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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DENNIS L. BRETCHES, et al., Plaintiffs and Appellants, v. ONEWEST BANK, et al., Defendants and Respondents.	B238686 (Los Angeles County Super. Ct. No. MC021928)

APPEAL from a judgment of the Superior Court of Los Angeles County. Randolph A. Rogers, Judge. Reversed.

Tovar & Cohen, Rene Tovar and David J. Cohen for Plaintiffs and Appellants.

Allen Matkins Leck Gamble Mallory & Natsis, Mark R. Hartney and Rebecca G. Gundzik for Defendants and Respondents.

INTRODUCTION

Plaintiffs and appellants Dennis and Lucinda Bretches filed a second amended complaint alleging claims arising out of the foreclosure of their home. Defendants and respondents OneWest Bank and IndyMac Venture demurred to the complaint. The Bretcheses, acting without leave of court, attempted to file a third amended complaint in lieu of an opposition. At the demurrer hearing, the trial court ruled that the third amended complaint was ineffective because plaintiffs had not obtained permission to amend their pleading. The court then sustained the demurrer without leave to amend based on the fact that plaintiffs had not filed an opposition.

On appeal, the Bretcheses argue that the trial court abused its discretion in sustaining the demurrer without leave to amend. We agree and reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Original and First Amended Complaints

1. The original complaint

On September 10, 2010, Dennis and Lucinda Bretches, representing themselves, filed a complaint against IndyMac Mortgage Services (IMMS) alleging claims for breach of contract, intentional infliction of emotional distress, "civil harassment" and "professional malpractice." The complaint alleged that IMMS, which was described as "a Division of OneWest [Bank]," had breached the terms of a construction loan agreement by failing to credit payments to plaintiffs' account, withholding insurance payments and obstructing plaintiffs' efforts to participate in the federal Home Affordable Modification Program (HAMP program). The complaint was accompanied by account statements and correspondence showing that the plaintiffs were delinquent in their loan payments.

In April of 2011, OneWest Bank filed a motion for judgment on the pleadings asserting that it had been erroneously sued as "IMMS." OneWest also argued that the Bretcheses' complaint failed to state a claim for breach of contract because: (1) the

complaint did not adequately describe the terms of the contract or explain how the contract had been breached; and (2) the documents accompanying the complaint demonstrated that the Bretcheses had failed to perform their contractual obligations. In addition, OneWest argued that the complaint did not contain sufficient facts to state claims for intentional infliction of emotional distress, civil harassment or professional malpractice.

At the hearing on the motion, the Bretcheses argued that they had been wrongfully accused of defaulting on their loan because numerous payments had not been credited to their account. The trial court, however, granted the motion for judgment on the pleadings with leave to "file a First Amended Complaint."

2. The first amended complaint

On May 23, 2011, the Bretcheses filed a first amended complaint against OneWest for breach of the implied covenant of good faith and fair dealing and fraud. The amended complaint alleged, in relevant part, that OneWest had "converted to their own benefit $15,000.00 of payment from Plaintiffs, which caused Plaintiffs to be unable to maintain the mortgage payments due under the [loan agreement], thereby causing Plaintiffs to default on the Loan Agreement." The Bretcheses also alleged that OneWest had committed fraud by falsely informing them that they were ineligible to participate in the HAMP program.

OneWest demurred to the amended complaint, arguing that the Bretcheses had exceeded the scope of the trial court's grant of leave to amend by replacing their original four causes of action (breach of contract, intentional infliction of emotional distress, civil harassment and professional malpractice) with two new claims (breach of the implied covenant and fraud). OneWest contended that the trial court "should not permit [the Bretcheses] to pursue these newly added causes of action" because they "did not have permission to file an amended pleading asserting additional claims."

OneWest also argued that it could not be sued for breach of the implied covenant because a recorded deed of trust and a subsequently recorded assignment of the deed

demonstrated that it was not a party to the loan agreement. The recorded documents, which OneWest attempted to introduce through a request for judicial notice, indicated that IndyMac Bank had been the original lender, and then had assigned the loan to IndyMac Venture. In addition, OneWest argued that the Bretcheses had not provided any details regarding the terms of the purported loan agreement and had not pleaded the fraud claim with sufficient particularity.

