UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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DONNA RUTH O'CONNOR ROSE, Plaintiff, v. J.P. MORGAN CHASE, N.A., Defendant.	CIV. NO. 2:12-225 WBS CMK MEMORANDUM AND ORDER RE: MOTION FOR SUMMARY JUDGMENT

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Plaintiff Donna Ruth O'Connor Rose brought this action against defendant J.P. Morgan Chase, N.A., for breach of contract arising out of alleged misconduct related to her home mortgage loan. Defendant now moves for summary judgment pursuant to Federal Rule of Civil Procedure 56.

I. Factual & Procedural History

On December 2, 2005, plaintiff obtained a mortgage loan from defendant secured by real property located at 2945 Sporting Court in Redding, California. (Decl. of Jennifer M. Sanclemente ("Sanclemente Decl.") Ex. 2 (Docket No. 58-4).) The Deed of

Trust obligated plaintiff to make periodic payments on the loan. (Id. ¶ 1.) If plaintiff submitted a payment that was inadequate to pay the loan balance then due, the Deed of Trust permitted defendant to hold these funds in a suspense account without applying them to the loan balance until plaintiff paid the remainder of the balance outstanding. (Id.) The Deed of Trust stated that defendant would apply plaintiff's loan payments to monthly loan balances in the order that those balances became due. (Id. ¶ 2.)

In the event that plaintiff failed to make payments on the loan, the Deed of Trust provided that defendant would notify plaintiff that she was in default, require payment by a specified date, and inform plaintiff that failure to pay could result in acceleration of the total amount due on the loan and the sale of the property. (Id. ¶ 22.) If plaintiff did not cure the default by the date specified, the Deed of Trust authorized defendant to foreclose on the property. (Id.) If plaintiff was able to cure the default, the Deed of Trust provided that the foreclosure trustee would reconvey the property to plaintiff. (Id. ¶ 23.)

The Deed of Trust also contained provisions authorizing defendant to collect several types of fees from plaintiff. One provision permitted defendant to impose late fees for untimely payments. (Id. ¶ 1.) Another provision allowed defendant to recover "all expenses incurred" as a result of plaintiff's default on the loan "including, but not limited to, reasonable attorneys' fees and costs of title evidence." (Id. ¶ 22.) A third provision authorized defendant to recoup any money it paid to a foreclosure trustee to reconvey the defaulted property to

defendant. (Id. ¶ 23.) Defendant recorded these fees as "corporate advance transactions" and billed them to plaintiff in the form of "corporate advance fees" that it assessed against plaintiff's loan balance. (Sanclemente Decl. ¶ 9 (Docket No. 58-2).)

Between June 1, 2006 and December 31, 2008, plaintiff incurred sixteen charges for making late monthly payments. (See Sanclemente Decl. ¶ 11; Sanclemente Decl. Ex. 3 at 326-41 (Docket No. 58-5).) On October 26, 2009, defendant recorded a Notice of Default against the property because plaintiff had not made any loan payments since June 30, 2009. (Sanclemente Decl. ¶ 10; Sanclemente Decl. Ex. 6 (Docket No. 58-8.) On December 10, 2009, over five months after she had made her last payment, plaintiff sent defendant a cashier's check for $15,218.49. (Sanclemente Decl. ¶ 11; Decl. of Michael A. Doran ("Doran Decl.") ¶ 45 (Docket No. 70).) Defendant rescinded that Notice of Default on December 15, 2009. (Sanclemente Decl. ¶ 12; Sanclemente Decl. Ex. 7 (Docket No. 58-9).)

Although plaintiff was able to cure her default in 2009, she incurred six more charges for making late payments in 2010. (See Sanclemente Decl. Ex. 3 at 313-18.) In 2011, plaintiff made three payments of $2,779.00 in January, February, and March, but made no loan payments in April or May. (See id. at 312; Sanclemente Decl. ¶ 14.) As a result, defendant recorded a Notice of Default on June 2, 2011, reflecting an arrearage of $11,488.72. Plaintiff sent defendant two cashier's checks totaling $13,885.49 in late June 2011, (see Doran Decl. Ex. 8 (Docket No. 70-8)), which defendant applied to satisfy

plaintiff's outstanding loan balances for February, March, April, May, and June of that year (see id.; Sanclemente Decl. ¶ 14). Defendant rescinded the Notice of Default on July 7, 2011. (Sanclemente Decl. ¶ 15; Sanclemente Decl. Ex. 10 (Docket No. 58-12).)

