

## Mortgage Lender Hit with \$158K Judgment for Wrongful Foreclosure

A California Superior Court Judge entered a judgment of \$158,000 against PHH Mortgage for fraud when the lender made a loan modification but then repeatedly switched the amount of payments and initiated foreclosure proceedings.

Judge Steven W. Berrier reduced a verdict reached in July when a jury found for plaintiff Philip Linza of Plumas Lakes, CA, awarding \$513,902 in damages and \$15.7 million in punitive damages against the PHH.

The judgment, while dramatically less than the jury award, was still justice for the plaintiff and for California homeowners, according to plaintiff attorney Stephen Foondos of United Law Center. Linza filed suit against PHH 2012, trying in desperation to save his home from foreclosure after fighting with the bank for more than two years on his mortgage modification agreement.

### **Perplexing ruling**

“We were perplexed by the judge’s ruling given the jury’s award of \$15.7 million in punitive damages and the judge’s own \$5 million bond to secure the award during the post-trial period,” Foondos said. “Regardless, this decision must be viewed as a major victory for California homeowners as it empowers homeowners with the knowledge that anyone suffering from modification violations by their servicer can take legal action. No one can argue that \$158,000 isn’t a significant sum.”

In overturning the jury, the judge ruled that PHH Mortgage’s conduct and subsequent attempts to foreclose on Mr. Linza were merely, “an ‘insensitive’ breach of contract.”

“This verdict sends the very clear message that such conduct will no longer be tolerated and that the individual homeowner has legal rights to combat such wrongful and outrageous business practices,” Foondos said.

### **False promise**

Linza alleged that the mortgage company breached its contract and acted fraudulently by providing a loan modification but then repeatedly switching the amount of those payments and initiating foreclosure proceedings. In total, Linza and ULC sued on 11

causes of action including fraud, breach of contract, and intentional infliction of emotional distress.

Homeowners in California may sue on a fraud cause of action for false promise if a bank promises a homeowner a modification, but ends up denying the it, based on the California case by ULC, *Bushell v. JPMorgan/Chase* (3rd Dist. Ct. App. No. C070643).

As for Mr. Linza, his case continues. “We were not surprised by the court’s ruling as it is yet another example of a lower court not being informed on what’s really happening in this industry. Every day there is a report of another nonbank mortgage servicer coming under scrutiny by regulators for various abuses against mortgage holders. We intend to get back the millions of dollars the jury unanimously awarded Mr. Linza, on appeal.”

“Given the nature of this decision, the plaintiff now has the opportunity to establish new law and strengthen existing case law relating to homeowner abuse by servicers. We are used to having to win on appeal,” added Foondos.

## **Mortgage industry under fire**

This month, the mortgage servicing industry has increasingly come under fire by regulators due to their alleged inability to properly service their customers.

Congressmember [Elizabeth Warren](#) sent a letter to the U.S. Government Accountability Office on October 20, 2014 requesting a study of the risks posed to consumers by the “unprecedented” growth in nonbank mortgage servicing.

The Consumer Financial Protection Bureau (CFPB) released a report on October 28, 2014, on the little amount of compliance happening among nonbank servicers with the CFPB’s mortgage servicing rules that took effect in Jan. 2014. Most violations were described as “unfairly delaying permanent loan modifications” and “deceiving consumers about status of permanent loan modifications” — two of the biggest issues in the Linza case.

“This decision illustrates the glaring problem with the explosive growth of the servicing industry and the alleged oligopoly they’ve created,” added Foondos. “Mortgage holders are assigned to servicers when a lender sells its servicing rights to a nonbank servicer. The new servicer is forced upon the mortgage holder who has no ability to select a different servicer. When a servicer performs poorly, making mistakes that create havoc in a mortgage holder’s life, the person has no remedy other than to take legal action. Regulators must help open up the industry to competition so customers are better served.”

United Law Center intends to appeal the court's ruling given that stipulations of fact agreed to during the trial with opposing counsel were not recognized in the final ruling and the court's decision to give its own interpretation of "severe," something the jury overwhelmingly recognized in the jury's award. "This is fundamentally more than a breach of contract case. We will validate the jury's decision at the California Court of Appeals," added Foondos.

The case is Linza v. PHH Mortgage Corporation et al. (Yuba County Superior Ct. No. 12-0000714).

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**SUPERIOR COURT OF CALIFORNIA, COUNTY OF YUBA**

**PHILLIP LINZA,**

**Plaintiff,**

**vs.**

**CENTURY 21 (R) MORTGAGE, et al.,**

**Defendants.**

Case No. CV CV 12-0000714

RULING

Defendant's motion for Judgment Notwithstanding the Verdict (JNOV) came on for hearing on October 9, 2014, before the undersigned. Counsel appeared for both parties. After considering the moving and opposing papers, hearing argument, and taking the matter under submission, the Court rules as follows:

JNOV "may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support." *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4<sup>th</sup> 1107.

