

Re: Motion to Expunge Lis Pendens; Motion for Judgment on the Pleadings

Date: January 16, 2018

On August 31, 2017, plaintiffs Greg and Linda Hayes (“Plaintiffs”) filed a complaint alleging (1) a violation of California Homeowner Bill of Rights (“HBOR”); (2) a violation of Unfair Competition Law (“UCL”); (3) breach of the covenant of good faith and fair dealing; and (4) negligence.

Plaintiffs seek, among other things, to enjoin a pending nonjudicial foreclosure of their home which is located on Avenida Manzana in Atascadero (the “Property”). Defendant Everbank currently holds the Deed of Trust.¹

Motion for Judgment on the Pleadings

Pursuant to Code of Civil Procedure section 438(c)(1)(B)(ii),² Everbank moves for judgment on the pleadings, on the ground the complaint fails to state facts sufficient to constitute any cause of action against it. No opposition has been filed.

“A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same standard of review. All material facts which were properly pleaded are deemed true, but not contentions, deductions, or conclusions of fact or law. (*Mack v. State Bar of California* (2001) 92 Cal.App.4th 957, 961.)

It is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any identified defect can be cured by amendment. Thus, the burden is on the plaintiff to demonstrate the manner in which the complaint might be amended. (*Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 976.)

1. Tender

Everbank initially argues that the entire complaint fails because it does not allege a credible offer of tender.

“While the tender requirement may apply to causes of action to set aside a foreclosure sale, a number of California and federal courts have held or suggested that it does not apply to actions seeking to enjoin a foreclosure sale” (*Intengan v. BAC Home Loans*

¹ The Court grants Everbank’s request for judicial notice (“RJN”). (Evid. Code, § 452(c).)

² All statutory references are to the Code of Civil Procedure unless noted otherwise.

Servicing LP (2013) 214 Cal.App.4th 1047, 1053–1054 [no tender required to pursue injunctions against foreclosure sales when lenders fail to comply with Civ. Code, § 2923.5 “contact” requirement]; see also *Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1273-1274 [tender not required to state cause of action for “dual tracking” under Civ. Code, § 2923.6 where plaintiff sought monetary damages].)

The cases cited by Everbank appear to be focused on setting aside a trustee’s sale.³ Here, according to the complaint, a trustee’s sale has not yet occurred and Plaintiffs seek to enjoin the sale. (Cmplt., ¶ 30 [actively moving toward foreclosure], Prayer, ¶ 2 [seeking injunction].) Accordingly, an allegation regarding tender is not required.

The motion for judgment on the pleadings is therefore denied on this ground.

2. First Cause of Action – Violation of HBOR

Plaintiffs allege a violation of Civil Code section 2923.55(b)(1)(B) which requires the mortgage servicer to send the borrower a statement that he or she may request a specified list of documents. Everbank argues that “Plaintiffs do not allege the mortgage servicer failed to send this informational notice.” (Mtn., p. 5, ll. 19-20.) Plaintiffs, however, do allege in paragraph 43 of the complaint, that they did not receive the statement or the listed documents, despite a request for those items. (Cmplt., ¶ 43.)⁴

Regardless, the Court notes that Civil Code section 2923.55 has been repealed as of January 1, 2018. “[T]he repeal of a statute takes away the remedies afforded by it and defeats actions or proceedings pending under it at the time of the repeal, particularly where the cause of action was created, and the remedy was given by statute and was unknown to the common law.” (*State Subsequent Injuries Fund v. Industrial Acc. Commission* (1959) 175 Cal.App.2d 674, 666-667; see also 58 Cal. Jur. 3d Statutes § 76.) Without contrary argument from Plaintiffs, it appears they can no longer state a claim under Civil Code section 2923.55.

Plaintiffs, however, also allege a violation of Civil Code section 2923.7 – failure to provide a single point of contact after making request for foreclosure prevention alternative. The complaint claims Everbank’s failure to comply with this statute prevented Plaintiffs from obtaining timely and accurate status updates and therefore delaying submission of documents for purposes of processing their loan modification. (Cmplt., ¶ 40.)

Everbank argues the claim is insufficiently alleged because (1) Plaintiffs failed to allege the property is their principal residence and Civil Code section 2923.7 only applies to a

³ In addition, the Court notes that the majority of Everbank’s case citations on this issue are unpublished federal cases or older California cases cited for general propositions regarding the rule of tender.

