

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF CALIFORNIA
3

4 MARICELA VERDE HERNANDEZ,

5 Plaintiff,

6 v.

7 BANK OF AMERICA, COUNTRYWIDE,

8 Defendants.
9

1:11-cv-00001 OWW JLT

ORDER GRANTING MOTION FOR
JUDGMENT ON THE PLEADINGS
(DOC. 8)

10
11 I. INTRODUCTION

12 This action concerns real property located at 6651 Via Del
13 Mar, Bakersfield, California, 93307 ("Subject Property"). The
14 Complaint, apparently drafted by counsel, is riddled with
15 typographical errors and partial sentences, making it difficult
16 to understand. It appears from the Complaint that Plaintiff,
17 Maricela Verde Herndandez, purchased the property on or about
18 June 23, 2006 financed through a loan from "Countrywide, Bank of
19 America." Doc. 1, Compl. ¶ 12. At some point, Plaintiff "began
20 experiencing financial difficulties," and requested a loan
21 modification from her lender. *Id.* at ¶¶ 14-15. The lender
22 requested additional information regarding Plaintiff's
23 modification request. *Id.* at ¶ 17. On June 14, 2010, Bank of
24 America informed Plaintiff that it had "completed its review" of
25 her modification request, but the results of that review are not
26 articulated in the complaint. *Id.* at ¶ 18. Regardless of the
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1 outcome, the property was sold under the power of sale on June
2 16, 2010. *Id.*

3 Plaintiff, through counsel, requested rescission of the
4 sale, which request was apparently denied. *See id.* at ¶ 22.
5 Subsequently, Plaintiff filed a Complaint for Damages in the
6 Superior Court for the "County of Bakersfield," which was
7 accepted for filing by the Superior Court, Metropolitan Division,
8 County of Kern, on December 8, 2010. The Complaint alleges
9 twelve causes of action:
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- 11 1. Breach of Contract;
- 12 2. Violation of California Business & Professions Code
13 §§ 17200-17500, *et seq.*,
- 14 3. Breach of the Covenant of Good Faith and Fair
15 Dealing;
- 16 4. Fraud and Intentional Misrepresentation of Fact;
- 17 5. Negligent Misrepresentation of the Fact;
- 18 6. Unlawful Business Practices (Cal. Fin. Code §
19 22302);
- 20 8. Cancellation and Vacation of Foreclosure Sale;
- 21 9. Quiet Title;
- 22 10. Fraudulent Inducement;
- 23 11. Intentional Infliction of Emotional Distress;
- 24 12. Negligent Infliction of Emotional Distress.

25 The Complaint also contains allegations that Defendant violated
26 various provisions of federal law. *See Compl.* at ¶ 19 (alleging
27 violations of "12 U.S.C., 12 C.F.R., 15 U.S.C."); 4:27-5:4
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1 (alleging a violation of the UCL "predicated upon Violations of
2 TILA"); 17:15 (seeking relief under TILA).

3 On January 3, 2011, Defendant BAC Home Loans, erroneously
4 sued as Bank of America, Countrywide, timely and properly removed
5 this case to federal court pursuant to 28 U.S.C. § 1446(a), based
6 upon federal question jurisdiction. Doc. 1. Defendant
7 subsequently noticed for hearing on March 14, 2011 a motion for
8 judgment on the pleadings, or in the alternative for summary
9 judgment. Doc. 8. That hearing was continued to March 21, 2011.
10 Doc. 10. Notice of the new hearing date was served by U.S. Mail
11 on Plaintiff's counsel. See Docket Entry Dated 1/27/11.
12 Plaintiff, who is represented by counsel, failed to file any
13 opposition. See Doc. 13. A March 15, 2010 minute order took the
14 matter off calendar and submitted the motion for judgment on the
15 pleadings for decision on the papers. Doc. 14. The minute order
16 was served via U.S. Mail on Plaintiff's counsel March 15, 2011.
17 In an abundance of caution, an Order directing Plaintiff's
18 counsel to serve notice of the pending dispositive motion on
19 Plaintiff was served by mail on Plaintiff's counsel May 1, 2011.
20 Doc. 15. Plaintiff's counsel was ordered to return proof of
21 service upon Plaintiff and was given an additional fifteen (15)
22 days to inform the court whether or not Plaintiff intends to
23 oppose the motion. *Id.* No proof of service or other
24 communication from Plaintiff's counsel or Plaintiff has been
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1 received.