Defendant's motion requests that the Court set aside verdicts for Plaintiff as to the causes of action for claims for negligence, intentional misrepresentation, negligent misrepresentation, intentional interference with contract, intentional infliction of emotional distress, punitive damages, economic damages, and non-economic damages.

The jury returned multiple verdicts on forms submitted to them as to all causes of action. A final judgment was entered for Plaintiff by the Court based on the verdict forms for \$513,902.40 in compensatory damages and \$15,700,000 in punitive damages.

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1 FACTUAL BACKGROUND

2 Plaintiff sought to lower the mortgage payments on his home loan and on November 9, 2010,  
3 entered into a modification contract with his lender. The contract required a first monthly  
4 payment of \$1,543.27 on January 1, 2011. Plaintiff made this payment and two others in the  
5 first four months of 2011. Defendant sent Plaintiff a letter in April 2011 that his monthly  
6 payments were short by \$809.03 per payment. Plaintiff talked to the head of loss mitigation  
7 who made insensitive and unapologetic statements to him. Plaintiff received another letter  
8 from Defendant in early May 2011 giving notice of intent to foreclose and demanding \$7,056 to  
9 avoid foreclosure. Plaintiff called and was told several mistakes had been made. Later in May  
10 Plaintiff received another letter giving notice of intent to foreclose and demanding \$4,704 to  
11 avoid foreclosure. Plaintiff demanded a written acknowledgment or reaffirmation of the loan  
12 modification contract. Defendant sent a corrected monthly statement at the end of July.  
13 Plaintiff has made no further payments on the mortgage modification contract. At some point,  
14 ~~Defendant started but never completed non-judicial foreclosure proceedings.~~ Plaintiff  
15 continues to reside in his home.

16 NEGLIGENCE CLAIM

17 "[A]s a general rule, a financial institution owes no duty of care to a borrower when the  
18 institution's involvement in the loan transaction does not exceed the scope of its conventional  
19 role as a mere lender of money." *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231  
20 Cal.App.3d 1089. In this case, Defendant and Plaintiff stipulated that they had entered into a  
21 loan modification contract. There is no evidence that Defendant's involvement in this  
22 transaction was other than as a lender of money to Plaintiff. The court in *Nymark* held that the  
23 lender had no duty to the borrower arising from an alleged over-appraisal it had obtained on  
24 the borrower's property. The conduct of Defendant and its agents, on which Plaintiff's claim  
25 rests, all occurred after Plaintiff and Defendant executed the loan modification contract.  
26 Defendant sent Plaintiff inconsistent demands for payment arguably repudiating the  
27 modification contract, threatened Plaintiff with foreclosure, refused to return his many calls or  
28 to apologize for or correct its errors, refused to enter into a new agreement and even ridiculed

1 his plight. While this may constitute evidence that Defendant breached the loan modification  
2 contract, Defendant did not act other than as an arguably "bad" party to the loan modification  
3 contract. Hence, there is no evidence in this case that would support the existence of a tort  
4 duty necessary for a negligence claim. Accordingly, the motion is **granted** as to the  
5 negligence claim cause of action.

#### 6 NEGLIGENT AND INTENTIONAL MISREPRESENTATION CLAIMS

7 The fraud claims require proof of false statements made by Defendant intentionally or  
8 negligently, that Plaintiff reasonably relied on to his detriment. *Service by Medallion, Inc. v.*  
9 *Clorox Co.* (1996) 44 Cal.App.4<sup>th</sup> 1807. Defendant sent Plaintiff three letters in April and May  
10 2011, demanding more money than required by the loan modification contract entered into in  
11 November 2010. Two of the letters gave notice of intent to foreclose. Plaintiff received a  
12 statement in late July 2011 setting forth the monthly payment from the loan modification  
13 contract plus an escrow account increase of approximately \$34 per month for a total payment  
14 of \$1,577. 53. Plaintiff did not pay this amount.

15 Clearly, there were errors made by Defendant in demanding monies from Plaintiff  
16 inconsistent with the loan modification contract. Plaintiff claims that these misrepresentations  
17 constitute fraud. The loan modification contract established Plaintiff's promise to pay and  
18 Defendant's promise to accept lower monthly payments of principal and interest than in the  
19 original loan contract. Defendant's erroneous demands were contrary to this promise.  
20 However, "The mere making of a promise which the promisor afterwards fails or refuses to  
21 perform does not constitute actionable fraud." *Rheingans v. Smith* (1911) 161 Cal. 362, 366.  
22 Further, Plaintiff specifically did not pursue any claim or cause of action for "fraud in the  
23 inducement" or "a promise without intent to perform" and no such evidence was presented at  
24 trial.