At the hearing on the demurrer, OneWest informed the court that although it was the servicer of the loan, IndyMac Venture was the actual lender. It also reiterated that the entire complaint should be dismissed because the Bretcheses had asserted claims that did not appear in the original complaint. The trial court sustained the demurrer with leave to amend and clarified that the Bretcheses were permitted to add new claims to the second amended pleading.

B. The Second Amended Complaint and Dismissal of the Action

On September 6, 2011, the Bretcheses filed a second amended complaint against OneWest Bank and IndyMac Venture for breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, negligent misrepresentation and violation of Business and Professions Code section 17200. The complaint also requested an accounting to determine the amount that had been improperly charged or withheld from their mortgage account.

The second amended complaint alleged that the Bretcheses had entered into a residential construction loan with IndyMac Bank, and attached a copy of the purported loan agreement. It further alleged that, in 2009, the Bretcheses had "suffered losses by theft at the [p]roperty. Pursuant to the terms of the [loan], [plaintiffs] filed an insurance claim for $15,000.00 with IMMS. IMMS, however, withheld payment of these for some time, demanding receipts . . . to prove that the stolen items had been repaired or replaced." According to the Bretcheses, IMMS's delay in paying out the insurance proceeds forced them to advance $15,000 of their own funds to cover the "theft losses," which then caused them to default on their construction loan.

The Bretcheses' six causes of action were predicated on the defendants' decision to withhold the $15,000 insurance payment, and various other conduct, including: (1) "failing to properly credit all payments of principal and interest by [the Bretcheses] against the loan amount outstanding"; (2) failing to comply with Civil Code section 2923.5; and (3) obstructing the Bretcheses' efforts to obtain a loan modification under the HAMP program

On October 11, 2011, OneWest Bank and IndyMac Venture filed a demurrer to the second amended complaint. On the contract-based claims, the defendants re-asserted their prior arguments that OneWest was not a party to the loan agreement and that documents attached to the original complaint showed that the plaintiffs had failed to perform their contractual obligations. In regards to the conversion claim, defendants asserted that the terms of the loan agreement specifically permitted them to retain the $15,000 insurance payment until it could verify that the plaintiffs had replaced the stolen items. Defendants also argued that the negligent misrepresentation and section 17200 claims did not adequately describe the allegedly unlawful conduct at issue. Finally, defendants argued that the Bretcheses were not entitled to an accounting because they did not "allege that some balance [was] due to them."

The Bretcheses, who were still representing themselves, did not file an opposition to the demurrer. They did, however, file a third amended complaint that purportedly addressed the deficiencies in their prior pleading. At the demurrer hearing, the Bretcheses informed the court that they believed they were entitled to file the third amended complaint in lieu of an opposition pursuant to Code of Civil Procedure section 472. The trial court, however, ruled that section 472 was inapplicable because the defendants had previously filed an answer and multiple demurrers had already been sustained. The court further ruled that the Bretcheses were not authorized to file the third amended complaint without leave of court.

In response to these rulings, the Bretcheses asked whether the court was directing them to "argue the issues over the demurrer." The court informed the plaintiffs that they were not permitted to "argue the issue because [they] didn't file a . . . written opposition."

The Bretcheses then requested permission to amend the complaint, explaining that they had only filed the third amended complaint because an attorney had instructed them to do so. The trial court denied the request and sustained the demurrer without leave to amend, stating: "You don't get to walk in and say I want to amend." The court continued: "I have a million of these foreclosure cases, and I've been through these issues before. I don't see anything novel in your third amended complaint, and the demurrer to the second amended complaint is sustained without leave to amend. If you think there's some error you could take the appropriate recourse." On November 29, 2011, the court entered a judgment dismissing the action with prejudice. The Bretcheses filed a timely appeal.

