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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HSIN-SHAWN C. SHENG,

Plaintiff,

v.

SELECT PORTFOLIO SERVICING,
INC.; ALAW; and DOES 1-20,
inclusive,

Defendants.

No. 2:15-cv-0255-JAM-KJN

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTIONS TO DISMISS**

Plaintiff Hsin-Shawn Sheng ("Plaintiff") sued her mortgage servicer, Select Portfolio Servicing ("Defendant SPS"), alleging that it mishandled her loan modification application, thereby depriving her of the opportunity to be considered for a modification. She seeks to enjoin her servicer and trustee, Defendant ALAW, from foreclosing on her property. Defendants move to dismiss each of four causes of action, asserting that Plaintiff's claims fail as a matter of law. The Court grants the motions in part and denies them in part.¹

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for July 1, 2015.

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 Plaintiff took out a mortgage on her property with
3 Washington Mutual in 2007. Compl. ¶ 21. Within two years, she
4 fell into financial difficulty and defaulted on her loan. Compl.
5 ¶ 23. In May 2014, a notice of trustee's sale was recorded on
6 the property. Defendant's RJN Exh. 14. In July, Plaintiff's
7 loan servicer - Defendant SPS - "invited Plaintiffs [sic] to
8 apply for a first-lien loan modification[.]" Compl. ¶¶ 2, 27.
9 Plaintiff alleges that she timely submitted all required
10 documents to be considered for the modification. Compl. ¶¶ 28-
11 29.

12 But, Plaintiff alleges, Defendant did not timely acknowledge
13 or respond to Plaintiff's submissions. Compl. ¶ 29. Instead,
14 SPS sent numerous letters over the next two months asking for
15 "different 'missing document[s]' that Plaintiff had already
16 submitted previously." Compl. ¶ 30. Plaintiff complied by
17 resubmitting these documents. Compl. ¶¶ 31-33.

18 In mid-August, Plaintiff received a letter stating that SPS
19 had reviewed her "complet[e]" application and thanked her for
20 "submitting all required documentation." Compl. ¶ 67. Yet the
21 next paragraph of the letter stated that SPS could not offer a
22 loan modification because "you did not provide us with the
23 documents we requested." Id.

24 In September, Plaintiff had a phone conversation with an
25 employee of SPS, in which he stated that one document was still
26 missing. Compl. ¶ 34. The next day, Plaintiff spoke with a
27 different employee who told her to "disregard" everything that
28 anyone from SPS had previously told her, and to submit an

1 entirely new application. Compl. ¶ 36. Plaintiff again
2 complied. Compl. ¶ 37.

3 In October, Defendant SPS appeared to be evaluating
4 Plaintiff's most recently submitted application. See Compl.
5 ¶¶ 43-46. SPS sent Plaintiff a letter stating that "while we
6 [SPS] are awaiting the additional information, your account will
7 not be referred to foreclosure, nor will it be sold at
8 foreclosure sale if the foreclosure process has already been
9 initiated." Compl. ¶ 48. The letter also asked for another
10 "missing document." Compl. ¶ 47. Plaintiff complied by
11 resending the document. Compl. ¶ 49.

12 The trustee's sale was scheduled for November 25, 2014, but
13 has not yet occurred. See Compl. ¶¶ 51-52.

14 In December, Plaintiff sued Defendant SPS and the trustee
15 named on the notice of trustee's sale, ALAW,² in Placer County
16 Superior Court. Her complaint for injunctive relief and damages
17 (Doc. #2) asserts four causes of action: two violations of the
18 Homeowner Bill of Rights ("HBOR"), promissory estoppel, and
19 negligence. Defendants removed the case on the basis of
20 diversity and Defendant SPS moved to dismiss (Doc. #6).
21 Defendant ALAW filed a motion entitled "Joinder," in which it
22 adopted Defendant SPS's arguments for dismissal and also sought
23 dismissal on independent bases (Doc. #7). The motions were
24 dismissed for failure to comply with the Court's standing order
25 (Doc. #9). Defendants then refiled their motions in compliance
26 with that order (Docs. #10-11). The Court has considered

27 ² If ALAW is an acronym, Plaintiff does not provide the full name
28 of this Defendant in her complaint.

