

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROMUALDO ENRIQUEZ and OLIVIA ENRIQUEZ,

Plaintiffs,

v.

BANK OF AMERICA, N.A., et al.,

Defendants.

No. C-15-0940 MMC

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS; AFFORDING PLAINTIFFS LIMITED LEAVE TO AMEND; CONTINUING CASE MANAGEMENT CONFERENCE

Before the Court is the Motion to Dismiss, filed June 8, 2015, on behalf of defendants Bank of America, N.A. ("BANA") and The Bank of New York Mellon f/k/a The Bank of New York as trustee for the Structured Asset Mortgage Investments II Trust 2006-AR7 Mortgage Pass-Through Certificates, Series 2006-AR7 ("BNYM"). Plaintiffs Romualdo and Olivia Enriquez have filed opposition, to which defendants have replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.¹

BACKGROUND

In the operative complaint, the First Amended Complaint ("FAC"), plaintiffs allege that they own real property on Pristine Way in Brentwood, California (see FAC ¶ 1), that,

¹By order filed July 14, 2015, the Court took the matter under submission.

1 on June 15, 2006, they executed a “mortgage loan consisting of a Promissory Note, Deed
2 of Trust [and other documents]” (see FAC ¶ 6), that, on May 12, 2011, “all beneficial
3 interest under [p]laintiffs’ deed of trust, together with the Note,” was transferred to BNYM
4 (see FAC ¶ 10), and that, from July 1, 2011, to May 1, 2013, BANA was the “servicer” (see
5 FAC ¶ 8).

6 Plaintiffs also allege that, on September 29, 2011, they filed a complaint in state
7 court against “BANA and other parties for fraud and related misconduct pertaining to the
8 origination of their mortgage loan.” (See FAC ¶ 11.) Plaintiffs further allege that, on June
9 27, 2012, they “appeared at the offices of [BANA’s counsel] for their noticed depositions”
10 (see FAC ¶ 16), that, before the depositions commenced, counsel for BANA proposed that
11 the case be settled under certain terms, specifically, that “BANA was prepared to give
12 [p]laintiffs \$5000.00 on the condition that they vacate the property by midnight on August
13 31, 2012” (see FAC ¶ 17), and that, after a counteroffer by plaintiffs was rejected, plaintiffs
14 accepted the offer as proposed by BANA’s counsel (see FAC ¶¶ 18-19). Plaintiffs and
15 BANA thereafter entered into a written agreement, titled “Settlement and Agreement,”
16 resolving the state court action as to BANA. (See FAC ¶ 20, Ex. H.)

17 Plaintiffs allege that, as required by the settlement agreement, they “vacated the
18 property on August 31, 2012 and left it in a broom swept condition,” they “dismissed BANA
19 from the [state court] lawsuit,” and they “returned the key” to BANA. (See FAC ¶ 21.)
20 Plaintiffs also allege that, thereafter, BANA, paid plaintiffs \$5000 (see FAC ¶ 34), but
21 “breached its obligation under the contract to remove [p]laintiffs from the title” (see FAC
22 ¶ 36). According to plaintiffs, given that they remain on the title, they have been assessed
23 “fees and costs including inspection fees, property maintenance fees, legal fees, monthly
24 mortgage payments, default advances paid by the servicer and lender placement
25 homeowner’s insurance costs” (see FAC ¶ 40), as well as “at least \$11,000 in HOA fees”
26 (see id.). Plaintiffs further allege they are unable to “rent a place to live due to the damage
27 to their credit caused by the alleged default status of their mortgage loan” (see FAC ¶ 40),
28 and have been “squatting in their optical retail business” (see FAC ¶ 24).

1 On October 17, 2014, Quality Loan Service Corporation, which BNYM had earlier
2 named as trustee, “issued a ‘Notice of Default and Election to Sell Under Deed of Trust,’”
3 and, on January 23, 2015, “executed a Notice of Trustee’s Sale of [p]laintiffs’ property
4 scheduling a foreclosure sale for March 9, 2015.” (See FAC ¶¶ 26-27.)²

5 Based on the above, plaintiffs allege five causes of action, each arising under state
6 law.

7 DISCUSSION

8 Defendants argue that each of plaintiffs’ five causes of action is subject to dismissal.
9 The Court next considers each cause of action in turn.

