ADOLPHUS BOLDS, JR., et al., Plaintiffs and Appellants,
v.
WELLS FARGO BANK, N.A., et al., Defendants and Respondents.
No. A144235.
Court of Appeals of California, First District, Division Five.

Filed October 20, 2016.
Appeal from the Contra Costa County, Superior Court No. C-14-01161.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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SIMONS, J.
Plaintiffs Adolphus Bolds, Jr. and Latanya R. Bolds (Plaintiffs) sued Wells Fargo Bank, N.A. (Wells Fargo) and U.S. Bank, N.A., as trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-through Certificates, Series 2006-AR2 (U.S. Bank) (collectively, the Banks) following Wells Fargo's refusal to modify Plaintiffs' mortgage loan and U.S. Bank's issuance of a notice of default. We affirm the trial court's order sustaining the Banks' demurrer without leave to amend.

BACKGROUND[1]

In 2005, Wells Fargo issued a $600,000 loan to Plaintiffs, secured by a deed of trust (the Deed of Trust) against certain residential property (the Property). In early 2010, Plaintiffs and Wells Fargo executed a loan modification agreement whereby a past due amount was deferred to the end of the loan with no interest.
Between September 2010 and October 2013, Wells Fargo denied further modifications following multiple "retention reviews." Although the complaint does not expressly allege that Plaintiffs submitted loan modification applications which the reviews considered, it is a reasonable inference that we accept for purposes of this demurrer.
The complaint refers to twelve contemporaneous letters from Wells Fargo to Plaintiffs setting forth the specific reasons a loan modification was being denied:
September 2010: Two denials based on income and expense amounts.
November 2010: "Investor has determined this request is not in their best interest."
December 2010: "You have not responded to our attempts to reach you."
June 2012: "Investor has declined the request to modify your mortgage."

September 2012: "We service your loan on behalf of an investor that has not given us the contractual authority to modify your loan."
September 2012: "We have not been able to reach you."
November 2012: "Investor has declined the request to modify your mortgage."
November 2012: "You do not meet the investor requirements of the program because You have exceeded the number of modifications allowed by the investor."
September 2013: "Investor has declined the request to modify your mortgage."
September 2013: "You have exceeded the number of modifications allowed by the investor."
October 2013: "You still do not meet the requirements of a loan modification."
During this process, in April 2013, an assignment was recorded transferring the beneficial interest under the Deed of Trust to U.S. Bank. In June 2013, U.S. Bank issued a notice of default and election to sell with respect to the Property. This notice was rescinded in August 2013.
In March 2014, Wells Fargo sent Plaintiffs a letter responding to an "inquiry" Plaintiffs filed with the Consumer Financial Protection Bureau. The letter stated the retention reviews Wells Fargo conducted between September 2010 and October 2013 "either did not substantiate that your financials supported home affordability, we did not receive the requested financial documents, and/or the investor declined the request to modify your mortgage." The 2014 letter further stated that the federal Home Affordable Modification Program[2] was not available because Plaintiffs' loan "is in a mortgage-backed security pool that does not allow permanent changes to the terms set forth in the original loan documents," and the loan "is not eligible for an alternative loan modification since one was previously approved. This decision is in accordance with the guidelines established by the investor."
In June 2014, Plaintiffs filed the instant action. The complaint alleges four causes of action based on the Banks' refusal to modify Plaintiffs' loan: negligence, intentional misrepresentation, negligent misrepresentation, and violation of the Unfair Competition Law (Bus. & Prof. Code, §17200, et seq.). An additional cause of action for declaratory relief relates to the assignment of the Deed of Trust to U.S. Bank.[3] The trial court sustained the Banks' demurrer as to all counts without leave to amend and entered judgment dismissing the complaint.

DISCUSSION

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action." (*Schifando, supra*, 31 Cal.4th at p. 1081.) "We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111.) "If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando,* at p. 1081.)

I. ***Negligence***

"To state a cause of action for negligence, a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries." (*Lueras, supra*, 221 Cal.App.4th at p. 62.) As we will explain, the complaint fails to sufficiently allege the element of causation. While causation is generally a question of fact, it can be decided as a matter of law where, as here, "the facts of the case permit only one reasonable conclusion." (*Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, 354.)

