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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GWENDOLYN SPEARS,)
)
Plaintiff(s),)
)
v.)
)
LITTON LOAN SERVICING LP and)
DOES 1 through 6, INCLUSIVE,)
)
Defendant(s).)
_____)

No. C10-4873 BZ

**ORDER GRANTING IN PART
DEFENDANT'S MOTION TO
DISMISS WITH LEAVE TO
AMEND**

Before me is defendant's motion to dismiss plaintiff's complaint.¹ In her complaint, plaintiff alleges the following five causes of action against defendant²: (1) fraud; (2) wrongful foreclosure; (3) breach of implied covenant of good

¹ All parties have consented to my jurisdiction for all proceedings including entry of final judgment, pursuant to 28 U.S.C. § 636(c).

² Plaintiff's complaint alleges that defendant is the mortgagor of her loan, but defendant identifies itself as the servicer of the loan. According to defendant, New Century Mortgage Corporation is the original lender, trustee, and beneficiary, and the foreclosure sale of plaintiff's home was initiated by the substituted trustee, First American Loanstar Trustee Services.

1 faith and fair dealing; (4) intentional misrepresentation; and
2 (5) negligent misrepresentation.

3 The crux of plaintiff's complaint is that defendant
4 represented it would evaluate plaintiff's application for a
5 mortgage loan modification under the Home Affordable
6 Modification Program (HAMP) but did not do so. Plaintiff
7 began working with defendant to modify her loan in the Spring
8 of 2010. On June 2, 2010, defendant notified plaintiff by
9 letter that it would evaluate her loan modification
10 application and that this may take up to 30 days. The next
11 day, plaintiff received a letter from defendant that her
12 application was denied because plaintiff's home was not her
13 primary residence.³ Plaintiff claims this was not true, and
14 that defendant never intended to evaluate her application.
15 Plaintiff's home was eventually sold at a foreclosure sale in
16 August 2010. Because defendant failed to evaluate plaintiff's
17 application even though it had represented it would, plaintiff
18 claims defendant is liable for fraud, intentional
19 misrepresentation, and negligent misrepresentation.

20 In its motion to dismiss, defendant argues that it never
21 agreed to modify plaintiff's loan and is not required to do
22 so. But this argument misses the point. Plaintiff is not
23 claiming that defendant was required to modify her loan.
24 Rather, plaintiff alleges defendant misrepresented that it
25 would evaluate her loan modification application. To support

26
27 ³ Defendant's motion to dismiss explains that
28 plaintiff's application was denied because her home was a
rental and not an owner-occupied single family residence.

1 her claim, plaintiff cites that defendant denied her
2 application by letter dated one day after it notified her in
3 writing that it would evaluate it. Plaintiff contends the
4 reason for this denial was false because her home was her
5 primary residence. As required when evaluating a motion to
6 dismiss, I accept plaintiff's allegations as true and draw all
7 reasonable inferences in her favor. See Everest & Jennings,
8 Inc. v. Am. Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir.
9 1994). Accordingly, plaintiff's claim that defendant
10 represented it would evaluate her application without ever
11 having the intention to do so states valid causes of action
12 for fraud, intentional misrepresentation, and negligent
13 misrepresentation.⁴

14 However, as defendant pointed out in its Reply and argued
15 at the hearing, the complaint glosses over the issues of
16 plaintiff's reliance on any misrepresentation and how she was
17 damaged. In part, this may be due to facts which have changed
18 since the complaint was filed. Accordingly, plaintiff shall
19 amend these causes of action by **February 22, 2011.**⁵

20 Plaintiff's also sues for wrongful foreclosure under
21 California Civil Code § 2924. This statute requires the

22
23 ⁴ Defendant also argues that there is no private cause
24 of action under HAMP, and plaintiff has not established that
25 she would even be eligible for a loan modification. These
arguments are also unpersuasive. Plaintiff is seeking relief
for defendant's false representations regarding the evaluation
of her application; she is not suing under HAMP.

26 ⁵ Plaintiff's fraud cause of action otherwise satisfies
27 the heightened pleading requirement of FRCP 9(b). The
28 complaint sufficiently alleges that in 2010 defendant made
false representations to plaintiff that misled her into
believing her loan modification application would be evaluated.

1 recording and service of a notice of default and a notice of
2 trustee's sale in a non-judicial foreclosure sale. See Knapp
3 v. Doherty, 123 Cal.App.4th 76, 86-89 (2004). Plaintiff
4 alleges that she was not served with either of these notices
5 and therefore the foreclosure sale was improper. In its
6 motion to dismiss, defendant concedes that both recording and
7 service is necessary (Opp. at 7), but argues that it is not
8 required for plaintiff to actually receive these notices.
9 Although this is a true statement of the law,⁶ defendant again
10 misses the point behind plaintiff's allegation. Plaintiff did
11 not allege lack of notice; she alleged that defendant did not
12 serve both notices as required by the provisions governing
13 non-judicial foreclosures. Drawing all reasonable inferences
14 in plaintiff's favor, her claim that defendant never served
15 these notices is sufficient to state a valid cause of action
16 for violations of Civil Code § 2924.⁷

17 Plaintiff's last cause of action is for breach of the
18 implied covenant of good faith and fair dealing. She alleges
19 defendant agreed to evaluate her loan modification application
20 but then failed to honor this agreement with the required good
21 faith. Defendant's motion to dismiss argues this was an oral
22 agreement and is unenforceable under the statute of frauds.


23
24 ⁶ See Knapp, 123 Cal.App.4th at 88-89 ("We pointedly
25 emphasize, however, that Civil Code sections 2924-2924h,
26 inclusive, do not require actual receipt by a trustor of a
notice of default or notice of sale") (internal citations and
quotations omitted).

27 ⁷ Although defendant provides verification that it
28 recorded the notice of default and notice of trustee's sale, it
does not attempt to establish by declaration or judicial notice
that either of these documents were served.

1 Although plaintiff's opposition does not address this issue,
2 her complaint alleges that defendant wrote plaintiff a letter
3 stating that it would evaluate her application. At the
4 pleading stage, it is not clear that this writing is not a
5 sufficient "note or memorandum" within the meaning of the
6 Civil Code § 1624. That said, defendant's arguments as to
7 damages and consideration are well taken. Plaintiff shall
8 amend this claim by **February 22, 2011**.

9 For the foregoing reasons, defendant's motion to dismiss
10 is **GRANTED, IN PART**, with leave to amend. In proceeding, both
11 parties shall keep in mind the views about this case which the
12 Court expressed during argument.

13 Dated: February 3, 2011

14 
15 Bernard Zimmerman
16 United States Magistrate Judge

17 G:\BZALL\BZCASES\SPEARS V. LITTON LOAN\ORDER DENYING MOTION TO
18 DISMISS.FINAL RULING.wpd

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