10 A. Count I - “Breach of Contract”

11 In Count I, plaintiffs allege BANA failed to comply with its obligations under the
12 settlement agreement.

13 By order filed May 20, 2015, the Court dismissed plaintiffs’ breach of contract claim
14 for failure to allege facts to support a finding that BANA breached the terms of the
15 settlement agreement, and afforded plaintiffs leave to amend to allege, if they could, facts
16 to support a claim that BANA, by assertedly failing to take steps to remove plaintiffs from
17 the title, breached the implied covenant of good faith and fair dealing.

18 Plaintiffs now allege that “[t]he intention of all parties [was] that, in vacating the
19 property and turning the keys over to BANA, [p]laintiffs were relinquishing all title to, and
20 interest in, the Subject Property” (see FAC ¶ 35), but BANA “never sought to have
21 [p]laintiffs removed from the title” (see FAC ¶ 28), and, consequently, “breached the implied
22 covenant of good faith and fair dealing in BANA’s performance under the [s]ettlement
23 [a]greement” (see FAC ¶ 39).

24 Defendants contend Count I is subject to dismissal for two reasons. First,
25 defendants argue, plaintiffs have not alleged facts to support a finding that BANA breached

27 ²According to the parties’ respective memoranda filed in connection with the instant
28 motion, the foreclosure sale did not proceed as scheduled and, at least, as of the time
briefing was complete, had not occurred. (See Defs.’ Mot. at 4:5-7; Pls.’ Opp. at 5:25.)

1 the settlement agreement; in other words, according to defendants, plaintiffs have failed to
2 cure the deficiency identified in the Court’s prior order. Second, defendants argue, plaintiffs
3 have not alleged facts to support a finding that they incurred damages by reason of a
4 breach.

5 In support of their first argument, defendants interpret the FAC as alleging BANA
6 had a duty to “unilaterally” remove plaintiffs from the title. (See Defs.’ Mot. at 3:16.)
7 Defendants assert that BANA’s failure to do so cannot constitute a breach, as California
8 law prohibits a lender from unilaterally removing a borrower from the title. Rather, citing
9 California law, defendants contend the only lawful way to remove a defaulting borrower
10 from the title, in the absence of the borrower’s execution of a deed transferring the property
11 to the lender, is to foreclose on the property.³ The FAC, however, makes no reference to
12 BANA’s having a duty to “unilaterally” remove plaintiffs from the title; rather, the FAC
13 alleges BANA “never sought to have [p]laintiffs removed from the title.” (See FAC ¶ 28.)
14 Construing said allegation in the light most favorable to plaintiffs, see NL Indus., Inc. v.
15 Kaplan, 792 F.2d 896, 898 (9th Cir. 1986) (holding, when analyzing motion to dismiss,
16 district courts construe allegations in complaint “in the light most favorable to [plaintiff]”), the
17 Court finds plaintiffs are alleging that BANA, upon receiving the keys to the vacated
18 premises, failed to take, within a reasonable amount of time, whatever steps are allowed
19 under California law to remove plaintiffs from the title. As discussed above, defendants
20 concede such steps are available. The Court thus turns to defendants’ second argument,
21 specifically, that plaintiffs have not alleged sufficient facts to support a finding that they
22 have been damaged by the alleged breach of the covenant of good faith and fair dealing.

23 The FAC identifies three types of “harm” assertedly caused by the alleged breach:
24 (1) “severe emotional distress”; (2) the “assessment of fees and costs” by the “servicer”
25 and by a homeowner’s association; and (3) “damage to [plaintiffs’] credit.” (See FAC ¶ 40.)
26 As discussed below, plaintiffs have not alleged sufficient facts to support a finding that

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28 ³In the settlement agreement, plaintiffs conceded they had “defaulted on their loans.”
(See FAC Ex. H at 1.)

1 damages for any of those alleged harms are recoverable.