Plaintiff then missed her July 2011 loan payment. (Sanclemente Decl. ¶ 16; Sanclemente Decl. Ex. 3 at 310-11.) On August 15, 2011, plaintiff made a payment of $5,185.58, which defendant applied to satisfy plaintiff's July 2011 and August 2011 loan payments as well as outstanding late fees and corporate advance fees that plaintiff owed. (See Sanclemente Decl. Ex. 11 (Docket No. 58-13).) On August 17, 2011, defendant sent plaintiff a letter informing her that there was $1,008.86 in her suspense account, and that she could satisfy her loan payment for September 2011 by sending defendant $1584.73, the difference between the loan payment due and the amount in the suspense account. (See id.; Doran Decl. Ex. 8 (Docket No. 70-8).)

After defendant sent this letter, but before plaintiff made any payment on the loan, defendant deducted an additional $1028.26 in corporate advance fees from plaintiff's suspense account. (Sanclemente Decl. ¶ 18; Sanclemente Decl. Ex. 3 at 309.) As a result, when plaintiff submitted a payment for $1584.73 to pay the remaining amount due for September 2011, defendant placed that payment into the suspense account because it was insufficient to satisfy the total amount plaintiff owed for that month. (Sanclemente Decl. ¶ 18; Sanclemente Decl. Ex. 4 at 270 (Docket No. 58-6).) When plaintiff submitted payments for the next several months, defendant used those payments to satisfy

the previous month's balance, and plaintiff remained delinquent on her loan. (See Sanclemente Decl. ¶¶ 19-22; Decl. of Michael D. Rosen Ex. 1 ("Rosen Report") at 4-5 (Docket No. 58-19).)

By December 31, 2011--three days after plaintiff filed this action--plaintiff had an outstanding balance of $2807.93, which consisted of the loan payment due for December 2011 and three late charges. (Rosen Report at 3; Sanclemente Decl. Ex. 4 at 278.) By March 7, 2012, plaintiff had an outstanding loan balance of $5631.44, which consisted of the payments due for February and March 2012 and four late charges. (Rosen Report at 3; Sanclemente Decl. Ex. 4 at 292.) Plaintiff has not made any loan payments since February 2012. (See Doran Decl. Ex. 21 (Docket No. 70-21).

Plaintiff initiated this action on December 28, 2011 in Shasta County Superior Court, and defendant removed the action to this court pursuant to 28 U.S.C. § 1441(b) based on diversity jurisdiction. (Docket No. 1.) Plaintiff subsequently amended the complaint to bring a claim for breach of contract and a claim for constructive fraud. (Docket No. 27.) The court dismissed the constructive fraud claim with prejudice on August 2, 2012. (Docket No. 39.) Defendant now moves for summary judgment on plaintiff's breach of contract claim pursuant to Federal Rule of Civil Procedure 56. (Docket No. 58.)

II. Evidentiary Objections

On a motion for summary judgment, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). "[T]o survive summary judgment, a party

does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56." Fraser v. Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003) (quoting Block v. City of Los Angeles, 253 F.3d 410, 418-19 (9th Cir. 2001)) (internal quotation marks omitted). Even if the non-moving party's evidence is presented in a form that is currently inadmissible, such evidence may be evaluated on a motion for summary judgment so long as the moving party's objections could be cured at trial. See Burch v. Regents of the Univ. of Cal., 433 F. Supp. 2d 1110, 1119-20 (E.D. Cal. 2006) (Shubb, J.).

A. Plaintiff's Objections

Plaintiff initially raises a variety of objections to Defendant's Statement of Undisputed Facts,[1] the Declaration of Jennifer M. Sanclemente, and the Declaration of Michael Rosen on the basis of relevance, lack of foundation, and undue prejudice. (See Docket Nos. 67-69.) These objections are duplicative of the summary judgment standard itself. See Burch, 433 F. Supp. 2d at 1119-20. A court can award summary judgment only when there is no genuine dispute of material fact. Statements based on improper legal conclusions or without personal knowledge are not facts and can be considered as arguments, not as facts, on summary judgment. Instead of challenging the admissibility of this evidence, lawyers should challenge its sufficiency.

