

2015 WL 3821108 (N.D.Cal.) (Trial Motion, Memorandum and Affidavit)  
United States District Court, N.D. California.

Wai CHEUNG & Yin Wong, Plaintiffs,

v.

PNC MORTGAGE, Defendant.

No. 3:14-cv-03670-EDL.  
January 8, 2015.

**Plaintiff's Opposition to Defendant's Motion to Dismiss**

Tiffany R. Norman (SBN: 239873), TRN Law Associates, 654 Sacramento Street, Second Floor, San Francisco, CA 94111, Telephone: (415) 823-4566, Facsimile: (415) 762-5490, for plaintiffs Wai Cheung & Yin Wong.

*Complaint Filed: June 27, 2014*

*Trial Date: not set yet*

Plaintiffs WAI CHEUNG and YIN WONG ("Plaintiffs") hereby file their opposition to Defendant's Motion to Dismiss as follows:

**I. BACKGROUND**

Yin Wong is mentally disabled and English is her second language. First Amended Complaint, ("FAC") ¶ 5. She is the owner of property located at 14 Las Villas Court, San Francisco California, 94124. Id., ¶ 1. Ms. Wong and her daughter owned the property from 2001 to 2008, when the title was transferred to Ms. Wong's name only. Id., 5. From 2001 to 2009 Ms. Wong never missed a payment. In 2009 National City Bank merged with PNC. (Motion to Dismiss, "MTD" 2, 5-11) In Ms. Wong's First Amended Complaint she incorrectly stated there was a change in the servicer, however there was a complete change in the ownership of the loan, as Defendant points out in it papers. Id. After the merger PNC did not properly process Ms. Wong's payments, which lead to a foreclosure. FAC, ¶8. The missing payment and the merger occurred around the same time. Before the merger, Ms. Wong was never late on her payments.

The foreclosure occurred and the Trustee's Deed Upon Sale was recorded on July 21, 2010. The amount of the loan was \$172,660.81.

After the foreclosure, PNC tried to evict her on five separate occasions. With the help of numerous non-profits, she successfully fought each eviction. FAC, ¶ 11. She borrowed money from friends and family was able to repurchase the property from PNC. When she repurchased the property she did so at an inflated price since PNC charged her fees and costs associated with the foreclosure. Id. PNC recorded a Quit Claim Deed on April 29, 2013. Thus, from 2010 to 2013 Ms. Wong fought the wrongful foreclosure and wrongful eviction, and during this time title to the property was in PNC's name.

Unfortunately while fighting the wrongful foreclosure five evictions Ms. Wong suffered great distress. The stress caused her to lose her job, suffer from elevated blood pressure, headaches, suicidal tendencies and she was repeatedly hospitalized. FAC, ¶ 12.

### III. STANDARD OF REVIEW

Plaintiff is required to give only “a short and plain statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 557 (2007).) “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (internal citations and parentheticals omitted); *See also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 109, 1104 (9th Cir. 2008) [“Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.”].

In considering a motion to dismiss, courts must accept all of the plaintiff’s allegations as true and construe them in the light most favorable to the plaintiff. *Id.* at 550; *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). Motions to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure are viewed with disfavor and, accordingly, dismissals for failure to state a claim are “rarely granted.” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). Inquiry into the adequacy of the evidence is improper. *Enesco Corp. v. Price/ Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998). A court may not dismiss a complaint “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). If the court dismisses the complaint, it should grant leave to amend even if no request is made “unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)).

### IV. LEGAL ARGUMENT

#### A. PLAINTIFF HAS SUFFICIENTLY PLED NEGLIGENCE BECAUSE PNC BREACHED ITS DUTY DURING THE SERVICING OF THE LOAN, RESULTING IN DAMAGES TO PLAINTIFF.

To state a claim for negligence, a plaintiff must allege: (1) the defendant’s legal duty of care to the plaintiff; (2) breach of that duty; (3) causation; and (4) resulting injury to the plaintiff. *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 500 (2001).

In California, the test for determining whether a **financial** institution exceeded its role as money lender and thus owes a duty of care to a borrower-client involves “the balancing of various factors, among which are: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant’s conduct and the injury suffered, (5) the moral blame attached to the defendant’s conduct, and (6) the policy of preventing future harm.” *Nymark v. Heart Fed. Sav. & Loan Ass’n*, 231 Cal. App. 3d 1089 (1991).