2 “Damages are awarded in an action for breach of contract to give the injured party
3 the benefit of his bargain and insofar as possible to place him in the same position he
4 would have been in had the promisor performed the contract.” Coughlin v. Blair, 41 Cal. 2d
5 587, 603 (1953); see also Digerati Holdings, Inc. v. Young Money Entertainment, LLC, 194
6 Cal. App. 4th 873, 885 (2011) (observing that, “[a]lthough breach of the implied covenant
7 often is pleaded as a separate count, a breach of the implied covenant is necessarily a
8 breach of contract”). Here, cognizable damages would appear to be those that would
9 place plaintiffs in the position in which they would have been had BANA timely foreclosed
10 on the property after plaintiffs had performed their obligations under the settlement
11 agreement.

12 At the outset, however, the Court notes that damages for “mental suffering and
13 emotional distress” are only available for a breach of contract where “the express object of
14 the contract is the mental and emotional well-being of one of the contracting parties.” See
15 Erich v. Menezes, 21 Cal. 4th 543, 559 (1999) (citing, as example, “cemetery’s agreement
16 to keep burial service private and to protect grave from vandalism”). Here, clearly, the
17 express object of the subject settlement agreement was not the “mental and emotional
18 well-being,” see id. of any party thereto.

19 Next, simply being assessed fees and costs is not a cognizable loss. Rather,
20 “California authorities generally require payment of the liability in order to include the
21 liability as damages.” See Green Wood Industrial Co. v. Forceman Int’l Dev. Group, Inc.,
22 156 Cal. App. 4th 766, 777 (2007). Here, plaintiffs do not allege they have paid any of the
23 assessments, and, consequently, do not allege they have incurred an actual loss. To the
24 extent California authority might be read to recognize a claim for damages based on a
25 liability without actual payment, plaintiffs fail to make an adequate showing. In particular,
26 plaintiffs fail to allege facts to support a finding that any such claimed liability “could or
27 would be enforced by the third party against the plaintiff or that the plaintiff otherwise could
28 and would satisfy the obligation.” See id. at 776 (holding third party’s demand for payment

1 not sufficient to support award for damages “because that third party may never attempt to
2 force the plaintiff to satisfy the alleged obligation, and [the] plaintiff may never pay [it]”).
3 Further, as to any claim for payment made by defendants, such claim, as defendants
4 acknowledge, would be “wiped out” upon foreclosure. (See Defs.’ Mot. at 4:27-28 (citing
5 “California’s Anti-Deficiency Statute,” Cal. Code Civ. Proc. § 580b).)

6 Lastly, plaintiffs’ allegation that they have a “low credit score” and cannot “purchase
7 anything on credit” (see FAC ¶ 40) is insufficient as plaintiffs allege no facts to suggest their
8 credit score would have been more favorable if their credit reports reflected a foreclosure
9 as opposed to a continuation of unpaid mortgage payments. See Coughlin, 41 Cal. 2d at
10 603 (holding recoverable damages are those that would “put [plaintiffs] in the same position
11 [they] would have been in had [defendant] performed”)

12 Accordingly, as plaintiffs have not alleged sufficient facts to support a finding that
13 they incurred any type of recoverable loss as a result of BANA’s alleged breach, Count I is
14 subject to dismissal. As that deficiency was not previously identified by the Court, and it is
15 not clear that plaintiffs would be unable to allege additional facts to support their claim, the
16 Court will afford plaintiffs leave to amend to allege, if they can do so, a cognizable injury.

17 **B. Count II - “Fraud”**

18 In Count II, plaintiffs allege against BANA and BNYM a claim for fraud.

19 In its order of May 20, 2015, the Court dismissed the fraud claim, with leave to
20 amend to allege, if plaintiffs could do so, a claim that they were fraudulently induced to
21 enter into the settlement agreement.