DISCUSSION

On appeal, the Bretcheses do not challenge the trial court's decision to sustain the demurrer to the second amended complaint, arguing only that they should have been granted leave to amend. The Bretcheses contend that although the third amended complaint was not accepted for filing, the allegations in the newly-drafted pleading demonstrate a "'reasonable possibility that [they] can state a good cause of action'" against defendants. (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 876-877 (*Gami*).)[1]

A. Standard of Review

"Our review of the court's decision denying leave to amend is reviewed for abuse of discretion. '"When the trial court sustains a demurrer without leave to amend, we must . . . consider whether the complaint might state a cause of action if a defect could reasonably be cured by amendment. If the defect can be cured, then the judgment of dismissal must be reversed to allow the plaintiff an opportunity to do so. [Citations.]"

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1 The Bretcheses also argue that, pursuant to Code of Civil Procedure section 472, they were entitled to file the third amended complaint without leave of court. Because we conclude that the trial court abused its discretion in sustaining the demurrer without leave to amend, we need not address that argument.

[Citation.]' [Citation.]" (*Michael Leslie Productions, Inc. v. City of Los Angeles* (2012) 207 Cal.App.4th 1011, 1019 (*Michael Leslie Productions*.) "On the other hand, there is nothing in the general rule of liberal allowance of pleading amendment which 'requires an appellate court to hold that the trial judge has abused his discretion if on appeal the plaintiffs can suggest no legal theory or state of facts which they wish to add by way of amendment.' [Citation.] The burden is on the plaintiffs to demonstrate that the trial court abused its discretion and to show in what manner the pleadings can be amended and how such amendments will change the legal effect of their pleadings. [Citations.]" (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1387-1388 (*Careau*).)

In "reviewing [plaintiffs'] proposed amendments to [the] complaint . . ., we deem to be true all material facts alleged [citation] and also accept as true facts that may be implied or inferred from those expressly alleged. [Citation.]" (*Mansell v. Otto* (2003) 108 Cal.App.4th 265, 283, fn. 5.)

B. The Bretcheses Have Not Forfeited Their Right to Appeal the Trial Court's Denial of Leave to Amend

OneWest and IndyMac Venture argue that the Bretcheses have forfeited their right to appeal the trial court's judgment because they did not file an opposition to the demurrer to the second amended complaint. Defendants further assert that "the third amended complaint should not be considered . . . on this [a]ppeal" because the Bretcheses "did not have leave to file the third amended complaint, and by their own admission, it was not accepted for filing."

Ordinarily, a party's failure to oppose a motion at the trial court would constitute waiver of appellate review. (See, e.g., *Bell v. American Title Ins. Co*. (1991) 226 Cal.App.3d 1589, 1602 ["Having failed to effectively oppose [respondent's] motion in the trial court, appellants have thus waived any objections to the resulting order"].) A special rule, however, applies to demurrers. Under Code of Civil Procedure section 472c, subdivision (a), "'[a] trial court's order sustaining a demurrer without leave to amend is

reviewable for abuse of discretion "even though no request to amend [the] pleading was made." [Citation.] While it is the plaintiff's burden to show "that the trial court abused its discretion" and "show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading" [citation], a plaintiff can make "such a showing . . . for the first time to the reviewing court" [citation].'" (*Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064, 1072; see also *Careau, supra,* 222 Cal.App.3d at p. 1386 ["To meet the plaintiff's burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court"]; *Dudley v. Department of Transp.* (2001) 90 Cal.App.4th 255, 260.)

The procedural rules summarized above demonstrate that, regardless of whether the Bretcheses opposed the demurrer or properly filed the third amended complaint, we may consider the newly-drafted pleading in assessing whether they have demonstrated a "reasonable possibility" that they can amend their claims to "'state a good cause of action.'" (*Gami, supra,* 18 Cal.App.4th at p. 876.)[2]

C. The Allegations in the Third Amended Complaint Demonstrate a Reasonable Possibility That the Bretcheses Can Properly State a Claim Against Defendants

Although the plaintiffs' opening brief argues that the allegations in their third amended complaint demonstrate that they can state claims against OneWest and IndyMac Venture, the response brief does not address those arguments. Instead, defendants argue only that the trial court properly concluded that the claims in the second amended

