

FORBEARANCE AGREEMENTS MUST BE IN WRITING

Many plaintiffs in wrongful foreclosure lawsuits attempt to rely, at least in part, on what the lender's representative "told them" over the phone or in person.

But a recent decision by the California Court of Appeal (Second District in Los Angeles) — [*Granadino v. Wells Fargo Bank, N.A.*](#) — confirms that a **lender's mere verbal agreement to modify the loan or forbear from foreclosing will ordinarily be unenforceable.**

The facts

The plaintiffs were a married couple who took a loan secured by their residential property in Pasadena, California. The lender recorded a notice of default in May 2010, and a notice of trustee's sale in August 2011. Plaintiffs hired a lawyer and attempted to negotiate a loan modification with the lender, and the lender agreed to postpone the trustee's sale from September 24, 2011 to October 17, 2011.

On the date of the scheduled trustee's sale (October 17, 2011), Plaintiffs claimed that the lender told plaintiffs' agent (a paralegal at their attorney's office) that plaintiffs were "under active review for a modification" and, therefore, there was no longer a trustee's sale scheduled.

In November 2011, the lender sent plaintiffs a letter stating that their loan was being removed from the modification review process, and that the foreclosure process could move forward.

A sale date of December 16, 2011 was scheduled, and plaintiffs' home was sold at that sale.

Plaintiffs sued the lender for promissory estoppel, claiming that the lender's verbal statements in October 2011 were enforceable, and that had they known of the about the actual scheduled sale date they would have fully reinstated the loan.

The trial court granted summary judgment in favor of the lender.

The Court of Appeal's Opinion

The Court of Appeal affirmed, based primarily on the statute of frauds. The court observed that under California's statute of frauds, any agreement pertaining to the sale of real property or an interest therein is invalid unless memorialized in a signed writing. **A mortgage or deed of trust is subject to the statute of frauds, as is any agreement that modifies a contract subject to the statute of frauds.**

The court observed that since the plaintiffs acknowledged no such writing existed regarding the lender's alleged agreement to forbear, their lawsuit was doomed and properly dismissed.

The court also offered three alternative bases for its conclusion — plaintiffs failed to show an actionable promise, reasonable reliance, or damages.

First, the court held that even if the statute of frauds did not apply, the lawsuit still failed because plaintiffs failed to show a clear "promise" by the lender or reasonable reliance by plaintiffs. **The lender's statement (on October 17, 2011) that plaintiffs were under active review for a modification and that no sale was scheduled was not a "promise" because it did not constitute an assurance that the lender would or would not do something. Instead, it was a "mere statement of fact" that made no assurances regarding a future sale.**

Second, plaintiffs failed to show reliance because they produced no evidence showing that they could reinstate the loan had they known of the December trustee's sale. Plaintiffs' financial documents showed they did not have enough money to reinstate the loan, and plaintiffs offered only a "speculative" statement that they would have "explored the possibility" of getting a new loan. Further, plaintiffs could not rely on the lender's October 2011 verbal statements because the lender's November 2011 letter made it clear that the foreclosure process would move forward.

Finally, the court pointed out that because plaintiffs had no equity in the property (the loan was underwater by \$125,000), they "failed to establish damages." The court did not discuss this alternative basis of its holding in much detail, but this court would apparently disagree with the conclusion of a recent opinion from the Fourth District Court of Appeal, which held that a plaintiff with no equity in the property could still pursue a claim for wrongful foreclosure. See my prior post, [Can a Foreclosure be "Wrongful" if the Debtor is Underwater?](#)

Lesson

The statute of frauds presents a sometimes insurmountable obstacle to a plaintiff's claim of "wrongful foreclosure." **The statute of frauds applies not only to mortgages and deeds of trust, but also to loan modifications and forbearance agreements.**

Any borrower intending to rely on the lender's statements regarding the modification of a loan or the postponement/cancellation of a foreclosure sale must have the lender's clear promise in writing. And even with such a writing, the borrower must present more than speculative evidence showing that he/she could have cured the default in a timely manner.