1 Plaintiff's previously filed opposition (Doc. #8) as well as her
2 updated opposition (Doc. #12) and Defendant SPS's reply filed
3 July 1, 2015 (Doc. #16).

4 5 II. OPINION

6 A. Judicial Notice

7 Defendant SPS seeks judicial notice of sixteen documents
8 (Doc. #10-1). Each was recorded in the Placer County Recorder's
9 Office. Because these documents are in the public record and are
10 not subject to reasonable dispute, the Court takes judicial
11 notice. See Fed. R. Evid. 201; Santa Monica Food Not Bombs v.
12 City of Santa Monica, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006);
13 Lee v. City of Los Angeles, 250 F.3d 662, 689 (9th Cir. 2001).

14 B. Analysis

15 1. First Cause of Action: Dual Tracking

16 Plaintiff first alleges that Defendants violated the dual
17 tracking provision of HBOR. That provision prohibits
18 "record[ing] a notice of default or notice of sale, or
19 conduct[ing] a trustee's sale, while [a] complete first lien loan
20 modification application is pending." Cal. Civ. Code
21 § 2923.6(c).

22 Defendants argue that this cause of action fails because
23 Plaintiff did not initiate her application for a loan
24 modification until July 2014 - two months after Defendants
25 recorded the notice of sale. Mot. at 5. Plaintiff does not
26 dispute this timing, but instead counters that dual tracking
27 occurred when Defendant SPS's employee "stated it would carry out
28 the sale eventually." Opp. at 9:12. The parties also dispute

1 whether the application was ever "complete" for purposes of the
2 statute. See Mot. at 4-7; Opp. at 8-9.

3 The plain terms of the statute foreclose Plaintiff's theory,
4 because Defendants did not record a notice, or conduct a sale,
5 after July. Defendants recorded the notice of trustee's sale in
6 May, see Defendant's RJN Exh. 14, then Plaintiff filed her
7 application (assuming for the moment that it was complete)
8 sometime in July or August, see Compl. ¶¶ 27-33. Because
9 recordation occurred before Plaintiff submitted any application,
10 Defendant did not "record a notice of default or . . . sale"
11 while Plaintiff's application was pending. Nor did Defendants
12 "conduct a trustee's sale." See Compl. ¶ 51 (stating that sale
13 has not yet occurred). Plaintiff's claim therefore does not fall
14 within the terms of the statute. Indeed, other courts agree that
15 simply scheduling or rescheduling a sale does not violate the
16 dual tracking provision. See Johnson v. SunTrust Mortg., Inc.,
17 2014 WL 3845205, at *5 (C.D. Cal. Aug. 4, 2014) ("Plaintiffs
18 allege only that a sale remained scheduled, but this is not
19 barred by Section 2923.6(c).") (citations omitted); McLaughlin v.
20 Aurora Loan Servs., LLC, 2014 WL 1705832, at *6 (C.D. Cal. Apr.
21 28, 2014) ("[Plaintiff] now argues that even scheduling the sale,
22 though the notice was never recorded, violated the HBOR's
23 prohibition on 'conducting a trustee's sale[.]' . . . [T]his
24 argument is without merit and not supported by the statutory
25 language.") (citation omitted).

26 Plaintiff cites one case to the contrary. See Opp. at 9:13-
27 14. The Court refuses to rely on it, as it is an apparently
28 unpublished order from Sacramento County Superior Court that

1 Plaintiff has not provided to the Court. See E.D. Cal. L.R.
2 133(i)(3)(i).

3 Plaintiff's claim therefore fails even assuming that
4 Plaintiff submitted a complete application. The Court dismisses
5 her first cause of action.