[1] This court does not consider statements of undisputed fact in ruling on a motion for summary judgment. Instead, the court looks to the evidence itself (whether in the declarations, depositions, or discovery responses) referenced in the moving or opposing papers to determine whether there are disputed issues of material fact.

Objections on any of these grounds are superfluous, and the court will overrule them.

Next, plaintiff objects to the Declaration of Jennifer M. Sanclemente on the basis that she "has not established herself as an expert" and is therefore not competent to testify about how defendant accounted for plaintiff's loan payments. (Pl.'s Objections to Sanclemente Decl. ¶ 1(i)(a) (Docket No. 68).) This objection is misplaced because Sanclemente, an employee of defendant responsible for maintaining customer account records, is a lay witness whose testimony is based on her "personal knowledge of the facts" set forth in her declaration. (Sanclemente Decl. ¶ 1.) The court will therefore overrule this objection.

Plaintiff also objects to the exhibits attached to Sanclemente's declaration on the basis that they are inadmissible hearsay. (Pl.'s Objections to Sanclemente Decl. ¶ 1(i)(b).) However, Sanclemente avers that these exhibits consist of financial records about plaintiff's mortgage loan that were "maintained in the course of Chase's regularly and ordinarily conducted business activities." (Sanclemente Decl. ¶¶ 3, 4.) Sanclemente also avers that she has personal knowledge of these records and has authenticated that they are records of plaintiff's mortgage payments and charges against her account. (Id. ¶¶ 1, 5.) These exhibits are therefore not hearsay, see Fed. R. Evid. 803(6), and the court will overrule this objection.

Plaintiff also objects to the Declaration of Michael D. Rosen on the basis that Rosen is incompetent to testify as an expert. (Pl.'s Objections to Rosen Decl. ¶ 1(i)(c) (Docket No.

69).) Federal Rule of Evidence 702 permits a witness who is qualified "by knowledge, skill, experience, training, or education" to testify as an expert if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. "A trial court has broad latitude not only in determining whether an expert's testimony is reliable, but also in determining how to determine the testimony's reliability." Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011) (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 145 (1999)).

Rosen, who is a certified public accountant with a Ph.D. in agricultural economics and who has served as a financial and accounting expert in over 300 cases, is qualified to offer expert testimony about how plaintiff's loan payments were accounted for. (See Rosen Report at 1-2; Rosen Report Exs. 1-2.) The court is also satisfied that Rosen has relied on a sufficient quantity of data, that his accounting methodology is reliable, and that he has reliably applied this methodology to the facts of the case. (See Rosen Report at 2-6.) Rosen's testimony therefore satisfies the criteria set forth by Rule 702 and is sufficiently reliable according to the standards set forth by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), Kumho Tire, 526 U.S. 137, and their progeny.

Plaintiff contends that Rosen's testimony is

nonetheless improper because the application of plaintiff's payments to her loan balance implicates "issue[s] of contract law and promissory estoppel, not accounting." (Pl.'s Objections to Rosen Decl. ¶ 1(i)(c).) This argument mischaracterizes Rosen's testimony. Rosen's testimony concerns the factual question of "whether payments made by [plaintiff] had been accurately applied towards the balances," not the legal question of whether plaintiff had performed her obligations under the mortgage loan or whether defendant had breached its obligations under the loan. (Rosen Report at 2.) Even if plaintiff were correct that Rosen's testimony bears on these questions, it is well-established that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Nationwide Transport Fin. v. Cass Info. Sys., Inc., 523 F.3d 1051, 1058 (9th Cir. 2008) (citing Fed. R. Evid. 704(a)). The court will therefore overrule this objection.

Plaintiff also objects to Rosen's testimony on the basis that defendant did not disclose the Schedule of Corporate Advance Transactions or identify the names of the attorneys who were billed for foreclosure-related fees. (Pl.'s Objections to Rosen Decl. ¶ 1(i)(b).) Plaintiff offers no evidence to substantiate this assertion. In any event, plaintiff concedes that she was aware that Rosen relied on this information since April 29, 2013, the date on which defendant produced his expert report. (See id.) Plaintiff had over nine months in which she could have sought to compel defendant to produce this information. Even if plaintiff were correct that defendant had

failed to include this information in its initial disclosures, this alone "would not warrant the extreme sanction of exclusion." Semtech Corp. v. Royal Ins. Co. of Am., Civ. No. 03-2460 GAF PJWx, 2005 WL 6192906, at *3 (C.D. Cal. Sep. 8, 2005) (citation omitted). The court will therefore overrule this objection.

