that ";a further postponement of the sale until the first week of September was conditioned upon Ravana[';s] speaking with Lara again and persuading him that [appellants] actually required another postponement."; We disagree. While it may fairly be implied that Ravana was required to notify Lara of the needed extension, there is ample evidence he did so. According to his deposition testimony, starting August 29, Ravana called Lara';s direct line repeatedly to advise him the Garcias'; loan would be closing the first week of September and would need the extension Lara had promised. No more was required.

Moreover, Lara';s silence in the face of his alleged prior promise to provide additional time if needed could reasonably be viewed as an affirmative response. (See *Wilson v. Bailey* , *supra*, 8 Cal.2d at p. 423 [to establish grounds for estoppel, ";';";[t]he person against whom the estoppel is asserted, must *by his silence* or his representation, have created a belief of the existence of a state of facts which it would be unconscionable to deny . . ." ' " (italics added)]; *Southern Cal. Acoustics Co. v. C. V. Holder, Inc*. (1969) 71 Cal.2d 719, 722 [79 Cal.Rptr. 319, 456 P.2d 975] [silence in face of offer viewed as acceptance where relationship between parties or previous course of dealing permits].) Clearly, Ravana interpreted Lara';s silence in that manner, and the evidence presented by appellants supports that Lara intended to convey agreement, as he later told both Ravana and Mrs. Garcia that the foreclosure sale had been a ";mistake,"; specifically told Mrs. Garcia that he had given appellants more time, and acknowledged spending nearly a month after the sale communicating with Ravana, Mrs. Garcia and the purchaser in an attempt to ";resolve [the] issue."; In sum, appellants presented sufficient evidence of a definite promise from Lara to support their promissory estoppel claim, and the trial court';s summary adjudication of this claim must be reversed.

D. *Wrongful Foreclosure/Unfair Business Practices*

The basis for appellants'; first cause of action entitled ";Wrongful Foreclosure"; is unclear from the complaint, the opposition to summary judgment or **[183 Cal.App.4th 1047]** their brief on appeal. Appellants cited Civil Code section 2924 et seq. in the complaint -- the statutory provisions which govern nonjudicial foreclosures -- but did not indicate which, if any, were violated. In their opposition to the summary judgment motion and in their brief on appeal, appellants purport to rely on *Raedeke*, *supra*, 10 Cal.3d 665, but only for the proposition that appellants and respondent exchanged sufficient legal consideration to support a breach of contract claim. As discussed, *Raedeke* does not support their contention in this regard. In any event, the claim at issue in *Raedeke* was for ";breach of [] oral promise to postpone the sale,"; not wrongful foreclosure. (*Id*. at p. 672.)

We surmise from appellants'; reply brief that they may be attempting to assert a claim similar to that in *Nguyen v. Calhoun* (2003) 105 Cal.App.4fh 428 [129 Cal.Rptr.2d 436], where the lender allegedly agreed, as in *Raedeke*, to postpone foreclosure after the defaulting borrower procured a new purchaser and the purchaser agreed to pay off the loan by a certain date. As a general rule, if the funds necessary to reinstate or pay off a defaulted loan secured by a deed of trust are received by the lender prior to the foreclosure sale, the foreclosure sale is invalid and may be set aside, even if the purchaser was an innocent third party. (See, e.g., *Bank of America v. La Jolla Group II* (2005) 129 Cal.App.4th 706, 711-714 [28 Cal.Rptr.3d 825] [borrower appeared at branch of lender and paid sum necessary to reinstate loan; foreclosure sale occurring four days later was invalid].) In *Nguyen*, however, the court held that because the funds to pay off the loan -- apparently sent on the day of the foreclosure -- were not received by the lender until three days after the property was sold to a third party, the foreclosure could not be set aside. (105 Cal.App.4th at pp. 435, 443-445.) Appellants'; funds also were received too late to invalidate the foreclosure, so *Nguyen* (and *Bank of America v. La Jolla Group II*) are of no assistance to them. In any event, appellants have dismissed the third-party purchaser and without the purchaser, cannot obtain the remedy of setting aside the sale and recovering the property.[13]

With respect to appellant';s claim for unfair business practices, appellants'; contend that it should be reinstated only if the claim for wrongful foreclosure is reinstated. Accordingly, we reinstate neither claim.

[183 Cal.App.4th 1048] DISPOSITION

The judgment is reversed with respect to the claim for promissory estoppel only. In all other respects the judgment is affirmed. The matter is remanded for further proceedings consistent with this opinion. Appellants are entitled to costs on appeal.

Epstein, P. J., and Willhite, J., concurred.

Notes:

[1] As the parties explain in their briefs, respondent underwent a name change and is now known as Wachovia Mortgage, FSB.

[2] The complaint also named as defendants the trustee who handled the foreclosure sale and the third party who purchased the property at the sale. Those parties were subsequently dismissed. As a result of the dismissals, appellants'; additional claims for quiet title and conversion (the fourth and eighth causes of action) and the claims seeking to set aside the foreclosure sale (the second and fifth causes of action) were no longer viable. In this appeal, appellants seek to reinstate only the claims for wrongful foreclosure (first cause of action), breach of contract (third cause of action), promissory estoppel (sixth cause of action) and unfair business practices (seventh cause of action).