6 2. Second Cause of Action: Acknowledgement of
7 Documents

8 Plaintiff's second claim alleges that Defendant SPS violated
9 HBOR by failing to "provide written acknowledgement of the
10 receipt of documentation within five business days of receipt."
11 Cal. Civ. Code § 2924.10(a). A mortgage services must provide
12 such acknowledgement "[w]hen a borrower submits a complete first
13 lien modification application or any document in connection with
14 a first lien modification application." Id. Acknowledgement
15 must include:

16 (1) A description of the loan modification process,
17 including an estimate of when a decision on the loan
18 modification will be made after a complete application has
19 been submitted by the borrower and the length of time the
20 borrower will have to consider an offer of a loan
21 modification or other foreclosure prevention alternative.

22 (2) Any deadlines, including deadlines to submit missing
23 documentation, that would affect the processing of a first
24 lien loan modification application.

25 (3) Any expiration dates for submitted documents.

26 (4) Any deficiency in the borrower's first lien loan
27 modification application.

28 Id.

1 Defendant argues that Plaintiff has not shown that any
2 violation of the statute was "material." Mot. at 7. Defendant
3 suggests that Plaintiff knew what she needed to do to complete
4 her application, so any failure to acknowledge documents was not
5 material. See id. Plaintiff argues that the violation was
6 material in that Defendant's compliance would have allowed her to
7 complete her application to Defendant's specifications at an
8 earlier time. Opp. at 11.

9 Plaintiff is only entitled to the injunctive relief that she
10 seeks if she shows that the violation of section 2924.10 was
11 "material." Cal. Civ. Code § 2924.12(a)(1). Courts have
12 interpreted the term material to refer to whether the violation
13 affected the loan modification process. See, e.g., Gonzales v.
14 Citimortgage, Inc., 2015 WL 3505533, at *6 (N.D. Cal. June 3,
15 2015); Fink v. Wells Fargo Bank, N.A., 2015 WL 2438120, at *5
16 (N.D. Cal. May 21, 2015).

17 Taking the facts in the light most favorable to Plaintiff,
18 the violation alleged here did affect her loan modification
19 process. Plaintiff alleged that she submitted numerous documents
20 to Defendant for which she belatedly or never received
21 acknowledgement. Compl. ¶¶ 32, 34, 66. And the information she
22 eventually received from Defendant allegedly did not include the
23 four pieces of information required by the statute. Compl. ¶ 70.
24 This information is integral to the loan modification process, as
25 it informs the borrower about the process, the required
26 documents, the timeline, any "deficiency" in the application as
27 submitted, and any deadlines. See Cal. Civ. Code
28 § 2924.10(a)(1)-(4). Plaintiff alleges that if she had timely

1 received this information, she could have more quickly and
2 thoroughly responded to it. In fact, the main difficulty in
3 Plaintiff's application was determining whether the application
4 was complete and how to complete it. Because Defendant's alleged
5 violation affected Plaintiff's loan modification process, it was
6 a material violation.

7 Defendant's reply goes further, suggesting that Plaintiff
8 has not stated any violation, because the complaint supposedly
9 shows that Defendant responded properly. Reply at 2-3.
10 Defendant simply quotes three paragraphs of the complaint and
11 states, "The timeline *actually* alleged by Plaintiff demonstrates
12 that SPS did not breach [section] 2924.10[.]" Reply at 3:3-4.
13 Plaintiff's complaint cannot be used to defeat its own
14 allegations. Defendant's motion to dismiss this claim is denied.

15 3. Third Cause of Action: Promissory Estoppel

16 Defendant SPS argues that Plaintiff has not alleged
17 detrimental reliance to support her promissory estoppel claim.
18 Mot. at 8. Plaintiff states that she relied on Defendant's
19 promise to postpone foreclosure until it received her loan
20 modification application. Opp. at 11. This reliance was
21 detrimental, according to Plaintiff, because it led her to not
22 "retain[] counsel [or] seek[] injunctive relief at an earlier
23 time." Id.