25 Finally, as to the erroneous statements made by Defendant, there was no evidence that  
26 Plaintiff believed the statements to be true so that he was misled by them. In fact, the opposite  
27 is true. Plaintiff was insistent and frustrated that the true amount owed by him under the loan  
28 modification contract was not being acknowledged by Defendant. Plaintiff spent time trying to

1 get someone from Defendant's offices to correct what he knew and believed were erroneous  
2 statements of money owed. He didn't rely on the statements and act thereon to his detriment.  
3 He disputed the statements then and to this day. (See *Cadlo v. Owens-Illinois, Inc.* (2004) 125  
4 Cal.App.4<sup>th</sup> 513). Thus, Plaintiff failed to present sufficient evidence to establish the element of  
5 reliance.

6 Defendant's motion is **granted** as to these claims/causes of action.

7 CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACT

8 Defendant cannot be liable under this tort theory for interfering with its own contract.  
9 *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4<sup>th</sup> 503. The parties  
10 stipulated that Plaintiff and Defendant entered into the loan modification contract and that  
11 Defendant transferred its right to receive payments to a third party investor. However, there  
12 was no evidence that the third party investor was substituted into the contract in place of  
13 Defendant. Accordingly, the motion for JNOV is **granted** as to this claim.

14 CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (IIED)

15 The facts that must be proven to recover under this claim are: 1) outrageous conduct  
16 that is "so extreme as to exceed all bounds of that usually tolerated in a civilized society"  
17 (*Berkley v. Dowds* (2007) 152 Cal.App.4<sup>th</sup> 518, 534), 2) intent by Defendant to cause emotional  
18 distress or that Defendant acted with reckless disregard that Plaintiff would suffer emotional  
19 distress (CACI 1600), and 3) Plaintiff suffered "severe or extreme" emotional distress.  
20 (*Wong v. Jing* (2010) 189 Cal.App.4<sup>th</sup> 1354, 1376.)

21 Defendant argues that the Court erred in allowing the Plaintiff to amend to conform to  
22 proof during trial on this claim and that this claim is barred by the statute of limitations. When  
23 defense counsel was asked if they had anything to say about Plaintiff's motion to amend to  
24 add the IIED cause of action, the response was that they did not because two causes of action  
25 already pled sought the same remedy. (3 TR 9:18-24.) Hence, not only did the defense not  
26 advise the court of how they were prejudiced or request a continuance to conduct further  
27 discovery, they essentially conceded the matter. Defendant's answer also does not allege a  
28 statute of limitations defense and defense counsel never requested leave to amend, so that

1 argument is unavailing. Liberality in allowing an amendment to state a different cause of  
2 action arising out of the same facts is not an abuse of discretion in this case. The first  
3 amended complaint alleges general damages on causes of action where emotional distress  
4 damages could have been awarded.

5 Defendant also raises the issue as to all the tort theories, that this is strictly a breach of  
6 contract case and that even if it is assumed that Defendant intentionally, recklessly, or even  
7 maliciously breached the loan modification contract, the law does not permit an independent  
8 tort recovery. In *Freeman & Mills Inc. v. Belcher Oil Co.* (1995) 11 Cal.4<sup>th</sup> 85 the California  
9 Supreme Court reversed its own 11-year-old rule by eliminating the tort of "bad-faith denial of  
10 contract" involving non-insurance contracts. Four years later, the California Supreme Court in  
11 *Erllich v. Menezes* (1999) 21 Cal.4<sup>th</sup> 543 held in a case involving the negligent breach of a  
12 contract to build a house that there was no independent tort duty, and, thus, no damages  
13 could be recovered for emotional distress even though there was evidence at trial of grossly  
14 deficient construction and severe emotional distress suffered by the homeowners. However,  
15 the Court specifically noted that the jury had not found that the contractor acted intentionally  
16 or fraudulently. The court cited to Justice Mosk's dissenting and concurring opinion in  
17 *Freeman, supra*, stating: "a tortious breach of contract...may be found when (1) the breach is  
18 accompanied by a traditional common law tort, such as fraud or conversion; (2) the means  
19 used to breach the contract are tortious, involving deceit or undue coercion; or (3) one party  
20 intentionally breaches the contract intending or knowing that such a breach will cause severe,  
21 unmitigable harm in the form of mental anguish, personal hardship, or substantial  
22 consequential damages." *Erllich v. Menezes, supra*, 21 Cal.4<sup>th</sup> 543, 553-554.

23 The evidence here is insufficient to establish outrageous conduct "so extreme as to  
24 exceed all bounds of that usually tolerated in a civilized society." Defendant made some errors  
25 in statements sent to Plaintiff that the evidence shows were due to his loan modification  
26 documentation not catching up with his existing loan accounting. The statements attributable  
27 to the loss mitigation supervisor were insensitive but not outrageous.

