

Todd Brown v. Bank of America, CV12-0309

Hearing: Defendant's Demurrer

Date: September 5, 2012

Plaintiffs

Todd and Renee Brown

Counsel

Penelope Bergman, Esq.

Defendant

Bank of America

Counsel

Wendy Miele, Esq.

TENTATIVE RULING

Todd and Renee Brown (Plaintiffs) bring this action against Bank of America, N.A. (Defendant) for alleged damages suffered as a result of Defendant's actions and tactics related to Plaintiffs' loan modification process. In other words, this is not the typical challenge to the lender's non-judicial foreclosure on the borrower's property.

Plaintiffs' complaint includes causes of action for negligence, unfair business practices, violation of Civil Code §1788 and promissory estoppel. Defendant demurs to all four causes of action. Plaintiffs oppose the motion.

Defendant demurs to the entire complaint on res judicata grounds based upon a prior ruling in a federal action, and on Plaintiff's failure to tender the full amount owed.

In the federal action, Plaintiffs challenged Defendant's foreclosure proceeding. The Federal Court summarized the action as follows: "The gravamen of plaintiffs' claims is that defendants improperly attempted to transfer the loan to a trust in order to securitize it, but failed to do so by the closing date specified in the Pooling & Service Agreement..."¹

With regard to the collateral estoppel issue, the parties agree that the following elements must be established: "(1) the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated; (2) the previous proceeding terminated with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding. [Citation.]" (*Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 878.)

Here, Defendant contends the Federal Court's ruling addressed the identical issues at stake in this action. Defendant's argument is premised upon the assumption that "Plaintiffs are still attempting to prevent foreclosure of the Property." However, Plaintiffs are not challenging the foreclosure in this action. Rather, the gravamen of

¹ The Court grants Defendant's request for judicial notice of the Federal Court's order.

Plaintiffs' claim is that Defendant was negligent in the handling of Plaintiffs' loan modification proceedings. Consequently, the issues adjudicated in the federal action are not "identical" to the ones that are at issue in this action.

For the same reasons, Defendant asserts that the action is barred because of Plaintiffs' failure to allege a viable tender of the full amount owed. A plaintiff is required to tender full payment of the secured indebtedness in order to challenge or set aside the foreclosure. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109; *Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1710.) As stated above, Plaintiffs are not seeking to set aside the foreclosure.

With regard to the negligence cause of action, Defendant demurs on the grounds that as a financial lender, it owes no legal duty to Plaintiffs. As a general rule, a financial institution owes no duty of care to a borrower in a loan transaction. (*Nymark v. Heart Federal Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) A duty arises only when a lender actively participates beyond the scope of its conventional role. (*Id*)

In California, the test for determining whether a financial institution owes a duty of care to a borrower-client "involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [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." (Citations) (*Nymark, supra* at 1098.)

According to Defendant, Plaintiffs have not alleged that Defendant had any dealings in any financial enterprises involving Plaintiffs that would impose a duty of care as a matter of law. In response, Plaintiffs cite to numerous federal district court cases in which the district judges, relying on the *Nymark* factors identified above, determined the lender did owe a duty of care to the borrower. While only advisory, those decisions provide compelling reasons supporting a claim that a bank that undertakes a loan modification participates beyond the scope of a conventional lender. (See *Garcia v. Ocwen Loan Servicing, LLC* (N.D. Cal., May 10, 2010) 2010 WL 1881098--- "Here, by asking Plaintiff to submit supporting documentation, Defendant undertook the activity of processing Plaintiff's loan modification request. Having undertaken that task, it owed Plaintiff a duty to exercise ordinary care in carrying out the task.")

Next, Defendant demurs to the unfair business practices cause of action on the grounds Plaintiffs fail to allege any prohibited practice on Defendant's part, and on the grounds Plaintiffs cannot establish any entitlement to the specific remedies available under Business & Professions Code §17200.

The unfair competition law (Bus. & Prof. Code §17200, et. seq.) focuses on conduct and prohibits "anything that can properly be called a business practice and that at the same time is forbidden by law." (*Albillo v. Intermodal Container Services, Inc.* (2003) 114 Cal.App.4th 190, 206.) Therefore, to state a valid claim, a plaintiff must establish that the

practice is either unlawful (i.e., is forbidden by law), unfair (i.e., harm to victim outweighs any benefit) or fraudulent (i.e., is likely to deceive members of the public). (*Id.*)

In this instance, Plaintiffs allege sufficient facts to establish a claim that Defendant's practice of misrepresenting its intent to modify the loan and inducing Plaintiffs into making trial payments were deceptive and fraudulent business practices sufficient to support a viable cause of action. (See *Boschma v. Home Loan Center* (2011) 198 Cal.App.4th 230, 254.) Additionally, Plaintiffs seek restitution and injunctive relief pursuant to the remedies allowed under Business & Professions Code §17200.

Defendant demurs to the third cause of action for violation of the Rosenthal Fair Debt Collection Practices Act (Civil Code §1788) on the grounds Defendant is not a "debt collector" engaged in the practice of debt collection under the Act. In support of this position, Defendant cites to federal authority defining "debt collectors" under the Federal Fair Debt Collection Practices Act. To the contrary, some district courts have held a mortgage servicer to be a "debt collector" under the Rosenthal Act. (See *Reyes v. Wells Fargo Bank, N.A.* (N.D. Cal., Jan. 3, 2011) 2011 WL 30759, 19-21 and *Walters v. Fidelity Mortg. of CA* (E.D. Cal. 2010) 730 F.Supp.2d 1185, 1203 where the plaintiff's claim arose "out of debt collection activities beyond the scope of the ordinary foreclosure process" such that a remedy was available under the RFDCPA.)

Finally, Defendant demurs to the promissory estoppel cause of action on the basis the deed of trust obligated Plaintiffs to pay the total amount due, such that it was not reasonable for Plaintiffs to have relied on "purported representations", and they cannot establish damages because they were required to perform under the deed of trust. Additionally, Defendant contends an oral loan modification is barred by the statute of frauds. Thus, any purported representation regarding a loan modification was only a "gratuitous promise."

In opposition, Plaintiffs cite to *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, in which the appellate court reversed the trial court's sustaining of a demurrer to a promissory estoppel cause of action. The *Aceves* court held that the bank's promise to work on a loan modification was sufficiently concrete to be enforceable, that the plaintiff's reliance was reasonable, that the plaintiff was damaged and that the oral promise was enforceable. (*Id.* at 226-231) The same appears to be alleged by Plaintiff in this action.

Defendant's demurrer to all causes of action is overruled.