As an initial matter, the parties dispute whether the Banks owed Plaintiffs a duty of care in connection with their modification applications. Plaintiffs argue the Banks had a duty to act reasonably in processing their applications, citing *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941 (*Alvarez*), which found the lender had a duty to "timely and carefully process" a loan modification application that it had agreed to consider. (*Id.* at p. 948.) The Banks argue no such duty is present, citing *Lueras, supra*, which concluded the lender had no duty to "offer, consider, or approve a loan modification." (221 Cal.App.4th at p. 68.) We assume, without deciding, that **the Banks owed Plaintiffs a duty of care to act reasonably in processing their modification applications.**

Plaintiffs argue the Banks breached this duty of care by providing erroneous reasons for denying a loan modification. Plaintiffs first argue the statement in the March 2014 letter that Plaintiffs' loan "is in a mortgage-backed security pool that does not allow permanent changes to the terms set forth in the original loan documents" must be incorrect because Plaintiffs' loan was modified in 2010. Plaintiffs argue the Banks therefore breached their duty of care because it was "unreasonable for [the Banks] to deny a loan modification on such grounds."

However, as the Banks argue in their brief to this court, Plaintiffs did not allege they would have received a loan modification but for this alleged breach.[4] (Compare *Alvarez, supra*, 228 Cal.App.4th at p. 951 [the plaintiffs "alleged that the improper handling of their applications deprived them of the opportunity to obtain loan modifications, which they allege they were qualified to receive and would have received had their applications been properly reviewed"].) No such allegation can be reasonably inferred in light of the multiple other reasons provided for denying Plaintiffs' modification applications. Accordingly, Plaintiffs have failed to allege such a breach caused any damages.

Plaintiffs alternatively argue that, if the statement in the March 2014 letter was true, such that no loan modification was ever possible, the Banks "breached their duty to [Plaintiffs] by keeping [Plaintiffs] in a loan modification [process] for more than three years that had no hope of success. . . ." Plaintiffs contend this breach caused them injury including damage to their credit, fees and penalties, and increased interest and arrears.[5] Plaintiffs do not explain, in either the complaint or their brief to this court, how the breach caused these damages. However, **it is a reasonable inference that the damages were a result of Plaintiffs falling behind on their mortgage**. In connection with the misrepresentation claims, discussed below, Plaintiffs alleged that, "had Plaintiffs known that [the Banks] never intended to grant [them] a modification, [they] would not have continued in the process and would have either sold the property or sought the aid of family"; presumably Plaintiffs' theory is that, had they taken one of these alternative actions, they would not have fallen behind on the loan. Plaintiffs also allege they spent time and money engaging in a futile loan modification process.

"To prevail on their causes of action for negligence . . ., Plaintiffs would have to establish that [the Banks'] negligence was a substantial factor in causing their injury. [Citation.] Except in situations involving concurrent independent causes, which no one contends is the case here, **`"the actor's negligent conduct is *not a substantial factor* in bringing about harm to another *if the harm would have been sustained even if the actor had not been negligent.*"'"** (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 899, fn. omitted.) Plaintiffs' theory of causation is that had Plaintiffs known a loan modification was not possible, they would have successfully pursued other options and would not have fallen behind on their mortgage. However, the complaint's allegations contradict this assertion. Specifically, beginning in September 2012, Wells Fargo denied Plaintiffs' loan modification for reasons which fully informed Plaintiffs that no modification was possible. Plaintiffs were told: "**We service your loan on behalf of an investor that has not given us the contractual authority to modify your loan"** (September 2012); **"You do not meet the investor requirements of the program because You have exceeded the number of modifications allowed by the**

investor" (November 2012); and "You have exceeded the number of modifications allowed by the investor" (September 2013). Yet Plaintiffs persisted in attempting to modify their loan, allegedly to the exclusion of other alternatives, through October 2013. This course of conduct fatally undermines Plaintiffs' contention they would have pursued other alternatives had they known no modification would occur.

Plaintiffs argue they should be granted leave to amend. However, none of their suggested amendments cure this deficiency. The trial court's denial of leave to amend was not an abuse of discretion.

II. *Misrepresentation*

"The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages. [Citation.] The elements of negligent misrepresentation are the same except for the second element, which for negligent misrepresentation is the defendant made the representation without reasonable ground for believing it to be true." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792 (*West*).) **"`Actual reliance occurs when a misrepresentation is "`an immediate cause of [a plaintiff's] conduct, which alters his legal relations,'" and when, absent such representation, "`he would not, in all reasonable probability, have entered into the contract or other transaction.'"'"** (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1256 (*Conroy*).) Plaintiffs have failed to demonstrate they justifiably relied on any misrepresentations.

"Fraud must be pleaded with specificity rather than with `"general and conclusory allegations."' [Citation.] **The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made."** (*West*, *supra*, 214 Cal.App.4th at p. 793.)

