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FILED

MAY 29 2012

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of California County of Santa Clara
BY  DEPUTY

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

ANGIE ROSE, et al.,

Plaintiffs,

vs.

BANK OF AMERICA, N.A., et al.,

Defendants.

Case No. 1-11-CV-210877

ORDER RE: DEMURRER TO FIRST
AMENDED COMPLAINT

The demurrer to first amended complaint by defendant Bank of America, N.A. came on for hearing before the Honorable Peter H. Kirwan on May 29, 2012, at 9:00 a.m. in Department 8. The matter having been submitted, the court orders as follows:

Defendant Bank of America, N.A.'s request for judicial notice in support of demurrer to first amended complaint is GRANTED, but only insofar as the court takes judicial notice of the existence of the documents, not necessarily the truth of matters asserted therein. (See Evid. Code, §452, subd. (h); *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549; *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal. App. 4th 343, 364.)

1 Defendant Bank of America, N.A.'s demurrer to plaintiffs Angie Rose and Jim Borelli's
2 first amended complaint on the ground that the court has no jurisdiction of the subject of the
3 cause of action alleged in the pleading [Code Civ. Proc., §430.10, subd. (a)], i.e., that the claims
4 asserted in the first amended complaint are moot, is OVERRULED.

5 Defendant Bank of America, N.A.'s demurrer to the first cause of action in plaintiffs
6 Angie Rose and Jim Borelli's first amended complaint on the ground that the pleading does not
7 state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (c)] for
8 promissory estoppel and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10,
9 subd. (f)] is SUSTAINED with 10 days' leave to amend.

10 "The doctrine of promissory estoppel is set forth in section 90 of the Restatement of
11 Contracts. It provides: 'A promise which the promisor should reasonably expect to induce action
12 or forbearance of a definite and substantial character on the part of the promisee and which does
13 induce such action or forbearance is binding if injustice can be avoided only by enforcement of
14 the promise.'" (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 637 (*Signal*
15 *Hill*.) "California recognizes the doctrine. 'Under this doctrine a promisor is bound when he
16 should reasonably expect a substantial change of position, either by act or forbearance, in
17 reliance on his promise, if injustice can be avoided only by its enforcement.'" (*Signal Hill, supra*,
18 96 Cal.App.3d at p. 637.) "The required elements for promissory estoppel in California are ...
19 (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise
20 is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the
21 estoppel must be injured by his reliance." (*Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60
22 Cal.App.3d 885, 890; see also *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th
23 887, 901 (*US Ecology*).

24 Defendant contends plaintiffs have not stated a clear and unambiguous promise of a loan
25 modification. In opposition, plaintiffs contend the promise is two-fold: a promise that missed
26 payments would not "impact their arrears or damage their credit" and a promise by defendant not
27 to foreclose while plaintiffs awaited loan modification. The first promise is found at paragraph
28 31. However, the second promise is not alleged in the first amended complaint. More

1 fundamentally, plaintiffs' claim for promissory estoppel is not the proper theory of recovery
2 here. "Cases have characterized promissory estoppel claims as being basically the same as
3 contract actions, but only missing the consideration element." (*US Ecology, supra*, 129
4 Cal.App.4th at p. 903.) "[P]romissory estoppel claims are aimed solely at allowing recovery in
5 equity where a contractual claim fails for a lack of consideration, and in all other respects the
6 claim is akin to one for breach of contract." (*Id.* at p. 904.) Promissory estoppel is used to
7 enforce a deficient contract. What plaintiffs seek here is to recover damages resulting from
8 fraudulent promises, not to enforce a contract. The doctrine of promissory estoppel does not
9 apply here.

10 Defendant further contends plaintiffs have not alleged any resulting injury. Plaintiffs
11 have alleged resulting injury at paragraph 33 of the first amended complaint. According to
12 defendant, their rescission of the notice of default has reversed any alleged damage. This is an
13 assertion of an extrinsic fact which the court cannot consider on demurrer.

14 Defendant Bank of America, N.A.'s demurrer to the second cause of action in plaintiffs
15 Angie Rose and Jim Borelli's first amended complaint on the ground that the pleading does not
16 state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for
17 breach of the covenant of good faith and fair dealing and on the ground that the pleading is
18 uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

19 "Every contract imposes upon each party the duty of good faith and fair dealing in its
20 performance and its enforcement." (*Foley v. Interactive Data Corp.* (1988), 47 Cal.3d 654, 683.)
21 "The covenant of good faith and fair dealing is implied in law to assure that a contracting party
22 'refrain[s] from doing anything to injure the right of the other to receive the benefits of the
23 agreement.' In essence, the covenant is implied as a supplement to the express contractual
24 covenants, to prevent a contracting party from engaging in conduct which (while not technically
25 transgressing the express covenants) frustrates the other party's rights to the benefits of the
26 contract." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153 [internal citations
27 omitted].) "We are aware of no reported case in which a court has held the covenant of good
28 faith may be read to prohibit a party from doing that which is expressly permitted by an

1 agreement. On the contrary, as a general matter, implied terms should never be read to vary
2 express terms.” (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*
3 (1992) 2 Cal.4th 342, 374.)

4 Defendant contends it cannot be liable for breach of the covenant of good faith and fair
5 dealing for taking action (foreclosure) which was expressly permitted by the subject agreements.
6 However, plaintiffs are not alleging merely that defendant commenced foreclosure; plaintiffs are
7 alleging that defendant promised plaintiffs that missing a payment would not impact their arrears
8 or damage their credit, but that defendant’s promise turned out false thereby depriving plaintiffs
9 of the benefit of the loan agreement/ deed of trust.