Finally, plaintiff contends that Rosen "has not established [himself] as an expert who can rely on hearsay documents to formulate a non-accounting opinion." (Pl.'s Objections to Rosen Decl. ¶ 1(ii).) Those documents are identical to several documents attached as exhibits to the Sanclemente Declaration that the court has already held are admissible as business records under Federal Rule of Evidence 803(6). The court will therefore overrule this objection.

B. Defendant's Objections

Defendant objects to every paragraph in the Declaration of Michael Doran. (See Def.'s Objections to Doran Decl. (Docket No. 72.) As with plaintiff's objections, defendant's objections on the basis of relevance, lack of foundation, impermissible opinion testimony, and speculation are all duplicative of the summary judgment standard itself and the court will overrule them. See Burch, 433 F. Supp. 2d at 1119-20. The court does not consider the evidence that defendant characterizes as inadmissible evidence of settlement negotiations, (see Def.'s Objections to Doran Decl. ¶ 56), and therefore overrules that objection as moot. Even if the court considered the evidence that defendant characterizes as hearsay or improper expert opinion, the court concludes that this evidence does not raise a genuine issue of material fact sufficient to withstand summary

judgment, and therefore overrules these objections as moot.

III. Discussion

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the non-moving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Alternatively, the moving party can demonstrate that the non-moving party cannot produce evidence to support an essential element upon which it will bear the burden of proof at trial. Id.

Once the moving party meets its initial burden, the burden shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324 (quoting then-Fed. R. Civ. P. 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Anderson, 477 U.S.

at 252.

In deciding a summary judgment motion, the court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. Id. at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment . . . ." Id.

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." Oasis W. Realty, Inc. v. Goldman, 51 Cal. 4th 811, 821 (2011). Failure to make payments on the terms required by a mortgage loan constitutes non-performance and ordinarily bars a plaintiff from prevailing on a breach of contract claim based on that loan. See, e.g., Wise v. Wells Fargo Bank, N.A., 850 F. Supp. 2d 1047, 1056 (C.D. Cal. 2012) (holding that, because plaintiff "admits . . . to having defaulted on the Loan," her "breach of contract cause of action fails as a matter of law"); Barsoumian v. Aurora Mortg. Servs., LLC, Civ. No. 12-4368 PA (AGRx), 2012 WL 6012984, at *4 (C.D. Cal. Dec. 3, 2012) ("Plaintiff's FAC admits that he was behind on his mortgage payments and in default on the loan . . . . Plaintiff has failed to . . . perform[] his obligations under that contract.")

Here, defendant has offered evidence that plaintiff was in default on her loan when she filed this action. On August 15, 2011, plaintiff was current on her loan payments through August

2011 and had a surplus of $1008.06 remaining in her suspense account. (See Sanclemente Decl. Ex. 11; Rosen Report at 4-5.) Between August 16 and August 22, 2011, however, defendant assessed five corporate advance fees totaling $1028.06, which it deducted from plaintiff's suspense account. (Sanclemente Decl. ¶ 18; Sanclemente Decl. Ex. 3 at 309.) When plaintiff sent in a payment for $1584.73 to satisfy her September 2011 balance, that payment constituted a partial payment and was placed in her suspense account without being applied to her loan balance. (Sanclemente Decl. ¶ 18; Sanclemente Decl. Ex. 4 at 270.) Defendant then applied plaintiff's October 2011 payment to her September 2011 balance, her November 2011 payment to her October 2011 balance, and so forth. (Rosen Report at 5.) As a result, when plaintiff filed this lawsuit on December 28, 2011, she was in default on her loan. (See id.; Sanclemente Decl. ¶¶ 19-22.) Plaintiff offers no evidence that she cured the default at any time thereafter; on the contrary, plaintiff's default grew from $2807.93 on December 31, 2011 to $5631.44 on March 7, 2012, and she has not made any payment since that point. (See Sanclemente Decl. Ex. 4 at 278, 292; Rosen Report at 3.)