The complaint alleges the Banks "engaged in an ongoing misrepresentation to [Plaintiffs] that if they continued to try for a modification then they would have the opportunity to have their loan modified to a payment that they would be able to afford each month, therefore allowing them to stay in their home."[6] The only specific misrepresentations alleged are the twelve loan modification denial letters sent between 2010 and 2013. Plaintiffs argue the denials constituted misrepresentations because they indicated modification might be possible in the future.

As an initial matter, at least three of the denials convey no such misrepresentation. **These denials—stating "We service your loan on behalf of an investor that has not given us the contractual authority to modify your loan," "You do not meet the investor requirements of the program because You have exceeded the number of modifications allowed by the investor," and "You have exceeded the number of modifications allowed by the investor"—cannot reasonably be construed to indicate modification might be possible in the future**. Even if we assume that the remaining denials may be so construed, the three denials highlighted above informed Plaintiffs no modification was possible, as discussed in Part I.[7] In the face of these three denials, Plaintiffs continued to pursue modification to the exclusion of other options. Therefore, Plaintiffs have failed to allege they actually relied on the other denials. (*Conroy, supra*, 45 Cal.4th at p. 1256 **["`[a]ctual reliance occurs when a misrepresentation is "`an immediate cause of [a plaintiff's] conduct'"'"].)**

Plaintiffs rely on *Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403 (*Fleet*). **In *Fleet,* the lender told the homeowners their loan would be permanently modified if they made three monthly payments and verified financial hardship.** (*Id.* at p. 1406.) After receiving the second payment and before the third payment was due, the lender foreclosed on the home. (*Ibid.*) The Court of Appeal concluded the complaint sufficiently alleged fraudulent misrepresentation. (*Id.* at pp. 1411-1412.) *Fleet* is distinguishable. Unlike in *Fleet,* there are no allegations the Banks affirmatively told Plaintiffs a modification would be granted. Moreover, there is no indication the homeowners in *Fleet* were informed no modification was possible.

Plaintiffs argue they should be granted leave to amend the complaint "to further allege that all the statements made to them were part of the larger scheme to keep [Plaintiffs] in the loan modification process for as long as possible. . . ." We agree with Plaintiffs that the complaint already is reasonably construed to include such an allegation, which does not cure its inability to allege reliance. We affirm the trial court's order sustaining the demurrer as to the misrepresentation claims without leave to amend.

III. *Unfair Competition Law*

The complaint alleges the Banks violated the Unfair Competition Law (Bus. & Prof. Code § 17200 et seq. (UCL)) by their conduct in connection with Plaintiffs' loan modification applications, as alleged in the negligence and misrepresentation causes of action.

"To have standing to sue under the UCL, a private plaintiff must allege he or she `has suffered injury in fact and has lost money or property,'" which includes a showing "`that that economic injury was the result of, i.e., *caused by* the unfair business practice or false advertising that is the gravamen of the claim.'" (*Lueras, supra*, 221 Cal.App.4th at p. 81.) As discussed above, Plaintiffs have failed to show any injury was caused by the Banks' conduct in connection with their loan modification applications. Accordingly, the demurrer as to the Unfair Competition Law claim was properly sustained.

IV. *Declaratory Relief*

The complaint seeks declaratory relief to determine whether U.S. Bank has an enforceable interest in the Property. The complaint asserts Plaintiffs have standing to challenge the assignment of the Deed of Trust to the trust represented by U.S. Bank (the Trust) because the assignment is void. The complaint argues the assignment took place more than 90 days after the Trust's closing date, contrary to the Trust's pooling and servicing agreement,[8] and is therefore void under New York law that governs the agreement.

As Plaintiffs argue, this theory was adopted in *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1096-1097 (*Glaski*). *Glaski* interpreted a New York statute providing: "`If the trust is expressed in an instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void.'" (*Id.* at p. 1096.) Relying on a New York trial court opinion, *Glaski* concluded: "Because the [trust at issue] was created by the pooling and servicing agreement and that agreement establishes a closing date after which the trust may no longer accept loans, this statutory provision provides a legal basis for concluding that the trustee's attempt to accept a loan after the closing date would be void as an act in contravention of the trust document." (*Ibid.*) The court acknowledged cases which "rejected the postclosing date theory on the grounds that the New York statute is not interpreted literally, but treats acts in contravention of the trust instrument as merely *voidable*," but rejected them in favor of a "literal reading" of the statute. (*Id.* at pp. 1096, 1097.)