10 Defendant Bank of America, N.A.’s demurrer to the third cause of action in plaintiffs
11 Angie Rose and Jim Borelli’s first amended complaint on the ground that the pleading does not
12 state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for fraud
13 and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is
14 OVERRULED.

15 “The requirement of specificity in a fraud action against a corporation requires the
16 plaintiff to allege the names of the persons who made the allegedly fraudulent representations,
17 their authority to speak, to whom they spoke, what they said or wrote, and when it was said or
18 written.” (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

19 Defendant contends plaintiff has not alleged fraud with the requisite specificity.
20 However, the relevant allegations can be found at paragraphs 56 and 57 of the first amended
21 complaint.

22 Defendant further contends that plaintiffs have not alleged any resulting injury. Plaintiffs
23 have alleged resulting injury at paragraphs 59 through 61 of the first amended complaint.

24 Defendant Bank of America, N.A.’s demurrer to the fourth cause of action in plaintiffs
25 Angie Rose and Jim Borelli’s first amended complaint on the ground that the pleading does not
26 state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for
27 wrongful foreclosure and on the ground that the pleading is uncertain [Code Civ. Proc., §430.10,
28 subd. (f)] is SUSTAINED with 10 days’ leave to amend.

1 “A trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained
2 where there has been an illegal, fraudulent or wilfully oppressive sale of property under a power
3 of sale contained in a mortgage or deed of trust.” (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 8.)

4 Defendant contends the fourth cause of action for wrongful foreclosure is rendered moot
5 by virtue of the “Notice of Rescission of Declaration of Default and Demand for Sale and of
6 Notice of Default and Election to Sell” that it caused to be recorded on or about December 1,
7 2011. Plaintiff contends it has suffered damages beyond the initiation of foreclosure itself. The
8 court finds defendant’s argument to be persuasive. Although plaintiff contends it suffered
9 damages beyond the initiation of foreclosure, those damages are the result of the allegedly false
10 promise made by defendant, not as a result of a foreclosure sale.

11 Defendant Bank of America, N.A.’s demurrer to the fifth cause of action in plaintiffs
12 Angie Rose and Jim Borelli’s first amended complaint on the ground that the pleading does not
13 state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for
14 violation of Business and Professions Code section 17200 et seq. and on the ground that the
15 pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

16 “UCL can only be brought by ‘a person who has suffered injury in fact and has lost
17 money or property as a result of the unfair competition.’” (*In re Tobacco II Cases* (2009) 46
18 Cal.4th 298, 325 citing Bus. & Prof. Code, §17204.) Defendant first contends that plaintiffs
19 have not alleged any loss of property or money. Plaintiffs have alleged resulting injury at
20 paragraphs 59 through 61 of the first amended complaint, incorporated into the fifth cause of
21 action by paragraph 79.

22 Defendant next contends the fifth cause of action fails because plaintiffs have not alleged
23 the violation of any underlying laws. “Business and Professions Code section 17200 et seq.
24 prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL
25 covers a wide range of conduct. It embraces anything that can properly be called a business
26 practice and that at the same time is forbidden by law.” (*Korea Supply Co. v. Lockheed Martin*
27 *Corp.* (2003) 29 Cal.4th 1134, 1143 (Korea).) “By proscribing unlawful business practices, the
28 UCL borrows violations of other laws and treats them as independently actionable. In addition,

1 practices may be deemed unfair or deceptive even if not proscribed by some other law. Thus,
2 there are three varieties of unfair competition: practices which are unlawful, or unfair, or
3 fraudulent.” (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 48.) Plaintiffs have
4 adequately alleged unfair competition of the fraudulent variety.

5 Defendant Bank of America, N.A.’s demurrer to the sixth cause of action in plaintiffs
6 Angie Rose and Jim Borelli’s first amended complaint on the ground that the pleading does not
7 state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for
8 violation of the California Rosenthal Fair Debt Collections Practices Act (“Rosenthal Act”) and
9 on the ground that the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is
10 SUSTAINED with 10 days’ leave to amend.

11 Defendant first contends the Rosenthal Act does not apply to foreclosures. The case law
12 appears to be unsettled on this issue. Irrespective, the first amended complaint alleges conduct
13 preceding the initiation of foreclosure.

14 Defendant further contends the sixth cause of action fails because plaintiffs do not allege
15 defendant was attempting to collect a debt. It is not clear which specific statutory violation is
16 being asserted, but plaintiffs allege that “it is unlawful to make false, deceptive, or misleading
17 representations *in an effort to collect a debt.*” Plaintiffs allege that “Defendant BANK OF
18 AMERICA knowingly made false and misleading statements to Plaintiffs in an attempt to collect
19 a debt.” However, this allegation conflicts with plaintiffs’ earlier allegations that plaintiffs
20 themselves affirmatively sought loan modification. Thus, the alleged representations were made
21 in response to plaintiffs’ request for loan modification, not in an effort to collect a debt. In order
22 to assert a claim for violation of the Rosenthal Act, plaintiffs must reconcile these conflicting
23 allegations.

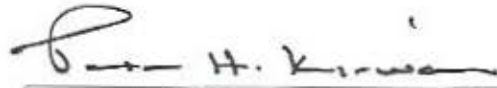
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1 Defendant next contends plaintiffs have not adequately alleged that defendant is a "debt
2 collector" as that term is defined by the Rosenthal Act. The court finds merit to this argument as
3 well. (See *Zakar v. CHL Mortg. Pass-Through Trust 2006* (S.D. Cal. 2011) 2011 U.S. Dist.
4 LEXIS 118763, *12.)

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6
7 Dated: 5/29/12



Hon. Peter H. Kirwan
Judge of the Superior Court