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2 On July 12, 2012, the respondents filed a motion to strike the appellants' opening brief that raised similar issues. Respondents contended that we should strike the appellants' entire opening brief because it was predicated on the third amended complaint, which was "not filed and not before the trial court at the time it sustained the demurrer to the SAC without leave to amend." On July 24, 2012, we denied the motion to strike, citing Code of Civil Procedure section 472c, subdivision (a).

complaint were defective and that we need not address the third amended complaint.[3] As explained above, however, we may consider the newly-proposed pleading in assessing whether the trial court abused its discretion by denying leave to amend. In making this determination, we will consider, in part, whether plaintiffs have addressed the purported defects that defendants identified in relation to the second amended complaint. (*Michael Leslie Productions, supra,* 207 Cal.App.4th at p. 1019 [“‘“When the trial court sustains a demurrer without leave to amend, we must . . . consider whether the complaint might state a cause of action if a defect could reasonably be cured by amendment”’”].)

1. The Bretcheses have demonstrated a reasonable possibility that they can properly state a claim for breach of contract

To properly plead a cause of action for breach of contract, the Bretcheses are required to plead: (1) the existence of a valid contract; (2) the plaintiff’s performance of the contract or excuse for nonperformance; (3) the defendant’s breach; and (4) resulting damage. (*Careau, supra,* 222 Cal.App.3d at p. 1388.)

The allegations in the proposed third amended complaint satisfy these pleading requirements. First, the Bretcheses allege that they entered into a written construction loan agreement with IndyMac Bank, which assigned the loan to OneWest and IndyMac Venture. A copy of the written agreement is attached to the pleading.

Second, the Bretcheses allege that, while they were performing their contractual obligations, defendants breached the terms of the agreement by, among other things: (1) failing to properly credit principal and interest payments between September 2009 and November 2009; (2) “improperly and/or inaccurately assess[ing] charges to [the] loan

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3 The defendants’ only discussion of the allegations in the third amended complaint appears in a footnote of their appellate brief, which states: “To the extent the Court considers the third amended complaint . . . it must conclude that based upon the newly included allegations and the doctrine of judicial estoppel . . . Appellants’ fourth attempt to state a claim against Respondents is also unsuccessful.” The brief contends no further analysis or discussion explaining why the allegations in the third amended complaint fail to state a claim.

account" in November of 2009; (3) "Fail[ing] to timely endorse an insurance reimbursement check due to [p]laintiffs in the amount of $15,000.00 . . ."

Third, the Bretcheses allege that defendants' conduct caused them to expend funds they would not have otherwise been required to spend, thereby causing them to "default[] on their obligation," which resulted in financial damage.

The newly-proposed pleading also includes allegations that specifically address the two defects defendants identified in their demurrer to the second amended complaint. First, defendants argued that the second amended complaint failed to state a breach of contract claim against defendant OneWest because recorded documents showed that it was not a party to the loan agreement. In the newly-proposed version of the complaint, however, the Bretcheses allege that IndyMac Bank assigned the benefits and liabilities of the contract to both OneWest and IndyMac Venture: "OneWest and [IndyMac Venture] . . . have been assigned and/or have acquired not only the assets, but also the liabilities of [IndyMac Bank] . . ., including without limitation those liabilities resulting from the Loan Agreement and [IndyMac Bank's] conduct in relation thereto and in relation to its dealings with Plaintiffs."

"Contract duties are generally delegable, unless prohibited by statute, public policy or the terms of the contract." (29 Williston on Contracts § 74:27 (4th ed.); see *also Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1381 ["'[A]ssignability of things [in action] is now the rule; nonassignability, the exception; and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party . . . .' [Citations.]"]; Civ. Code, §§ 953, 954.) Therefore, to the extent OneWest has assumed the benefits and obligations of the Bretcheses' loan agreement, plaintiffs may pursue a breach of contract claim against it. Although the evidence may ultimately prove that OneWest is neither a party to nor an assignee of the construction loan agreement, at this stage in the proceedings we must accept as true the allegations in the third amended complaint. (See *Careau, supra*, 222 Cal.App.3d at p. 1391 [when reviewing whether a demurrer has been properly sustained, "it is not our task to be concerned with the possible difficulty or inability of proving such allegations"].)