2 Defendant's motion for judgment on the pleadings or in the
3 alternative for summary judgment is GRANTED IN ITS ENTIRETY for
4 the reasons set forth below. In addition, a copy of this order
5 shall be served on the State Bar of California with a cover
6 letter directing that it be added to the disciplinary file of
7 Plaintiff's counsel, Emeka Godfrey Onwualu, SBN # 161868.
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10 II. STANDARD OF DECISION

11 A. Motion for Judgment on the Pleadings.

12 Federal Rule of Civil Procedure 12(c) states, "[a]fter the
13 pleadings are closed but within such time as not to delay the
14 trial, any party may move for judgment on the pleadings." When
15 Rule 12(c) is used to raise the defense of failure to state a
16 claim upon which relief can be granted, the standard governing
17 the Rule 12(c) motion for judgment on the pleadings is the same
18 as that governing a Rule 12(b) (6) motion. *See McGlinchy v. Shell*
19 *Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). A motion to
20 dismiss brought under Federal Rule of Civil Procedure 12(b) (6)
21 "tests the legal sufficiency of a claim." *Navarro v. Block*, 250
22 F.3d 729, 732 (9th Cir. 2001). In deciding whether to grant a
23 motion to dismiss, the court "accept [s] all factual allegations
24 of the complaint as true and draw[s] all reasonable inferences"
25 in the light most favorable to the nonmoving party. *TwoRivers v.*
26 *Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). To survive a motion to
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1 dismiss, a complaint must "contain sufficient factual matter,
2 accepted as true, to 'state a claim to relief that is plausible
3 on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (May 18,
4 2009) (quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570
5 (2007)).

6
7 A claim has facial plausibility when the plaintiff
8 pleads factual content that allows the court to
9 draw the reasonable inference that the defendant
10 is liable for the misconduct alleged. The
11 plausibility standard is not akin to a
12 "probability requirement," but it asks for more
13 than a sheer possibility that defendant has acted
14 unlawfully. Where a complaint pleads facts that
15 are "merely consistent with" a defendant's
16 liability, it "stops short of the line between
17 possibility and plausibility of 'entitlement to
18 relief.'"

13 *Id.* (citing *Twombly*, 550 U.S. 556-57). Dismissal also can be
14 based on the lack of a cognizable legal theory. *Balistreri v.*
15 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

17 B. Motion for Summary Judgment.

18 Summary judgment is appropriate when "the pleadings,
19 depositions, answers to interrogatories, and admissions on file,
20 together with affidavits, if any, show that there is no genuine
21 issue as to any material fact and that the movant is entitled to
22 judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S.
23 317, 322 (1986). A party moving for summary judgment "always
24 bears the initial responsibility of informing the district court
25 of the basis for its motion, and identifying those portions of
26 the pleadings, depositions, answers to interrogatories, and
27 the pleadings, depositions, answers to interrogatories, and
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1 admissions on file, together with the affidavits, if any, which
2 it believes demonstrate the absence of a genuine issue of
3 material fact." *Id.* at 323 (internal quotation marks omitted).

4 Where the movant has the burden of proof on an issue at
5 trial, it must "affirmatively demonstrate that no reasonable
6 trier of fact could find other than for the moving party."
7 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.
8 2007); *see also S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d
9 885, 888 (9th Cir. 2003) (noting that a party moving for summary
10 judgment on claim on which it has the burden at trial "must
11 establish beyond controversy every essential element" of the
12 claim) (internal quotation marks omitted). With respect to an
13 issue as to which the non-moving party has the burden of proof,
14 the movant "can prevail merely by pointing out that there is an
15 absence of evidence to support the nonmoving party's case."