[3] According to respondent';s statement of facts, appellants indicated in their loan application that they intended to occupy the property as their primary residence within a year of the sale. Appellants did not dispute that contention, but presented evidence that they were engaged in construction on the property and that it was not feasible to move in during that timeframe.

[4] Appellants had previously defaulted in June 2006 and cured in September 2006.

[5] Respondent';s statement of facts does not explain why it continued the trustee';s sale on this or the prior occasion. The complaint alleged that the two postponements were due to negotiations with appellants, who had promised in June to begin the process of refinancing other property they owned in order to cure the default and reinstate the loan. Appellants did not, however, present any evidence concerning these facts in their opposition to summary judgment.

[6] A settlement statement sent to Lara with the conditional approval estimated that the close of escrow would take place September 7, 2007. The settlement statement also indicated that appellants were being charged $25,000 for a loan origination fee, $1,000 for an appraisal, $1,018.90 for title insurance and hundreds of dollars for escrow expenses. The settlement statement further indicated that the funds were to be used to pay off additional creditors, including the IRS and the State of California. The conditional loan approval indicated that appellants would be paying an interest rate of 13 percent.

[7] While the transcript reads ";August,"; the context makes clear that the reference was to September, as does the remainder of Ravana';s testimony, in which he confirms that Lara promised to extend the deadline beyond August 30 if necessary to close the loan: ";';[D]on';t worry, I have the final say-so. If I know that you need a few more days, I';ll... extend it for you.';";

[8] Respondent objected to the portions of Mrs. Garcia';s and Ravana';s depositions offered to establish their postforeclosure conversations with Lara on the grounds that the testimony was hearsay and violated the privilege against introduction of settlement communications. The record indicates that the trial court sustained respondent';s objections with respect to Mrs. Garcia';s deposition testimony and overruled them with respect to Ravana';s. As Mrs. Garcia';s account of Lara';s statements was admissible under the party admission exception to the hearsay rule, was not privileged, and was essentially corroborated by Ravana';s testimony, we will treat Mrs. Garcia';s testimony

as part of the record.

[9] In most cases, such promises are deemed unenforceable due to Civil Code section 1698 (section 1698), which essentially provides that to be valid, a contract in writing must be modified by a contract in writing. (*California Securities Co. v. Grosse*, *supra*, 3 Cal.2d at p. 733; *Sutherland v. Barclays American/Mortgage Corp*., *supra*, 53 Cal.App.4th at p. 312; *Karlsen v. American Sav. & Loan Assn*., supra, 15 Cal.App.3d at p. 121; *Stafford v. Clinard*, *supra*, 87 Cal.App.2d at p. 481.) In *Karlsen*, the court also held that a purported oral agreement to postpone a foreclosure sale was not enforceable by the borrower because it was not supported by consideration. (15 Cal.App.3d at p. 121; see also *Raedeke*, supra, 10 Cal.3d at p. 673.) In *Secrest v. Security National Mortgage Loan Trust*, the court held that enforcement of the lender';s promise to forebear from exercising the right of foreclosure was precluded by section 1698 and the statute of frauds. (Secrest v. Security National Mortgage Loan Trust 2002-2, supra, 167 Cal.App.4th at pp. 547-548.)

[10] Respondent contends that the statute of frauds and section 1698 preclude enforcement of Lara';s alleged promise. A party is estopped to assert the statute of frauds as a defense ";where [the] party, by words or conduct, represents that he will stand by his oral agreement, and the other party, in reliance upon that representation, changes his position, to his detriment."; (*Associated Creditors'; Agency v. Haley Land Co*. (1966) 239 Cal.App.2d 610, 617 [49 Cal.Rptr. 1].) In addition, ";[i]t is well settled that the rule against varying the terms of a written instrument by parol or seeking to alter a contract in writing other than by a contract in writing or an executed oral agreement, is subject to the exception that a party to a contract may by conduct or representations waive the performance of a condition thereof or be held estopped by such conduct or representations to deny that he has waived such performance."; (*Panno v. Russo* (1947) 82 Cal.App.2d 408, 412 [186 P.2d 452]; accord *Sutherland v. Barclays American/Mortgage Corp*., *supra*, 53 Cal.App.4th at p. 312, fn. 8 [noting that while § 1698 provides that ";';[a] contract in writing';"; may be modified ";';by a contract in writing';"; or ";';by an oral agreement to the extent that the oral agreement is executed by the parties,';"; the statute as amended in appellants'; claim is premised on promissory estoppel, neither § 1698 nor the statute of frauds will defeat their claim. Section 1698 also specifically states that ";';[n]othing in this section precludes in an appropriate case the application of rules of law concerning estoppel....'" (italics omitted)].) Accordingly, to the extent appellants'; claim is premised on promissory estoppel, neither section 1698 nor the statute of frauds will defeat their claim.

[11] We note that respondent raised unclean hands in their moving papers below, but only with respect to appellants'; declaratory relief claim.

[12] As noted in footnote 7, *ante*, Ravana';s reference to Lara';s assurance that ";as long as I know that you could close [the loan] the first week of August, I';ll extend it"; was clearly intended to refer to September, as the context of the conversations makes clear.

[13] Appellants specifically state in their reply brief that they do not wish to set aside the foreclosure sale.