The defendants' demurrer to the second amended complaint also argued that the Bretcheses could not assert a contract claim because documents attached to the original complaint demonstrated that they failed to make timely loan payments in 2009. Thus, according to defendants, the complaint effectively admitted that plaintiffs had failed to perform their contractual obligations. The third amended complaint, however, alleges that this purported nonperformance was the result of defendants' prior breach. More specifically, the Bretcheses allege that defendants withheld an insurance reimbursement check and principal payments that should have been credited toward their account, thereby causing their subsequent delinquency in payment. Thus, plaintiffs have alleged facts indicating that any nonperformance was excused by defendants' prior breach of the agreement. Again, although the evidence may ultimately show that the plaintiffs were not excused from failing to perform under the agreement, we cannot make that determination at this stage in the proceedings.

The proposed third amended pleading demonstrates a reasonable possibility that plaintiffs can properly state a claim for breach of contract against the defendants. The trial court therefore abused its discretion in sustaining the demurrer to this claim without leave to amend.

2. The Bretcheses have failed to demonstrate a reasonable possibility that they can state a claim for breach of the implied covenant of good faith and fair dealing

The proposed third amended complaint alleges that defendants breached the implied covenant of good faith and fair dealing. "'Every contract imposes on each party a duty of good faith and fair dealing in each performance and in its enforcement.' [Citations.] Simply stated, the burden imposed is '"that neither party will do anything which will injure the right of the other to receive the benefits of the agreement."' [Citations.] Or, to put it another way, the 'implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose.' [Citation.]" (*Careau*, *supra*, 222 Cal.App.3d at p. 1393.)

"[A]llegations which assert such a claim must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement. . . . [¶] If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Careau*, *supra*, 222 Cal.App.3d at p. 1395.)

The Bretcheses' newly-proposed complaint alleges that defendants breached the implied covenant of good faith and fair dealing by engaging in five different acts: (1) "fail[ing] to properly credit all of Plaintiffs' principal and/or interest payments called for under the Loan Agreement"; (2) "Improperly and/or inaccurately assess[ing] charges (including charges for late fees and loan extension fees . . .); (3) "Fail[ing] to timely endorse an insurance reimbursement check due to Plaintiffs in the amount of $15,000.00 . . ."; (4) failing to accurately respond to inquiries regarding the HAMP loan program; and (5) failing comply with Civil Code section 2923.5.

The first four of these alleged acts – failing to properly credit payments to the loan account, charging improper fees, improperly withholding an insurance payment and failing to respond to inquiries regarding a HAMP modification – are identical to the conduct alleged in support of the plaintiffs' breach of contract claim. As a result, the allegations are "superfluous" to the breach of contract claim and may be "disregarde[ed]." (*Careau*, *supra*, 222 Cal.App.3d at p. 1395; see also *Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1370 [where "claim of breach of the implied covenant relies on the same acts, and seeks the same damages, as its claim for breach of contract," summary adjudication affirmed on the ground "the cause of action

for breach of the implied covenant is duplicative of the cause of action for breach of contract, and may be disregarded"].)

The only remaining allegation pleaded in support of the implied covenant claim asserts that defendants violated Civil Code section 2923.5, which "prohibits filing a notice of default until 30 days after the lender contacts the borrower 'to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure.' (Citation.]" (*Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 527 (*Stebley*).) The implied covenant of good faith and fair dealing, however, "'is limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create obligations not contemplated by the contract.' [Citation.]" (*Pasadena Live, LLC v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094.) Plaintiffs have cited no provision of the contract requiring defendants to comply with section 2923.5, which is a statutory obligation that may be enforced through a private right of action. (See *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 214, 217-220 (*Mabry*).)[4] Nor have they alleged how the violation of this statute unfairly deprived them of the benefit of the loan agreement.

Because plaintiffs' proposed third amended complaint alleges no conduct that supports an independent claim for breach of the implied covenant of good faith and fair dealing, they have failed to demonstrate that the trial court abused its discretion in sustaining the demurrer to this claim without leave to amend. (*Careau, supra*, 222 Cal.App.3d at p. 1386 ["To meet the plaintiff's burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action"].)