28 There was no evidence that the errors made were intentional or made in reckless

1 disregard of causing emotional distress. Three statements with errors were sent in April and  
2 May before a correct statement was sent out at the end of July. There was no evidence  
3 presented as to why this happened other than from Defendant. Defendant's explanation is  
4 basically that the paperwork got delayed. This is far from conduct that is intentional or made  
5 with reckless disregard that plaintiff would suffer emotional distress.

6 There was insufficient evidence that Plaintiff's claimed emotional distress was severe or  
7 extreme. He went to the doctor only once. He took some pills that weren't identified. His  
8 medical costs were about \$200. While a potential foreclosure has been a possibility,  
9 Defendant hasn't pursued that for over two years during which time Plaintiff has had no rent or  
10 mortgage expense because he has made no mortgage or property tax payments. Plaintiff  
11 complained of lost sleep and nausea, of being upset, hurt, stressed, and angry, but he was  
12 mostly "just pissed," as he testified. Plaintiff walks his dog, prays, and goes out with friends.  
13 He hasn't gone to counseling for any stress. While there has been some stress associated  
14 with this experience, the evidence is not sufficient to establish that it was severe or extreme.  
15 Accordingly, the Court **grants** Defendant's motion for JNOV as to this claim.

#### 16 CLAIMS FOR NON-ECONOMIC AND PUNITIVE DAMAGES

17 Claims for non-economic damages (i.e. emotional distress, pain, and suffering) and  
18 punitive damages are not recoverable on the breach of contract and breach of the implied  
19 covenant of good-faith claims. (See *Erich v. Menezes* (1999) 21 Cal.4<sup>th</sup> 543; Civil Code  
20 section 3294.) In addition, these damages are not recoverable on tort causes of action as to  
21 which the Court has granted the motion for JNOV. Accordingly, the motion for JNOV is  
22 **granted** as to these damages.

#### 23 CLAIMS FOR ECONOMIC DAMAGES

24 The jury awarded compensatory damages of \$513,902.40 on the contract theories  
25 which includes past economic damages of \$158,902.40 and future economic damages of  
26 \$55,000.

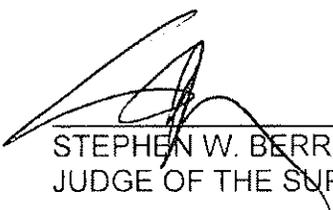
27 Plaintiff is not required to prove damages with exactness or absolute certainty. The  
28 damages awarded must be reasonable and must be proved to a reasonable degree of

1 certainty. They must not be speculative. Defendant's only argument is that they are  
2 speculative.

3 The parties do not dispute that there was no evidence presented of future economic  
4 damages. The motion for JNOV is **granted** as to future economic damages.

5 There is evidence to support the medical portion of past economic damages. There  
6 was expert testimony that Plaintiff's credit was damaged, that Plaintiff made hundreds of calls  
7 trying to straighten out the erroneous bills, and that Plaintiff earned \$30,000 to \$45,000 per  
8 year in his job. There was evidence that over \$50,000 has been added to the mortgage from  
9 January 2011 to trial due to non-payment of the mortgage payments, penalties, and interest.  
10 There was evidence that Plaintiff put \$80,000 down on his house when he bought it and spent  
11 \$55,000 in the backyard on improvements. He spent \$1,200 for the loan modification fee. He  
12 spent about 20 hours on the phone to the Department of Corporations regarding his problem  
13 with Defendant. When viewed in the light most favorable to Plaintiff, there is substantial  
14 evidence to support the verdict. Accordingly, the motion for JNOV as to past economic  
15 damages is **denied**.

16 DATED: October 24, 2014

  
STEPHEN W. BERRIER  
JUDGE OF THE SUPERIOR COURT

1 PROOF OF SERVICE BY MAIL

2 I, the undersigned, hereby declare that I am a citizen of the United States, over the age  
3 of eighteen years, and not a party to the within action. I am employed at Yuba County  
4 Superior Court and my business address is 215 5<sup>th</sup> Street, Marysville, California.

5 On October 24, 2014, I served the within: RULING on the named parties by placing a  
6 true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the  
7 central depository for mail collection for Yuba County, located at 215 5<sup>th</sup> Street, Marysville,  
8 California, addressed as follows:

9 JON L OLDENBURG Counsel for plaintiff  
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15 FORREST A HAINLINE III Counsel for defendant  
16 PATRICK S THOMPSON  
17 GOODWIN PROCTER LLP  
THREE EMBARCADERO CENTER 24<sup>TH</sup> FL  
SAN FRANCISCO CA 94111

18 I declare under penalty of perjury that the foregoing is true and correct.

19 Executed on October 24, 2014, at Marysville, California.

20 H. STEPHEN KONISHI  
21 CLERK OF THE SUPERIOR COURT

22 By: K. Reel  
23 Court Clerk  
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