22 Plaintiffs now allege that the attorney retained by BANA to represent BANA in the
23 state court action plaintiffs filed in 2011 made false statements to them during settlement
24 negotiations. (See FAC ¶¶ 42-43.) As described in the FAC, BANA’s counsel told them
25 that (1) “the only way to get out from under their mortgage obligations was to turn the
26 property over to BANA,” and that (2) “this was their only option if they wanted to rebuild
27 their lives.” (See FAC ¶¶ 46-47.) According to plaintiffs, they entered into the settlement
28 agreement in reliance on the above-referenced “false statements.” (See FAC ¶ 47.)

1 Defendants argue, inter alia, the statements made by BANA's attorney during the
2 settlement negotiations are absolutely privileged under § 47 of the California Civil Code,
3 and, consequently, the fraud claim is subject to dismissal. The Court agrees.

4 Under § 47, a "privileged publication" includes statements made in a "judicial
5 proceeding." See Cal. Civ. Code § 47(b). The privilege may be raised as a defense to "all
6 torts except malicious prosecution," see Silberg v. Anderson, 50 Cal. 3d 205, 212 (1990),
7 and is "absolute in nature," see id. at 215. To determine if a statement is privileged under
8 § 47(2), courts apply a "four-part test," see id. at 219; specifically, the privilege applies to
9 any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or
10 other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that
11 [has] some connection or logical relation to the action," see id. at 212.

12 "Numerous courts" have held that statements "made during settlement negotiations"
13 are privileged under § 47. See Navarro v. IHOP Properties, Inc., 134 Cal. App. 4th 834,
14 843 (2005) (citing "[n]umerous courts" so holding; finding cause of action for fraud was
15 "barred" by § 47 where based on allegation "[plaintiff] was lied to about [defendant's]
16 intentions with regard to the settlement terms"); Dowling v. Zimmerman, 85 Cal. App. 4th
17 1400, 1422 (2001) (holding statements made by attorney "while negotiating [a] stipulated
18 settlement of [an] unlawful detainer action" were "privileged under subdivision (b) of Civil
19 Code section 47"). Nonetheless, plaintiffs argue, the privilege does not apply here,
20 because, according to plaintiffs, "the instant action in no way seeks to achieve the
21 objectives of the 2011 litigation nor does it have any connection or logical relation to the
22 dismissed action." (See Pls.' Opp. at 12:15-19.) In other words, plaintiffs appear to argue
23 that the action referenced in the third and fourth elements of the above-cited four-part test
24 is the current action, in which the privilege has been asserted, not the earlier lawsuit in
25 which the statement was made. The relevant authority, however, is to the contrary. See,
26 e.g., O'Neil v. Cunningham, 118 Cal. App. 3d 466, 471-72, 475 (1981) (holding, where
27 defamation claim was based on statement made in letter sent during course of prior
28 litigation, claim was barred by § 47 as letter "had a 'connection' with the underlying lawsuit"

1 and “was aimed to achieve the object of the [prior] litigation, namely, to settle it”).

2 Accordingly, Count II is subject to dismissal, without leave to amend.

3 **C. Count III - “Violation of Business and Professions Code, Section 17200 et seq.”**

4 In Count III, plaintiffs allege that BANA and BNYM violated § 17200 of the California
5 Business and Professions Code.

6 In its order of May 20, 2015, the Court dismissed plaintiffs’ § 17200 claim, with leave
7 to amend to identify a practice as to which plaintiffs had standing to challenge.

8 Plaintiffs now base their § 17200 claim on allegations that “BANA and BNYM
9 “breach[ed] the implied covenant of good faith and fair dealing in their performance under
10 the 2012 Settlement and Agreement” (see FAC ¶ 53.C), and that BANA’s counsel made
11 false statements when negotiating the settlement of the prior state court action (see FAC at
12 15: 5-9).⁴ In order words, the § 17200 claim is derivative of Counts I and II.

13 To the extent Count III is based on BANA’s counsel’s statements made during
14 settlement negotiations, Count III is subject to dismissal, as defendants argue, for the
15 reasons stated above with respect to Count II.