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4 Although section 2923.5 provides a private right of action (see *Mabry, supra,* 185 Cal.App.4th at pp. 214), "the sole available remedy is 'more time' before a foreclosure sale occurs. [Citation.] After the sale, the statute provides no relief." (*Stebley, supra,* 202 Cal.App.4th at p. 526.) The statute "does not provide for damages, or for setting aside a foreclosure sale . . .," nor does it "require the lender to modify the loan." (*Ibid.*; see also *Mabry, supra,* 185 Cal.App.4th at pp. 231-232.)

3. Plaintiffs have demonstrated a reasonable possibility that they can properly state a claim for conversion

Plaintiffs' proposed third amended complaint includes a claim for conversion, which "is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.) A conversion may occur even if the property is later returned. (See *Mears v. Crocker First Nat. Bank* (1948) 84 Cal.App.2d 637 [upholding conversion claim where company wrongfully withheld title to stock for six week period].) The general measure of damages for conversion is "[t]he value of the property at the time of the conversion" and "[a] fair compensation for the time and money properly expended in pursuit of the property." (Civ. Code, § 3336.) However, when damages of such a value would be manifestly unjust, a plaintiff may recover "an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted." (*Ibid*.; see also *Myers v. Stephens* (1965) 233 Cal.App.2d 104, 119-120.)

The allegations in the proposed third amended complaint satisfy these pleading requirements. First, the Bretcheses allege that they were entitled to a "$15,000 payment of insurance proceeds." Second, they allege that the defendants wrongfully "exercised dominion and control of" the insurance payment when they failed to credit it to the plaintiffs' account. Third, they allege that they were damaged by defendants' temporary conversion because the "withholding of the insurance disbursement contributed and/or directly led to" their subsequent default.

In their demurrer to the second amended complaint, defendants argued that plaintiffs could not assert a conversion claim based on the withholding of insurance funds because the loan agreement specifically permitted such conduct. In support, it cites a provision of the contract allowing the lender to hold insurance proceeds "until Lender has had an opportunity to inspect such Property to ensure the work has been completed to

Lender's satisfaction, provided that such inspection shall be undertaken promptly." The proposed third amended complaint, however, specifically acknowledges this provision, but alleges that defendants continued to withhold the insurance funds "for their own benefit" even after plaintiffs had "fulfilled all of the requirements." At this stage in these proceedings, we must accept those allegations as true.

The plaintiffs' proposed third amended complaint demonstrates a reasonable possibility that they can state a claim for conversion. The trial court therefore abused its discretion in sustaining the demurrer to this claim without leave to amend.

4. Plaintiffs have failed to demonstrate a reasonable possibility that they can properly state a claim for negligent misrepresentation

The proposed third amended complaint asserts a claim for negligent misrepresentation. "The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. [Citation.]" (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.) "The tort of negligent misrepresentation does not require scienter or intent to defraud. [Citation.] It encompasses '[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true' [citation], and '[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true' [citations]." (*Small v. Fritz Companies, Inc*. (2003) 30 Cal.4th 167, 173–174).

The proposed third amended complaint alleges that defendants negligently misrepresented that: (1) they would "keep an accurate account of the loan payments, fees and credits, as represented to plaintiffs in writing in the Loan Agreement"; (2) they would "promptly distribute insurance proceeds upon submission of a valid claim of loss pursuant to the Loan Agreement"; (3) plaintiffs' HAMP application could not be

approved because the property was not the plaintiffs' primary residence; and (4) plaintiffs' HAMP application would be completed by June 2011.[5]

The first two "misrepresentations" merely assert that defendants failed to abide by obligations enumerated in the loan agreement. "A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations. Instead, "'[c]ourts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies.' [Citations.]" (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 643, superseded by statute on another ground as set out in *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1079-1080.) In this case, plaintiffs have not identified any social policy warranting the imposition of tort remedies for defendants' purported breach of the loan agreement.