Plaintiff contends that this apparent default resulted not from her failure to perform under the terms of the Deed of Trust, but from defendant's failure to correctly calculate her loan balance and apply her payments to the loan. (See Doran Decl. ¶ 58; Pl.'s Resps. to Def.'s 1st Set of Interrogs. ¶ 4 (Docket No. 58-18.) There is no evidence to support this claim. Defendant's accounting records show that plaintiff was current on her loan payments as of August 15, 2011, and had $1008.06 in her

suspense account. (See Rosen Report Ex. 3 at 29; Sanclemente Decl. ¶17.) Those records also document each of the five corporate advance fees that defendant assessed against plaintiff's suspense account between August 16 and 22, 2011, each of which has a matching entry in the accounting records representing a foreclosure-related fee that plaintiff incurred as a result of her default in June 2011. (Sanclemente Decl. Ex. 3 at 309-10; Sanclemente Decl. Ex. 5 (Docket No. 58-7).)

Once defendant assessed these fees, plaintiff had a deficit in her suspense account. (See id.; Rosen Report Ex. 3 at 30.) When plaintiff sent in a payment of $1584.73, that payment was not enough to satisfy the required loan payment of $2592.79. (Rosen Report at 5; Sanclemente Decl. ¶ 18.) The Deed of Trust explicitly authorized defendant to hold partial payments in the suspense account in lieu of applying them to plaintiff's loan balance. (Sanclemente Decl. Ex. 2 ¶ 1.) As a result, when plaintiff received her next loan statement on September 22, 2011, it informed her that she had $1584.73 -- the amount of her previous payment -- in her "Unapplied Funds Balance" and that she owed $5,293.15, consisting of two outstanding monthly payments of $2592.79 and a late fee of $107.57. (Sanclemente Decl. Ex. 4 at 270; Doran Decl. Ex. 11 (Docket No. 70-11).) Those numbers are consistent with Rosen's accounting of plaintiff's loan payments. (See Rosen Report Ex. 3 at 28-29.)

Plaintiff's argument that defendant misapplied her loan payments is premised on her attorney's own "summary of accounting based on the verified Second Amended Complaint and verified answer by Chase." (Doran Decl. ¶ 56; Doran Decl. Ex. 21 (Docket

No. 70-21).) This accounting is incomplete because it omits all of the corporate advance fees or late fees that defendant billed to plaintiff from August 2011 onwards. (See Doran Decl. Ex. 21.) By contrast, defendant's evidence explicitly accounts for the assessment of these fees. For instance, both Sanclemente and Rosen explicitly state that defendant assessed corporate advance fees before plaintiff sent in her September 2011 payment, and rely on this fact to conclude that defendant accurately declined to apply plaintiff's September 2011 payment of $1584.73 to her account because it was a partial payment. (Sanclemente Decl. ¶ 18; Rosen Report at 4-5.) Even plaintiff's own expert witness, a certified public accountant named Wayne Brown, concedes that "the loan was still in arrears for the September 2011 payment even after the $1584.73 was paid" because "this payment was posted to a suspense account." (Doran Decl. Ex. 20 (Docket No. 70-20).)

Plaintiff then contends that she was not in default on the loan because the fees that defendant assessed for foreclosure-related services were unlawful. In particular, plaintiff argues that the imposition of these fees violated section 2924.17 of the California Civil Code, which requires a loan servicer to ensure that it has "reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose" before recording a Notice of Default. (Pl.'s Opp'n at 3-4 (Docket No. 66).) Because the Notices of Default were unlawful, plaintiff reasons, the fees that defendant incurred in recording and rescinding them were also unlawful. (Id.)

Section 2924.17 is part of the Homeowner's Bill of

Rights ("HBOR"), which "took effect on January 1, 2013." Rockridge Trust v. Wells Fargo, N.A., --- F. Supp. 2d ----, Civ. No. 13:1457 JCS, 2013 WL 5428722, at *28 (N.D. Cal. Sep. 25, 2013). "California courts comply with the legal principle that unless there is an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application." Myers v. Philip Morris Cos., 28 Cal. 4th 828, 841 (2002).