24 The doctrine of promissory estoppel provides that "[a]
25 promise which the promisor should reasonably expect to induce
26 action or forbearance on the part of the promisee . . . and which
27 does induce such action or forbearance is binding if injustice
28 can be avoided only by enforcement of the promise." Jones v.

1 Wachovia Bank, 230 Cal.App.4th 935, 944 (2014). A plaintiff must
2 demonstrate (1) a clear and unambiguous promise; (2) reliance by
3 the promisee; (3) the reliance was reasonable and foreseeable;
4 and (4) the plaintiff was injured by her reliance. US Ecology,
5 Inc. v. State, 129 Cal.App.4th 887, 901 (2005). "Detrimental
6 reliance requires a showing that plaintiff has undertaken a
7 sufficient change of position in reliance on defendant's
8 promise." Panaszewicz v. GMAC Mortgage, LLC, 2013 WL 2252112, at
9 *5 (N.D. Cal. May 22, 2013) (citations and quotation marks
10 omitted).

11 The Court agrees with Defendant that Plaintiff has not shown
12 detrimental reliance. First, Plaintiff's argument that her
13 allegations show that she relied on Defendant's promise lacks
14 merit. Defendant made its alleged promise to delay foreclosure
15 in a letter dated October 13, 2014. Compl. ¶¶ 48, 80. Plaintiff
16 states that she relied on this promise by choosing not to retain
17 counsel or seek an injunction. But within two months, Plaintiff
18 had done exactly these things: she retained counsel and filed
19 this action to enjoin a sale of her property. Taking these
20 actions shortly after she was allegedly deterred from taking them
21 belies Plaintiff's claim of reliance.

22 Even if she did rely on the promise for that two month
23 period, not having counsel did not change her position. Indeed,
24 the feared injury did not occur: the property was not sold. She
25 was able to bring this action in a similar position to where she
26 was two months earlier.

27 Because Plaintiff's reliance - if any - did not result in a
28 detrimental change of position, the third cause of action fails.

1 ///

2 4. Fourth Cause of Action: Negligence

3 Defendant argues that Plaintiff's final cause of action
4 should be dismissed because it does not adequately allege duty,
5 breach, causation, or damages. Mot. at 9-10. This argument
6 fails because it ignores recent developments in the law and
7 mischaracterizes Plaintiff's claim, which adequately states a
8 negligence cause of action.

9 To state a claim for negligence, Plaintiff must show (1) a
10 legal duty, (2) breach of that duty, and (3) proximate cause
11 between the breach and (4) the plaintiff's injury. Mendoza v.
12 City of L.A., 66 Cal. App. 4th 1333, 1339 (1998). "The existence
13 of a legal duty to use reasonable care in a particular factual
14 situation is a question of law for the court to decide." Bowman
15 v. Wells Fargo Home Mortg., 2014 WL 1921829, at *6 (N.D. Cal. May
16 13, 2014) (citation omitted).

17 SPS asserts it did not have a duty of care because "it was
18 not asked to do anything outside of the ordinary course of its
19 duties as loan servicer[.]" Mot. at 9:17-18. Defendant cites
20 Nymark v. Heart Federal Saving & Loan Association, 231 Cal.App.3d
21 1089 (1991) and Shepherd v. American Home Mortgage Services,
22 Inc., 2009 WL 4505925 (E.D. Cal. Nov. 20, 2009). But Defendant's
23 argument ignores the developments in this area of law over the
24 past six years, in which courts have increasingly established a
25 duty for loan servicers who agree to consider a borrower's loan
26 modification application.³ See Banks v. JPMorgan Chase Bank,

27 _____
28 ³ In reply, Defendant does not even respond to the more recent
cases cited by Plaintiff, but rather parrots its earlier argument

1 N.A., 2014 WL 6476139, at *12 (C.D. Cal. Nov. 19, 2014) (“[Recent
2 California cases] support the conclusion that servicer conduct
3 during the modification negotiation process may create a special
4 relationship and a resulting duty of care[.]”).