Courts have concluded in several cases that a **financial** institution has exceeded its role as a money lender when they are servicing a loan. This is demonstrated in cases involving servicing and reviewing borrowers for loan modifications. Courts have found that a servicer is subject to a standard of reasonable care in handling the applications. *See Banks v. JP Morgan Chase*, 2014 WL 6476139 (C.D. Cal. Nov. 19, 2014); *Rijhwani v. Wells Fargo Home Mortgage, Inc.*, 2014 WL 890016, at \*16 (N.D. Cal. Mar. 3, 2014); *Ansanelli v. JP Morgan Chase Bank, N.A.*, 2011 WL 1134451, at \*7 (N.D. Cal. Sep. 11, 2013); *Chancellor v. One West Bank*, 2012 WL 1868750, at \*13-14 (N.D. Cal. May 22, 2012); *Garcia v. Ocwen Loan Serv., LLC*, 2010 WL 1881098, at \*3 (N.D. Cal. May 10, 2010). Yet, PNC argues that Plaintiffs cannot establish a duty of care because PNC did nothing to exceed the scope of its conventional role as a mere lender of money. MTD, 4:13-16, 6:22.

Taking Ms. Wong's allegations as true, PNC undertook a duty of exercising care in processing Ms. Wong's payments and applying the payments to the loan. Under a *Nymark* analysis, a balancing of the factors in this case supports the imposition of a duty upon PNC. To be sure, the transaction between Ms. Wong making and PNC correctly applying the payment was intended to affect Ms. Wong since it was used for her mortgage payment. The potential harm to Ms. Wong from mishandling the payment recording a Notice of Default, Notice of Trustee Sale, and foreclosure were foreseeable: the loss of her home. The injury to Ms. Wong was certain, if it appears as if a borrower does not make their mortgage payments they go into foreclosure and will lose their house. There is also a close connection between PNC's conduct and any injury actually suffered, PNC's alleged conduct of not properly applying Ms. Wong's payments lead to Ms. Wong going into default, losing her property, and suffering from stress. Anyone who loses their house wrongfully, then fights five evictions, will suffer emotional distress. Finally, "[t]he existence of a public policy of preventing future harm to home loan borrowers is shown by recent actions taken by both the state and federal government to help homeowners caught in the home foreclosure crisis." *Garcia*, *supra*, 2010 WL 1881098, at \*3 (citing Cal. Civ. Code § 2923.6).

Ms. Wong alleges PNC breached the duty of care when they mishandled Ms. Wong's payments and did not apply them to her account. FAC, ¶ 7. Ms. Wong originally believed the payments were misapplied due to the change in servicing, but now realizes it was due to the merger between PNC and National City Mortgage. Be it a merger or a change in servicing, the end result is the same; the party collecting the payments did not properly apply the payments which lead to foreclosure of Ms. Wong's property.

Moreover, Ms. Wong has sufficiently alleged resulting damages in that Ms. Wong suffered from stress, the loss of her job, and medical issues. FAC, ¶12-13. PNC claims it was not reasonably foreseeable that "as a result of a pending foreclosure, Plaintiff would lose her job, suffer permanent disability, desire to kill herself...and suffer other severe issues." MTD, 5:3-14. However, PNC incorrectly states the facts. This was not a "*pending*" foreclosure, this was an actual foreclosure. It occurred and as a result Plaintiff fought five evictions to stay in her home. Numerous nonprofits assisted in fighting the evictions. Being in fear of eviction five times in three years caused her great stress. Any borrower who is about to be evicted from their house, wrongfully, will inevitably suffer great emotional distress. Unfortunately Plaintiff's emotional distress was severe. As a direct and proximate result of the negligence, PNC caused damage to Ms. Wong. As such, PNC's motion to dismiss Ms. Wong's claim for negligence should be denied.

## **B. MS. WONG HAS STANDING AND HAS SUFFICIENTLY PLED A CLAIM UNDER BUSINESS & PROFESSIONS CODE SECTION 17200 BASED ON PNC'S MISHANDLING OF HER PAYMENTS.**

PNC claims that Ms. Wong lacks standing to bring a claim for violation of [Business and Professions Code § 17200 et seq.](#) because Ms. Wong has not reinstated her loan or tendered payment. MTD, 6:16-27. However, PNC is mistaken. Ms. Wong repurchased the Property from PNC paying off the loan and further fees and costs associated with the foreclosure. FAC, ¶ 11. Thus, Ms. Wong does not need to tender, since there is nothing owed.