Plaintiff has not cited, and the court cannot identify, any authority for the proposition that section 2924.17 or any other provision of the HBOR applies retroactively to Notices of Default recorded before January 1, 2013. On the contrary, numerous courts have held that the HBOR "does not apply retroactively." Emick v. JP Morgan Chase Bank, Civ. No. 2:13-340 JAM AC, 2013 WL 3804039, at *3 (E.D. Cal. July 19, 2013); see also, e.g., Rockridge Trust, 2013 WL 5428722 at *28; Morgan v. Aurora Loan Servs., LLC, Civ. No. 12-4350 CAS MRWx, 2013 WL 5539392, at *6 (C.D. Cal. Oct. 7, 2013). Plaintiff's contention that the corporate advance fees violated section 2924.17 is therefore unavailing.

Plaintiff also contends that defendant could not bill her for foreclosure-related attorneys' fees because the attorneys' services constituted legal malpractice and therefore are "worth nothing." (Pl.'s Opp'n at 4.) This contention fails because plaintiff cannot assert a claim premised on the malpractice of attorneys retained by defendant. While plaintiff cites a number of cases in support of the proposition that an

attorney may "be liable to a third party for malpractice," the California Supreme Court has clarified that this rule applies only where the third party was an "intended, third party beneficiar[y] of the contract to provide legal services." Borrissoff v. Taylor & Faust, 33 Cal. 4th 523, 530 (2004) (citations omitted). Plaintiff was not the intended beneficiary of the foreclosure proceedings that defendant initiated against her property; defendant was. Plaintiff therefore cannot bring a claim premised on the alleged malpractice of defendant's attorneys because "an attorney has no duty to protect the interests of an adverse party." Fox v. Pollack, 181 Cal. App. 3d 954, 961 (1986).

Plaintiff also argues that the imposition of the corporate advance fees was unlawful because the mortgage loan was "unconscionable to start out with." (Pl.'s Opp'n at 2.) Under California law, "a court may choose not to enforce a contract or a portion of a contract that it finds unconscionable." Rosenfeld v. JPMorgan Chase Bank, N.A., 732 F. Supp. 2d 952, 966 (N.D. Cal. 2010) (citing Cal. Civ. Code § 1670.5). A contract term is only unenforceable on this basis if it is both procedurally and substantively unconscionable. Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 981-82 (9th Cir. 2007). A contract term is procedurally unconscionable when "there is oppression or surprise due to unequal bargaining power," and is substantively unconscionable when it generates "results [that] are overly harsh or one-sided." Rosenfeld, 732 F. Supp. 2d at 966 (citing Discover Bank v. Superior Court, 36 Cal. 4th 148, 160 (2005)).

There is no evidence that the mortgage loan or any

provision contained therein was procedurally unconscionable. The provisions authorizing corporate advance fees are plainly written into the Deed of Trust, which plaintiff "ha[d] a duty to read . . . before signing." Rosenfeld, 732 F. Supp. 2d at 966 (holding that a loan provision permitting a lender to adjust the interest rate on plaintiff's home mortgage was not procedurally unconscionable because the loan agreement "clearly explains the terms of repayment"); see also, e.g., Emp. Painters Trust v. J & B Finishes, 77 F.3d 1188, 1192 (9th Cir. 1996) ("A party who signs a written agreement is bound by its terms, even though the party neither reads the agreement nor considers the legal consequences of signing it.").

There is likewise no evidence that this provision was "hidden" from plaintiff or that she had an "absence of meaningful choice" about whether to sign the Deed of Trust. Altman v. PNC Mortg., 850 F. Supp. 2d 1057, 1080-81 (E.D. Cal. 2012) (O'Neill, J.) (citing A & M Produce Corp. v. FMC Corp., 135 Cal. App. 3d 473, 486 (4th Dist. 1982)). In fact, plaintiff's lawyer testifies that he was present when defendant's loan broker suggested that plaintiff enter into the mortgage loan, that he did not "support the plaintiff obtaining such a loan," but that he was nevertheless "not able to convince plaintiff of the problems with borrowing far in excess of her income." (Doran Decl. ¶ 8.) Absent any evidence of oppression or surprise in the formation of the contract, plaintiff's argument that the provision authorizing corporate advance fees is unconscionable is unavailing. See Rosenfeld, 732 F. Supp. 2d at 966.