5 Although the law remains unsettled in California, this Court
6 agrees with those cases finding a duty in processing a loan
7 application. See, e.g., Meixner v. Wells Fargo Bank, N.A., 2015
8 WL 1893514, at *10 (E.D. Cal. Apr. 24, 2015) (discussing cases
9 holding that a special relationship arises when a loan servicer
10 agrees to consider a borrower’s loan modification); Johnson v.
11 PNC Mortg., 2015 WL 662261, at *4 (N.D. Cal. Feb. 12, 2015) (“The
12 California Court of Appeals has [] held that, particularly in
13 light of HBOR, once a mortgagee undertakes to consider a loan-
14 modification request, it owes the borrower a duty to use
15 reasonable care in handling that request.”) (citation omitted);
16 Alvarez v. BAC Home Loans Servicing, L.P., 228 Cal.App.4th 941,
17 949-50 (2014) (imposing a duty based on “borrower’s lack of
18 bargaining power” in seeking loan modification, the fact that
19 “[b]orrowers cannot pick their servicers or fire them,” and
20 allegations that defendants had violated specific provisions of
21 HBOR). Therefore, once SPS agreed to consider Plaintiff for a
22 loan modification in July 2014, it had a duty to handle her
23 application with reasonable care.

24 Defendant’s other arguments as to breach, causation, and
25 damages mischaracterize Plaintiff’s allegations. For example,
26 Plaintiff did not allege that Defendant breached its duty by

27 from the original motion and again cites Nymark and Shepherd.
28 See Reply at 4.

1 "failing to give [her] a loan modification," Mot. at 9:27-28 -
2 and the alleged injury was not Plaintiff's original default, see
3 Mot at 10:12-13. Rather, Plaintiff alleges that Defendant agreed
4 to consider her loan modification application, then violated HBOR
5 by failing to "timely address or respond" to it. She alleges
6 that Defendant belatedly followed up with confusing and
7 contradictory information regarding whether the application was
8 complete, what needed to be done to make it complete, whether the
9 application had been denied or was still being considered, and
10 whether and how Plaintiff could resubmit or renew her
11 application. This mishandling - between July and October 2014 -
12 allegedly caused Plaintiff to lose the "opportunity to have her
13 loan modified sometime in early in [sic] September[.]" Compl.
14 ¶ 85. These allegations are adequate. See Shapiro v. Sage Point
15 Lender Servs., 2014 WL 5419721, at *9 (C.D. Cal. Oct. 24, 2014)
16 (denying motion to dismiss because "Plaintiff [] alleged he
17 received contradictory information from RCS, that an RCS
18 representative told him his documents had been received and his
19 application was being considered when it was later denied because
20 of missing documents, and that RCS failed to ever notify him
21 which documents were missing"); Alvarez, 228 Cal.App.4th at 951
22 (stating that loss of the opportunity to obtain a loan
23 modification is an adequate damages allegation).

24 Because the complaint alleges facts satisfying each element
25 of negligence, the Court denies Defendant's motion as to this
26 claim.

27 5. Defendant ALAW

28 Plaintiff named Defendant ALAW in only one cause of action.

1 The Court dismisses that cause of action - the first cause of
2 action - for the reasons stated above. Defendant ALAW is
3 therefore dismissed from this case, and the Court does not reach
4 ALAW's further arguments about whether liability can attach to a
5 trustee.

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III. ORDER

For the reasons set forth above, the Court GRANTS Defendant SPS's motion to dismiss as to Plaintiff's first and third causes of action. The dismissal of these claims is with prejudice as any further amendment would be futile. The Court DENIES all other aspect of SPS's motion to dismiss. Defendant ALAW's motion is GRANTED, and ALAW is hereby dismissed from this case.

This case will proceed against SPS on the second and fourth causes of action. SPS must file its Answer within twenty days of this Order.

IT IS SO ORDERED.

Dated: July 24, 2015



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE