

# DEMURRER (Judge Lori A. Fournier)

Case Number: VC066556      Hearing Date: February 06, 2018  
Dept: SEC

HERINGTON v. THE REO GROUP, INC.

CASE NO.: VC066556

HEARING: 02/06/18

JUDGE: LORI ANN FOURNIER

#8

## TENTATIVE ORDER

Defendant THE REO GROUP, INC.'s unopposed demurrer to Plaintiff's Complaint is **SUSTAINED without leave to amend**. C.C.P. § 430.10(e).

Moving Party to give Notice.

No Opposition filed as of February 5, 2018. On December 27, 2017, this Court granted Plaintiff's former counsel's motion to be relieved as counsel-Plaintiff has been unrepresented since that date.

This action for wrongful foreclosure was filed by Plaintiff (in pro per) DARREN HERINGTON on September 7, 2017. Plaintiff's Complaint asserts the following causes of action: (1) Breach of Contract; (2) Breach of Implied Covenant of Good Faith and Fair Dealing; (3) Promissory Estoppel; (4) Rescission; (5) TILA; (6) Fraud; (7) Negligent Misrepresentation; (8) Unfair Business Practices – Cal. B&P Code §17200 et seq.; and (9) Wrongful Foreclosure.

Defendant demurs to Plaintiff's first, second, third, sixth,

seventh, eighth, and ninth causes of action pursuant to CCP §430.10 (e) and (f).

### First Cause of Action – Breach of Contract

The elements for a breach of contract cause of action are: (1) existence of a contract; (2) plaintiff's performance or nonperformance; (3) defendant's breach (or anticipatory breach); and (4) resulting damage to plaintiff. (Reichert v. General Ins. Co. (1968) 68 Cal.2d 822, 830.) The elements of a cause of action for breach of implied-in-fact contract are: (1) existence of contract implied from the promisor's conduct; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) resulting damage. (Blaustein v. Burton (1970) 9 Cal.App.3d 161, 184.) Pleading contracts by legal effect involves alleging the relevant terms in substance. (McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457, 1489.)

Plaintiff has not alleged sufficient facts to maintain this cause of action against Defendant. Plaintiff failed to state the material terms of the contract that Defendant purportedly breached. The demurrer to the first cause of action is sustained.

### Second Cause of Action – Breach of Implied Covenant of Good Faith and Fair Dealing

"There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal.4th 390, 400.) "The covenant of good faith and fair dealing is implied in every contract as a method to protect the interests of the parties in having the contractual promises and purposes performed." (Love v. Fire Ins. Exchange (1990) 221 Cal.App.3d 1136, 1147.) "The implied covenant of good faith and fair dealing rests upon the

existence of some specific contractual obligation.” (Racine & Laramie, Ltd. v. Department of Parks & Recreation (1992) 11 Cal.App.4th 1026, 1031.) “There is no obligation to deal fairly or in good faith absent an existing contract.” (Id., at p. 1032.)

A breach of implied covenant of good faith and fair dealing claim “must show that the conduct of the defendant ... demonstrates a failure or refusal to discharge contractual responsibilities, prompted ... by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.” (Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1395.) The “implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract.” (Pasadena Live, LLC v. City of Pasadena (2004) 114 Cal.App.4th 1089, 1093–1094 (citation omitted).)

Here, the Complaint does not allege a specific contractual obligation on which to premise an implied covenant claim. In the absence of a tangible breach of contract claim, the Complaint lacks facts to demonstrate Defendant’s failure or refusal to discharge contractual responsibilities, prompted by a conscious and deliberate act. The demurer to the second cause of action is sustained.

### Third Cause of Action – Promissory Estoppel

The elements of promissory estoppel are: (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting estoppel must be injured by his reliance. (Granadino v. Wells Fargo Bank, N.A. (2015) 236 Cal.App.4th 411, 416; see also Smith v. City & County of San Francisco (1990) 225

Cal.App.3d 38, 48 [to allege promissory estoppel, pleadings must allege facts demonstrating such reliance on promises, beyond just conclusory allegations of reasonable reliance upon promises]; Aceves v. U.S. Bank, N.A. (2011) 192 Cal.App.4th 218, 226 [agreement to work on a mortgage reinstatement and loan modification was a “clear and unambiguous promise” and, in reliance, plaintiff relinquished a legal right to stay foreclosure by filing bankruptcy].)