Plaintiff then suggests that defendant's imposition of

the fees constituted a breach of contract because she was not "promptly notified" of them, as required by the Deed of Trust. (Doran Decl. ¶ 25.) This argument fails because the Deed of Trust does not require defendant to "promptly notify" plaintiff of any fees. The provision of the Deed of Trust that plaintiff cites states that "Borrower shall promptly furnish to Lender all notices of amounts to be paid" as escrow items. (Sanclemente Decl. Ex. 2 ¶ 3 (emphasis added).) It does not state that defendant has an obligation to notify plaintiff of corporate advance charges, promptly or otherwise. (See id.)

Nor did defendant fail to notify plaintiff of the corporate advance charges. In a Mortgage Loan Statement dated September 22, 2011, defendant indicated that it had billed five separate corporate advance charges to plaintiff's account, stated the amount of each charge, and notified plaintiff that there was $1584.73 remaining in her suspense account. (Doran Decl. Ex. 11 (Docket No. 70-11).) Plaintiff's attorney admits that plaintiff received this letter and that he reviewed it "shortly after September 22, 2011." (Doran Decl. ¶ 27.) Although plaintiff's attorney claims that he "didn't crack the 'code'" of what the charges stated referred to, (see id.), this failure reflects his own lack of comprehension, not any failure by defendant to notify plaintiff of the corporate advance fees. In fact, defendant notified plaintiff on multiple occasions that it had billed her for foreclosure-related fees, and accurately stated the amount she owed on every monthly statement it issued. (See Sanclemente Decl. Ex. 4 at 270-294.) If plaintiff or her attorney were confused by these charges, they were free to "contact a Customer

Care Professional," who defendant invited plaintiff to call with "any questions regarding [her] balance." (Id. at 270.)

At oral argument, plaintiff's attorney raised a new argument: even if plaintiff appeared to be in default when she filed this lawsuit, this default was excused because an accounting error in 2009 caused her to overpay her loan by several thousand dollars. Having not brought his brief or any of the exhibits with him to oral argument, plaintiff's attorney nonetheless assured the court that there was ample support for this conclusion and that it was a matter of "simple math." Despite the court's repeated invitations to identify portions of the record that supported this theory, he was unable to do so. After several minutes of fumbling through incomprehensible pieces of paper that he characterized as "evidence," plaintiff's attorney exhausted the court's patience and the matter was taken under submission. After the hearing, the court independently searched through the file again in attempt to find some support for counsel's theory. It has found none.

In short, the undisputed evidence shows that defendant correctly applied plaintiff's payments from July 2011 onward to her account, that plaintiff's payments from September 2011 onward were untimely, and that she was in default on her loan at the time she filed this action. While the court is not entirely clear why defendant chose to inform plaintiff that she had $1008.06 remaining in her suspense account immediately before billing her for corporate advance fees that she had incurred over a month prior, plaintiff offers no evidence that defendant's billing was erroneous or that the fees it charged her were

unlawful.[2] Because plaintiff is in default on her mortgage loan, she has failed to perform under the terms of that loan and therefore cannot prevail on her breach of contract claim. See Wise, 850 F. Supp. 2d 1056. Accordingly, the court must grant defendant's motion for summary judgment.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment be, and the same hereby is, GRANTED.

The Clerk of the Court is directed to enter judgment in accordance with this Order and close the file.

Dated: February 10, 2014

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

[2] In addition to the arguments she raises in her Opposition, plaintiff alleges at various points in the Complaint and in her responses to defendant's interrogatories that defendant's billing practices failed to comply with the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 et seq., and its implementing regulations. (See Compl. ¶ 81; Resps. to Def.'s 1st Set of Interrogs. ¶ 4.) Plaintiff does not identify which portions of RESPA or its regulations that defendant allegedly violated or cite any authority in support of her claim that defendant's imposition of corporate advance fees violated RESPA. To the extent plaintiff claims that the fees were unlawful because they were based on misrepresentations of the amount due on her loan, this argument fails because defendant's accounting demonstrates that it accurately calculated the amount due on the loan and applied plaintiff's payments appropriately.