The remaining two misrepresentations involve statements regarding the plaintiffs' HAMP program applications. The first allegation asserts that, in August of 2010, defendants misinformed plaintiffs that they were ineligible to participate in HAMP, but later recanted the statement. The complaint, however, does not include any allegation explaining how the plaintiffs relied on this misrepresentation or how they were damaged by such reliance. Nor can we infer how they might have been damaged by defendants' statement given that the allegations in the complaint indicate that: (1) the defendants recanted the statement; and (2) after the statement was recanted, the plaintiffs applied for a HAMP loan. Thus, plaintiffs have failed to demonstrate they can plead facts showing they detrimentally relied on the August 10th statement.

The second HAMP allegation asserts that, in March of 2011, defendants misinformed plaintiffs that their "HAMP loan would be completed by June of 2011."

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5 In their demurrer to the second amended complaint, defendants argued that plaintiffs had not adequately stated a claim for negligent misrepresentation because they failed to identify "'"how, when, where, to whom and by what means the representations were tendered."'" The proposed third amended complaint addresses this purported defect by including specific information about when each representation was made, who it was made by and to whom it was made.

The California Supreme Court has explained that, "[t]o be actionable, a negligent misrepresentation must ordinarily be as to past or existing material fact;" a "promise to perform at some future time" is not sufficient. (*Tarmann v. State Farm Mut. Auto. Ins. Co*. (1991) 2 Cal.App.4th 153, 159 ["we decline to establish a new type of actionable deceit: the negligent false promise"].) Plaintiffs' assertion that, in March of 2011, defendants stated that the HAMP application would be approved three months later constitutes a promise of future activity, rather than a statement as to past or existing material fact.

In sum, none of the conduct alleged in plaintiffs' proposed third amended is sufficient to support a claim for negligent misrepresentation. As a result, plaintiffs have failed to demonstrate that the trial court abused its discretion when it sustained the demurrer to this claim without leave to amend.

5. Plaintiffs have demonstrated a reasonable possibility of stating a claim for violation of Business and Professions Code section 17200

To "state a claim for a violation of the Unfair Competition Law [UCL] (Bus. & Prof. Code, § 17200), a plaintiff must allege that the defendant committed a business act that is either fraudulent, unlawful, or unfair." (*Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1126.) In addition, to satisfy the UCL's standing requirements (see Bus. & Prof. Code, § 17204), the plaintiff must allege that he or she suffered an "economic injury . . . that was the result of, i.e., caused by, the unfair business practice. . . that is the gravamen of the claim." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322 (*Kwikset*).)

In their second amended complaint, plaintiffs alleged that defendants violated the UCL by breaching their promise to "use legally sufficient efforts to comply with the terms and conditions of the Loan Agreement." The defendants' demurrer to the second amended complaint, in turn, argued that plaintiffs had failed to identify "the violation of an independent underlying law or statute" or any other "illegal conduct undertaken by either of the defendants." They further argued that plaintiffs had failed to demonstrate

they had standing to assert a section 17200 claim because the complaint did not allege "any financial loss resulting from a purported violation . . . [of the statute.]"

Plaintiffs' proposed third amended complaint includes numerous additional allegations regarding defendants' violation of the UCL: "Defendants[']implicit and express representations to Plaintiffs in the Loan Agreement, that Defendants would use legally sufficient efforts to comply with the terms and condition of its agreements and with all applicable California law, . . . were likely to deceive the public, and did so . . . thereby causing Plaintiffs to suffer injury and monetary harm (i.e., excess and double interest payments, loan extension payments and late fees) . . . . [¶] More specifically, . . . Plaintiffs . . . believe it is Defendants' practice to fail to credit its borrowers with all of their principal and interest payments made in connection with loans with Defendants. Moreover Plaintiffs . . . believe that it is Defendants practice to withhold disbursements (including insurance disbursements) and fail to pay them in a timely fashion, so that [Defendants] continue to benefit by the keeping of funds which otherwise should have been disbursed and/or more timely disbursed to borrowers who have insurance to cover theft. The benefits to Defendants for such conduct include the keeping of and/or continued collection of interest on funds which should have been paid out to borrowers/claimants."