As the Second District Court of Appeal recently noted, **"the decision upon which *Glaski* relied for its understanding of New York law has not only been reversed, but soundly and overwhelmingly rejected. . . ."** (*Yhudai, supra,* 1 Cal.App.5th 1259.) For example, in *Rajamin v. Deutsche Bank Nat. Trust Co.* (2d Cir. 2014) 757 F.3d 79 (*Rajamin*), the Second Circuit Court of Appeals relied on the principle that, **"[u]nder New York law, unauthorized acts by trustees are**

generally subject to ratification by the trust beneficiaries" and agreed with cases that "interpreted New York law to mean that `a transfer into a trust that violates the terms of a PSA [pooling and servicing agreement] is voidable rather than void. . . .'" (*Id.* at pp. 88, 90; see also *Yhudai*, at p. 1259 [citing additional cases].) **At least two California Courts of Appeal have rejected *Glaski*'s interpretation of New York law**. (*Yhudai*, at p. 1259 **["a postclosing assignment of a loan to an investment trust that violates the terms of the trust renders the assignment voidable, not void, under New York law"**]; *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815 ["under New York law, an untimely assignment to a securitized trust made after the trust's closing date . . . is merely voidable"].) We agree with these cases and conclude the untimely assignment alleged in Plaintiffs' complaint is voidable, not void.[9] Plaintiffs do not argue they have standing to challenge the assignment if it is merely voidable, rather than void. (See *Yvanova, supra*, 62 Cal.4th at p. 936 ["**WHEN AN ASSIGNMENT IS MERELY VOIDABLE, THE POWER TO RATIFY OR AVOID THE TRANSACTION LIES SOLELY WITH THE PARTIES TO THE ASSIGNMENT; THE TRANSACTION IS NOT VOID UNLESS AND UNTIL ONE OF THE PARTIES TAKES STEPS TO MAKE IT SO."].)** None of their proposed amendments would cure this defect. Accordingly, we affirm the trial court's order sustaining the demurrer as to this claim without leave to amend.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal. JONES, P.J. and BRUINIERS, J., concurs.

[1] Our recitation of the facts assumes the truth of the factual allegations of the operative first amended complaint and considers judicially noticed matters. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).)

[2] "`[T]he United States Department of the Treasury implemented the Home Affordable Modification Program (HAMP) to help homeowners avoid foreclosure during the housing market crisis of 2008. "The goal of HAMP is to provide relief to borrowers who have defaulted on their mortgage payments or who are likely to default by reducing mortgage payments to sustainable levels, without discharging any of the underlying debt.""' (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 56 fn. 1 (*Lueras*).)

[3] The complaint alleges an additional claim for wrongful foreclosure; Plaintiffs conceded below the demurrer should be sustained as to this claim.

[4] Plaintiffs did not file a reply brief addressing the arguments in the Banks' brief on appeal.

While reply briefs are not mandatory (Cal. Rules of Court, rule 8.200(a)(3)), we will not endeavor to respond to the Banks' arguments on Plaintiffs' behalf. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 **["`We are not bound to develop appellants' argument for them.'"].)**

[5] The complaint also identifies Plaintiffs' legal fees in this action as damages. Plaintiffs' attorney fees are not recoverable as damages. (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 62 ["`**In the absence of a statute authorizing attorneys' fees as an element of damages, or of a contract to pay such fees in event of the party's recovery, attorneys' fees paid by a successful party in an action are never recoverable against the unsuccessful party.**'"].)

[6] The complaint also alleged a misrepresentation that the beneficial interest in the loan had been assigned to U.S. Bank when in fact the assignment was void. In part IV, *post*, we reject Plaintiffs' argument that the assignment was void. In any event, the complaint includes no allegations that Plaintiffs detrimentally relied on any such misrepresentation.

[7] Plaintiffs acknowledge such statements but argue the Banks nonetheless "continued to implore [Plaintiffs] to reapply." The portion of the record cited in support of this assertion, however, refers only to an invitation issued by the Banks in June 2014. This took place *after* the loan modification review process (2010 through 2013), and therefore could not have caused Plaintiffs to continue to seek modification.

[8] "A securitized investment trust is created by pooling the loans into a trust and selling to investors the right to receive the mortgage interest and principal payments. [Citation.] Terms of the trusts and the rights and obligations of the parties are set forth in a pooling and service agreement." (*Yhudai v. Impac Funding Corporation* (2016) 1 Cal.App.5th 1252, fn. 2, petn. for review pending, petn. filed Sept. 8, 2016 (*Yhudai*).)

[9] Our Supreme Court expressed no opinion on this issue in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 931 (*Yvanova*), which the parties addressed in supplemental briefing. We need not and do not address the other arguments raised by the parties in connection with this claim because our interpretation of New York law is dispositive.