16 *Soremekun*, 509 F.3d at 984. When a motion for summary judgment
17 is properly made and supported, the non-movant cannot defeat the
18 motion by resting upon the allegations or denials of its own
19 pleading, rather the "non-moving party must set forth, by
20 affidavit or as otherwise provided in Rule 56, specific facts
21 showing that there is a genuine issue for trial.'" *Id.* (quoting
22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

23 "Conclusory, speculative testimony in affidavits and moving
24 papers is insufficient to raise genuine issues of fact and defeat
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1 summary judgment." *Id.*

2 To defeat a motion for summary judgment, the non-moving
3 party must show there exists a genuine dispute (or issue) of
4 material fact. A fact is "material" if it "might affect the
5 outcome of the suit under the governing law." *Anderson*, 477 U.S.
6 at 248. "[S]ummary judgment will not lie if [a] dispute about a
7 material fact is 'genuine,' that is, if the evidence is such that
8 a reasonable jury could return a verdict for the nonmoving
9 party." *Id.* at 248. In ruling on a motion for summary judgment,
10 the district court does not make credibility determinations;
11 rather, the "evidence of the non-movant is to be believed, and
12 all justifiable inferences are to be drawn in his favor." *Id.* at
13 255.
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16 III. DISCUSSION

17 A. First Claim for Breach of Contract.

18 Plaintiff's first cause of action appears to assert that the
19 parties entered into a contract requiring a loan modification.
20 It is not clear whether Plaintiff alleges that this agreement was
21 written or oral. Compl. at ¶ 24.
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23 Defendant argues that Plaintiff has failed to establish that
24 the parties have entered into a contract requiring a loan
25 modification. Defendant points out that any such agreement would
26 directly contradict the written Deed of Trust, which provides
27 that:
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1 *Borrower Not Released; Forbearance By Lender Not a*
2 *Waiver.* Extension of the time for payment or
3 modification of amortization of the sums secured by
4 this Security Instrument granted by Lender to Borrower
5 or any Successor in Interest of Borrower shall not
6 operate to release the liability of Borrower or any
7 Successors in Interest of Borrower. Lender shall not be
8 required to commence proceedings against any Successor
9 in Interest of Borrower or to refuse to extend time for
10 payment or otherwise modify amortization of the sums
11 secured by this Security Instrument by reasons of any
12 demand made by the original Borrower or any Successors
13 in Interest of Borrower. Any forbearance by Lender in
14 exercise of any right or remedy including, without
15 limitation, Lender's acceptance of payments from third
16 persons, entities or Successors in Interest of Borrower
17 or in amounts less than the amount then due, shall not
18 be a waiver or preclude the exercise of any right or
19 remedy.

20 *See RFJN, Doc. 8-2, Ex. 3 § 12.*¹

21 Defendant has satisfied its burden to "point[] out that
22 there is an absence of evidence to support the nonmoving party's
23 case." *Soremekun*, 509 F.3d at 984. Plaintiff failed to respond
24 to Defendant's motion. The record contains no evidence of the
25 existence of an agreement to modify the loan nor any definite and
26 certain terms. Defendant's motion for summary judgment on the
27 breach of contract claim is GRANTED.

28 B. Second Claim for Unfair Competition.

 Plaintiff's unfair competition clause is expressly
 "Predicated on Violations of TILA." Compl. at 5:3-4 (caption).
 TILA "requires creditors to provide borrowers with clear and

¹ A court may consider a document referenced in the Complaint even in the context of a Rule 12(b)(6) motion to dismiss. *See Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002).

1 accurate disclosures of terms dealing with things like finance
2 charges, annual percentage rates of interest, and the borrower's
3 rights." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998).
4 Failure to satisfy TILA's requirements exposes a lender to
5 "statutory and actual damages [that are] traceable to a lender's
6 failure to make the requisite disclosures." *Id.*

8 Plaintiff's Complaint seeks only damages. Doc. 1 at page
9 25-26 of 32. A plaintiff seeking damages under TILA must file
10 suit within one year of the date of the alleged violation. 15
11 U.S.C. § 1640(e). As stated in *Meyer v. Ameriquest Mortg. Co.*,
12 342 F.3d 899, 902 (9th Cir. 2003):

13 The failure to make the required disclosures occurred,
14 if at all, at the time the loan documents were signed.

15 Here, the only possible transaction for which disclosures would
16 have been required was the closing of Plaintiff's loan on or
17 about June 27, 2006. This lawsuit, filed January 3, 2011 is time
18 barred. Defendant's motion for judgment on the pleadings and/or
19 for summary judgment that the TILA claim is time barred is
20 GRANTED.