⁴ The Court notes that the Declaration of Compliance (RJN, Ex. 2) confirms compliance with Civil Code section 2923.55(b)(2), but not subsection (b)(1).

borrower's principal residence; (2) Plaintiffs never submitted a completed loan application; and (3) Plaintiffs do not allege they requested a foreclosure prevention alternative.

Everbank's arguments on this cause of action demonstrate an inadequate review of the complaint. Plaintiffs allege in paragraphs 1 and 12 that the Property is their principal residence; and allege in paragraph 16 that they requested a loan modification (i.e., foreclosure prevention alternative). Moreover, completion of the loan modification application does not appear to be a prerequisite for purposes of providing a single point of contact under Civil Code section 2923.7.

The motion for judgment on the pleadings is therefore denied as to the first cause of action.

3. Second Cause of Action – Violation of the UCL

“The UCL provides that any ‘unlawful,’ ‘unfair’ or ‘fraudulent’ business act or practice is deemed to be unfair competition. ... Virtually any law-federal, state or local-can serve as a predicate for an action under Business and Professions Code section 17200. Thus, it is fairly said that section 17200 ‘borrows’ violations of other laws and treats them as “unlawful” practices independently actionable under the unfair competition law.” (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 717–718 [internal citations omitted].)

Here because Everbank has stated a cause of action under the HBOR, the second cause of action survives as well.

4. Third Cause of Action – Breach of the Covenant of Good Faith and Fair Dealing

To state a claim for breach of the covenant of good faith and fair dealing, a plaintiff must allege that (1) plaintiff and defendant entered into a contract; (2) plaintiff did all, or substantially all of the significant things that the contract required him to do, or that he was excused from having to do those things; (3) all conditions required for defendant's performance had occurred or were excused; (4) defendant unfairly interfered with plaintiff's right to receive the benefits of the contract; and (5) plaintiff was harmed by defendant's conduct. (CACI, No. 325.)

Everbank argues that Plaintiffs failed to allege that it “unfairly interfered” with Plaintiffs' benefits under the contract because Everbank had no obligation under the original loan agreement to consider Plaintiffs' loan modification request.

The Court is inclined to agree and in light of Plaintiffs' failure to defend the viability of their claims, grants the request for judgment on the pleadings as to the third cause of action. However, as this is the first attack on the complaint, the Court grants leave to amend. (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852

[denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment].)

5. Fourth Cause of Action – Negligence

Everbank next argues it is entitled to judgment on the pleadings as to the negligence cause of action because it did not owe Plaintiffs a duty of care.

“As a general rule, a financial institution owes no duty of care to a borrower when the institutions’ involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.” (*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 945.) This general rule is subject to exceptions. (*Id.* at p. 946.) One such exception is that a lender owes a general duty of care to use reasonable care in the processing of a loan modification request from the borrower. (*Alvarez, supra*, 228 Cal.App.4th at p. 951.)

Here, Plaintiffs allege Everbank breached its duty by, among other things, failing to provide a timely and good faith review of the loan modification application (Cmplt., ¶ 24); by erroneously informing Plaintiffs they had no right to appeal denial of the loan modification (Cmplt., ¶ 23); and by proceeding toward foreclosure in violation of public policy (Cmplt., ¶¶ 25-32).

The motion for judgment on the pleadings is denied as to the first, second, and fourth causes of action, but granted as to the third cause of action with leave to amend. Plaintiffs are directed to file an amended complaint within 10 days from service of the notice of ruling, unless the parties waive notice at the hearing.

Motion to Expunge Lis Pendens

Pursuant to section 405.31, Everbank seeks to expunge a lis pendens recorded by Plaintiffs on the Property on the ground the complaint does not contain a real property claim.⁵ There is no opposition.

“Unlike most other motions, the burden of proof is on the party opposing the motion to expunge.” (Weil & Brown, *supra*, at ¶ 9:430.) Plaintiffs, by their lack of opposition, have failed to establish the probable validity of any real property claim. (§ 405.32.)

The motion to expunge the lis pendens is, therefore, granted.

⁵ “Real property claim” is defined (in pertinent part) as a cause of action which, if meritorious, would affect title to, or the right to possession of, specific real property. (§ 405.4.) “The allegations of the complaint determine whether a ‘real property claim’ is involved; no independent evidence is required. [Citation.]” (Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial (Rutter 2017) ¶ 9:431.)