The above allegations demonstrate that plaintiffs' newly-proposed UCL claim is predicated on defendants' alleged breach of the loan agreement. "A breach of contract. . . may form the predicate for a UCL claim, '"provided it also constitutes conduct that is 'unlawful, or unfair, or fraudulent.'" [Citations.]' [Citation.] With respect to the unfairness prong of Business and Professions Code section 17200, appellate courts have recognized that 'a systematic breach of certain types of contracts (e.g., breaches of standard consumer . . . contracts . . .) can constitute an unfair business practice under the UCL. [Citations.]' [Citations.]" (*Arce v. Kaiser Foundation Health Plan, Inc*. (2010) 181 Cal.App.4th 471, 489-490.) The third amended complaint includes such allegations. Plaintiffs assert that defendants systematically breach their lender agreements by

withholding funds and interest owed to their borrowers. This is sufficient to state a claim under the UCL. (*Ibid*.)[6]

Moreover, unlike the second amended complaint, the newly-proposed complaint alleges that plaintiffs suffered an economic injury as a result of the defendants' practices. Specifically, they allege that they were forced to pay excess interest charges as well as unnecessary loan extension and late fee payments. (See *Kwikset, supra,* 51 Cal.4th at p. 323 ["There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary"].)

The allegations in the third amended complaint demonstrate that plaintiffs can amend their claims to state a cause of action for violation of the UCL. Therefore, the trial court abused its discretion in sustaining the demurrer to this claim without leave to amend.

6. Plaintiffs' request for an accounting is a form of relief, not a separate cause of action

The proposed third amended complaint includes a request for an accounting, which "is a 'species of disclosure, predicated upon the plaintiff's legal inability to determine how much money, if any, is due.' [Citation.]" (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 180.) In their demurrer to the second amended complaint, defendants argued that plaintiffs had improperly sought an accounting to determine how

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6 Plaintiffs also assert they can amend their complaint to state a UCL claim based on defendants' alleged violations of Civil Code section 2923.5. "But plaintiffs cannot properly allege they lost money or property 'as a result of' defendant's alleged violation of section 2923.5 (see Bus. & Prof.Code, § 17204) . . . [because the] only right to relief under the statute [i]s postponement of the foreclosure sale, and lenders are not required to take any action under the statute." (*Hamilton v. Greenwich Investors XXVI* (2011) 195 Cal.App.4th 1602, 1617.)

much they still owed on their loan. (See, e.g., *Quinteros v. Aurora Loan Services* (E.D. Cal. 2010) 740 F.Supp.2d 1163, 1170 ["Plaintiffs, as the party owing money, not the party owed money, has no right to seek an accounting"]; see also *Hernandez v. First American Loanstar Trustee Services* (S.D. Cal. Apr.12, 2010, No.10 Civ. 00119) 2010 WL 1445192, at p. *5 (*Hernandez*).) The allegations in the third amended complaint, however, show that plaintiffs have not requested an accounting to determine "'the amount of money still owed to [the lender].'" (*Hernandez, supra*, 2010 WL 1445192 at p. *5.) Instead, they seek an accounting of how much they were overcharged by defendants' allegedly improper accounting activities.

If plaintiffs prevail on any of the claims pleaded in the third amended complaint, they may be entitled to an accounting, which is "not an independent cause of action but merely a type of [equitable] remedy." (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82; see also *Janis v. California State Lottery Commission* (1998) 68 Cal.App.4th 824, 833 ["An accounting is derivative; it must be based on other claims"].) An accounting is appropriate where "the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable." (*Civic Western Corp. v. Zila Industries, Inc*. (1977) 66 Cal.App.3d 1, 14.) At this stage in the proceedings, we cannot determine that an accounting is an improper form of relief. If the Bretcheses do prevail on any of their claims, the trial court may then determine whether such relief is necessary. (*See Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 594 ["There is no right to an accounting where none is necessary"].)

DISPOSITION

The judgment is reversed. On remand, the trial court shall permit appellants to file a third amended complaint to state causes of action for breach of contract, conversion and violation of Business and Professions Code section 17200. Appellants shall recover their costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J. WOODS, J.