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22 C. Third Claim for Breach of the Implied Covenant of Good Faith
23 & Fair Dealing.

24 The Complaint alleges that Defendant's omissions and
25 misleading conduct in connection with the negotiation of a loan
26 modification breached the implied covenant of good faith and fair
27 dealing. However, a "courts are not at liberty to imply a
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1 covenant directly at odds with a contract's express grant of
2 discretionary power." *Third Story Music v. Waits*, 41 Cal. App.
3 4th 798 (1996). Here, the deed of trust expressly provides:

4 Any forbearance by Lender in exercise of any right or
5 remedy including, without limitation, Lender's
6 acceptance of payments from third persons, entities or
7 Successors in Interest of Borrower or in amounts less
8 than the amount then due, shall not be a waiver or
9 preclude the exercise of any right or remedy.

10 See RFJN Ex. 3 § 12. Plaintiff does not respond to Defendant's
11 contention that her claim for breach of the covenant of good
12 faith and fair dealing requires implication of a covenant at odds
13 with this language. Defendant's motion for judgment on the
14 pleadings as to the breach of the covenant of good faith and fair
15 dealing claim is GRANTED.

16 D. Fourth Claim for Fraud, Tenth Claim for Fraudulent
17 Inducement, and Fifth Claim for Negligent Misrepresentation.

18 Justifiable reliance is an element of fraud, fraudulent
19 inducement, and negligent misrepresentation. See *Engalla v.*
20 *Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 973-74 (1997);
21 *Conroy v. Regents of the Univ. of Cal.*, 45 Cal. 4th 1244, 1255-56
22 (2009). The Complaint does not allege and Plaintiff offers no
23 proof of any action Plaintiff took in justifiable reliance on any
24 misrepresentation allegedly made by Defendant. Defendant's
25 motion for summary judgment as to the fourth and tenth claims for
26 relief is GRANTED.

1 E. Sixth Claim for Violation of Cal. Bus. & Prof. Code § 17200
2 predicated on Violations of Cal. Fin. Code § 22302.

3 California Business and Professions Code § 17200,
4 California's Unfair Competition Law, provides: "[U]nfair
5 competition shall mean and include any unlawful, unfair or
6 fraudulent business act or practice and unfair, deceptive, untrue
7 or misleading advertising." Plaintiff's § 17200 claim is
8 predicated on an allegation that Defendant violated California
9 Financial Code § 22302.

10 Section 22302 applies California Civil Code § 1670.5's
11 prohibition on unconscionability to loan agreements. Civil Code
12 Section 1670.5(a) allows the court to refuse to enforce all or
13 part of a contract if the court finds as a matter of law that the
14 contract or any clause of the contract was unconscionable at the
15 time it was made. Cal. Civ. Code § 1670.5(a). The term
16 "unconscionable" is not defined by statute but has been defined
17 by the California courts. *Trend Homes, Inc. v. Superior Court*,
18 131 Cal. App. 4th 950, 956 (2005). "[U]nconscionability has both
19 a 'procedural' and a 'substantive' element." *Armendariz v.*
20 *Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 114
21 (2000). The procedural element of unconscionability focuses on
22 oppression and surprise. *Discover Bank v. Superior Court*, 36
23 Cal. 4th 148, 160 (2005). "Oppression' arises from an inequality
24 of bargaining power which results in no real negotiation and 'an
25 absence of meaningful choice." *Bruni v. Didion*, 160 Cal. App.
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1 4th 1272 (2008); *Aron v. U-Haul Co. of California*, 143 Cal. App.
2 4th 796, 808 (2006). "Surprise' involves the extent to which the
3 supposedly agreed-upon terms of the bargain are hidden in a
4 prolix printed form drafted by the party seeking to enforce the
5 disputed terms." *Bruni*, 160 Cal. App. 4th at 1289; *Aron*, 143
6 Cal. App. 4th at 808. "The substantive element of
7 unconscionability focuses on the actual terms of the agreement
8 and evaluates whether they create 'overly harsh' or 'one-sided'
9 results as to 'shock the conscience.'" *Bruni*, 160 Cal. App. 4th
10 at 1289; *Aron*, 143 Cal. App. 4th at 808. "Both elements must be
11 present, but the more substantively oppressive the contract term,
12 the less evidence of procedural unconscionability is required to
13 come to the conclusion that the term is unenforceable, and vice
14 versa." *Trend Homes*, 131 Cal. App. 4th at 956 (internal
15 quotation and citation omitted).
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18 Here, Plaintiff does not allege let alone provide evidence
19 of any contract that could even arguably be considered
20 unconscionable. Defendant's motion for summary judgment on the
21 sixth claim for relief is GRANTED.
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23 F. Eleventh Cause of Action for Intentional Infliction of
24 Emotional Distress.