16 To the extent Count III is based on the alleged breach of the covenant of good faith
17 and fair dealing, defendants argue Count III is subject to dismissal for failure to allege the
18 requisite injury, i.e., that plaintiffs have “lost money or property” as a result of the breach.
19 See Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 320-21 (2011) (holding plaintiff
20 seeking to bring § 17200 claim must have “lost money or property” as result of alleged
21 violation) (internal quotation and citation omitted). The Court agrees.

22 As discussed above with respect to Count I, although plaintiffs allege they have
23 been assessed fees and costs, they do not allege they have paid any such assessment,
24 nor do they allege they otherwise have incurred a loss as a result therefrom. Additionally,
25 and as further discussed above with respect to Count I, plaintiffs do not allege sufficient

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27 ⁴Plaintiffs also identify in Count III other assertedly unlawful practices. (See FAC
28 ¶¶ 54.A., 54.B, 54.D, 54.E.) In its order dismissing the initial complaint, however, the Court
dismissed the § 17200 claim without leave to amend to the extent it was based on those
additional practices. (See Order, filed May 20, 2015, at 9:2-5.)

1 facts to support a finding that any loss of credit was the result of BANA's failure to foreclose
2 on the property, i.e., that their credit scores would have been better had a foreclosure
3 occurred.

4 Accordingly, Count III is subject to dismissal. As said deficiency was not previously
5 identified by the Court, and it is not clear that plaintiffs would be unable to allege additional
6 facts to support their claim, the Court will afford plaintiffs leave to amend to allege, if they
7 can do so, that they lost money or property as a result of the alleged breach of the implied
8 covenant of good faith and dealing.

9 **D. Count IV - "Negligent Infliction of Emotional Distress"**

10 In Count IV, plaintiffs allege BANA's conduct as set forth in Counts I and II
11 constituted "negligence" (see FAC ¶ 62), specifically, the "knowing fraud and breach of
12 contract committed by BANA" (see FAC ¶ 59).

13 To the extent Count IV is based on "fraud," i.e., BANA's counsel's statements made
14 during settlement negotiations, Count IV is subject to dismissal for the reasons stated
15 above with respect to Count II.

16 To the extent Count IV is based on the alleged breach of the covenant of good faith
17 and fair dealing, Count IV is subject to dismissal, for the reason that, as discussed above
18 with respect to Count I, damages for emotional distress are not recoverable for the breach
19 of a contract of the type alleged here, and plaintiffs cannot avoid such rule by recasting the
20 claim as one for negligence or another tort. See Freeman & Mills, Inc. v. Belcher Oil Co.,
21 11 Cal. 4th 85, 102 (1995) (citing "general law precluding tort recovery for noninsurance
22 contract breach").

23 Accordingly, Count IV is subject to dismissal in its entirety.

24 **E. Count V - "Intentional Infliction of Emotional Distress"**

25 In Count V, plaintiffs allege that, as a result of the above-referenced "deliberate
26 fraud and breach of contract," they have suffered "extreme emotional distress." (See FAC
27 ¶ 68.)

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1 As Count V is, like Count IV, derivative of Counts I and II, the Court finds Count V is
2 subject to dismissal for the reasons stated above with respect to Count IV.

3 Accordingly, Count V is subject to dismissal in its entirety.

4 **CONCLUSION**

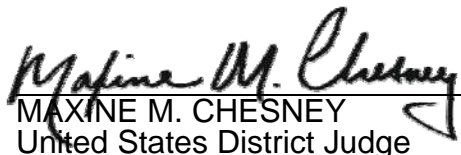
5 For the reasons stated above, defendants' motion to dismiss is hereby GRANTED,
6 and the First Amended Complaint is hereby DISMISSED.

7 If plaintiffs wish to file a Second Amended Complaint for purposes of curing the
8 deficiencies identified above with respect to Counts I and III, plaintiffs shall file any Second
9 Amended Complaint no later than August 7, 2015.

10 In light of the above, the Case Management Conference is hereby CONTINUED
11 from August 28, 2015 to October 23, 2015, at 10:30 a.m. A Joint Case Management
12 Statement shall be filed no later than October 16, 2015.

13 **IT IS SO ORDERED.**

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15 Dated: July 23, 2015


MAXINE M. CHESNEY
United States District Judge

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