Plaintiff’s allegations are not sufficient to maintain this cause of action. Specifically, there is no allegation that Defendant ever represented that a loan origination fee would not be charged. The demurrer to the third cause of action is sustained.

#### Sixth Cause of Action – Fraud

Fraud actions are subject to strict requirements of particularity in pleading. (Committee on Children’s Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 216.) Fraud must be pleaded with specificity rather than with general and conclusory allegations. (Small v. Fritz Companies, Inc. (2003) 30 Cal.4th 167, 184.) 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. (Lazar v. Superior Court (1996) 12 Cal.4th 631, 645.) Less specificity as to fraud claims is required if it appears from the nature of allegations that defendant must necessarily possess full information, or if the facts lie more in the knowledge of opposing parties. (Alfaro v. Community Housing Improvement System & Planning Assn., Inc. (2009) 171 Cal.App.4th 1356, 1384-1385.)

Here, and as argued by Defendant in the instant demurrer, Plaintiff fails to allege facts with requisite specificity necessary to maintain this cause of action against the demurring Defendant. The demurrer to the sixth cause of action is sustained.

#### Seventh Cause of Action – Negligent Misrepresentation

Although Plaintiff generally alleges that Defendant made certain misrepresentations that induced him into foregoing alternative refinancing or loans—the Complaint does not state facts to show that Plaintiff reasonably relied on any of Defendant’s purported misrepresentations. Moreover, Plaintiff alleges conclusions and fails to adequately state facts to support Defendant’s intent to defraud Plaintiff. The demurrer to the seventh cause of action is sustained.

#### Eighth Cause of Action – B&P Code §17200

To state a claim under §17200, Plaintiffs must allege whether the conduct complained of is a fraudulent, unlawful or an unfair business practice. To bring a claim under the fraud prong, Plaintiffs must allege an affirmative misrepresentation, conduct or business practice on the part of a defendant; or an omission in violation of defendant’s duty to disclose; and that is likely to deceive members of the public. (Buller v. Sutter Health (2008) 160 Cal.App.4th 981, 986.) To state a claim under the unfairness prong, Plaintiffs must allege that one or more of Defendants’ business practices are unfair, unlawful or fraudulent; and the remedy sought is authorized by law. (Paulus v. Bob Lynch Ford, Inc. (2006) 139 Cal.App.4th 659, 676; see also Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 337.) To state a claim under the unlawful prong, Plaintiffs must allege a violation of law and cite that law. (Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 610 [demurrer to SAC which failed to allege violation of a law was properly sustained without leave to amend].)

In this case, Plaintiffs rely on the alleged unlawful, unfair and fraudulent conduct set forth in the preceding paragraphs. Given the Court's rulings herein, Plaintiff has not sufficiently alleged a basis for a UCL claim. The demurrer to the eighth cause of action is sustained.

#### Ninth Cause of Action – Wrongful Foreclosure

The elements of a cause of action for wrongful foreclosure are as follows: (1) a trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property; (2) pursuant to a power of sale contained in a mortgage or deed of trust; and (3) the trustor or mortgagor sustained damages. (Munger v. Moore (1970) 11 Cal. App. 3d 1, 7; see also Sierra-Bay Fed. Land Bank Ass'n v. Superior Court (1991) 227 Cal.App.3d 318, 337 [trustee sale under deed of trust presumed valid, but debtors may obtain equitable relief to set aside a foreclosure, upon showing unfairness or irregularity of the sale, inadequate price, and an offer to pay the debt]; Abdallah v. United Sav. Bank (1996) 43 Cal.App.4th 1101, 1109 [required to allege tender of amount of secured indebtedness, in order to maintain any cause of action re sale irregularity].) As argued by Defendant in the instant demurrer, Plaintiff has failed to plead charging facts to maintain this cause of action against Defendant. Mere legal recitations of law do not suffice. The demurrer to the ninth cause of action is sustained.

#### Leave to Amend

The Court construes Plaintiff's failure to oppose the instant demurrer as an abandonment of his claims, or as an admission that the demurrer has merit. (See Herzberg v. County of Plumas (2005) 133 Cal.App.4th 1, 20.) Where no Opposition has been filed as of February 5, 2018, Defendant's demurrer to Plaintiff's Complaint is sustained without leave to amend.