25 The elements of the tort of intentional infliction of
26 emotional distress ("IIED") are: "(1) extreme and outrageous
27 conduct by the defendant with the intention of causing, or
28 reckless disregard of the probability of causing, emotional

1 distress; (2) the plaintiff's suffering severe or extreme
2 emotional distress; and (3) actual and proximate causation of the
3 emotional distress by the defendant's outrageous conduct...."
4 *Christensen v. Superior Court*, 54 Cal. 3d 868, 903 (1991)
5 (internal quotation and citation omitted). To be considered
6 "outrageous," conduct "must be so extreme as to exceed all bounds
7 of that usually tolerated in a civilized community." *Id.*

9 Plaintiff alleges that Defendant is liable for IIED by
10 virtue of the misrepresentations they allegedly made to
11 Plaintiff. The Complaint does not explain the nature of these
12 alleged misrepresentations in a manner that would permit them to
13 be classified as "outrageous." Defendant has moved for summary
14 judgment, arguing that Plaintiff has not come forward with
15 evidence establishing a dispute as to whether the alleged conduct
16 was outrageous. Plaintiff's failure to respond in any way
17 entitles Defendant to summary judgment on this claim.

19 Defendant's motion for summary judgment as to the IIED claim
20 is GRANTED.

22 G. Twelfth Claim for Negligent Infliction of Emotional
23 Distress.

24 In California, there is no independent tort of Negligent
25 Infliction of Emotional Distress ("NIED"). Rather, a NIED claim
26 is treated as a traditional negligence claim, the elements of
27 which are duty, breach of duty, causation, and damages. *Wong v.*
28 *Tai Jing*, 189 Cal. App. 4th 1354, 1377 (2010) (citing *Potter v.*

1 *Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 984 (1993)).

2 Plaintiff has failed to respond to Defendant's motion for summary
3 judgment. There is no evidence in the record to support any of
4 the elements of this claim.

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6 Defendant's motion for summary judgment on the NIED claim is
7 GRANTED.

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9 H. Seventh Cause of Action for Injunctive Relief, Eighth Cause
10 of action to Cancel and Vacate the Foreclosure Sale, Ninth
11 Cause of Action to Quiet Title.

12 Plaintiff's remaining claims for injunctive relief
13 (seventh), to cancel and vacate the foreclosure sale (eighth),
14 and to quiet title (ninth), are dependent and derivative of the
15 other claims in the case. Because Defendant is entitled to
16 summary judgment as to all of the underlying substantive claims,
17 Defendant's motion for summary judgment as to the seventh,
18 eighth, and ninth claims is GRANTED.

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21 IV. CONCLUSION

22 For the reasons set forth above, Defendant's motion for
23 summary judgment is GRANTED as to all of the claims in the
24 Complaint. Defendant shall submit a proposed form of order
25 consistent with this memorandum decision within five (5) days of
26 electronic service.

27 In addition, a copy of this order shall be served on the
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1 State Bar of California at 180 Howard Street, San Francisco,
2 California, 94105, with a cover letter directing that it be added
3 to the disciplinary file of Plaintiff's counsel, Emeka Godfrey
4 Onwualu, SBN # 161868.

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SO ORDERED
Dated: May 11, 2011

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/s/ Oliver W. Wanger
United States District Judge

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