Further, a plaintiff has standing under the UCL when he or she has: (1) expended money due to the defendant's acts of unfair competition; (2) lost money or property; or (3) been denied money to which he or she has a cognizable claim. See *Hall v. Time Inc.*, (2008) 158 Cal.App.4th 847, 854-55.

Here, Ms. Wong lost title to her property from 2010 to 2013 as a result of PNC's unfair business practices. On information and belief, when PNC merged with National City Mortgage they did not correctly debit the money from Plaintiffs' bank account and apply the funds to her mortgage payment. Ms. Wong's payments were on automatic withdraw. There is a direct correlation between the time of the merger and the only time in which Ms. Wong was late on her payments. As a result she went into default, foreclosure, and had to fight to stop five evictions. It took over three years to get title back to her property. As such, the Court should find that Ms. Wong has standing to sue under her UCL claim.

In addition to standing, Ms. Wong has sufficiently pled a claim under [section 17200](#) for unfair business practices. When an action is brought by a consumer against the creditor, as is the case here, a broader definition of the word "unfair" applies than when an

action is between direct competitors. In this context, an “unfair” business practice occurs “when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” See *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 4th 509, 530 (1984). A “practice is prohibited as ‘unfair’ or ‘deceptive’ even if not ‘unlawful’ and vice versa.” *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647.” *Id.*, at 180.

Here, Ms. Wong avers that PNC's practices are unfair. Ms. Wong pled that PNC violated Section 17200 when Ms. Wong's Property was foreclosed upon because PNC did not properly process her payment. In addition, Ms. Wong pled that PNC negligently processed Ms. Wong's payment and foreclosed upon her property. Further, that Ms. Wong had to fight to prevent five evictions and it took her three years to get title back in her name. This caused her severe emotional distress. This action was unfair and was substantially injurious to Ms. Wong. In the instant case, the court should find Ms. Wong has stated a valid claim and PNC's motion to dismiss her claim for violation of the Business and Professions Code should be denied.

### C. MS. WONG'S FOURTH CLAIM FOR RELIEF PROPERLY ALLEGES FINANCIAL ELDER ABUSE.

PNC claims this Court should grant its Motion to Dismiss for this claim for relief entirely because it was not in the original complaint. MTD, 8:15-21. However, Ms. Wong is not estopped from bringing additional causes of action this early in the pleading stage. There is no prejudice or undue delay caused to PNC. In fact, adding additional causes of action in an amended complaint is a common practice.

The Welfare and Institutions Code section 15610.30(c) provides that “financial abuse” of an elder occurs when “a person or entity ... [t]akes [or] assists in taking ... real or personal property of an elder ... for a wrongful use or with intent to defraud, or both” (§ 15610.30, subds. (a)(1) & (2), italics added) or “by undue influence.” (§ 15610.30, subd. (a)(3).) *Bounds v. Superior Court*, (2014) 229 Cal.App.4th 468, 472. It provides that someone “takes” such property when the elder “is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest ....” (§ 15610.30, subd. (c), italics added.) *Id.* California Civil Code Section 3345 holds unfair or deceptive practices against senior citizens or disabled persons occurs when the defendant's conduct caused a senior or disabled person to suffer loss or encumbrance of a primary residence. FAC, ¶ 44.

PNC argues this claim for relief fails because of the statute of limitations. MTD, 8:23-24. PNC argues that the SOL began to run when the Notice of Default was filed. MTD, 8:23-25. However, this is disingenuous. The action that constituted the financial elder abuse was the taking of the property through foreclosure. The foreclosure occurred and the Trustee's Deed Upon Sale was recorded on July 21, 2010. At this time Ms. Wong was no longer on title. The taking continued from this date until 2013 when Ms. Wong repurchased the property. Further, she fought PNC's attempt to evict her on five separate occasions, which continued to constitute the loss or encumbrance of a primary residence.

PNC claims that in order for Plaintiff to utilize the enhanced remedies, “Plaintiffs must prove ‘by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud or malice in the commission of the abuse.’ (Cal. Wel. & Inst. Code § 15657.5(b).) MTD, 8:29-9:2. However, this section deals with Ms. Wong's ability to recover attorney's fees and costs, not actual liability. Actual liability, as discussed above, occurs when a party takes or assists in taking an elders property for the wrongful use *or* intent to defraud. (W&IC §15610.30(c)) (emphasis added)

Further, courts are not as narrow in their interpretation of liability for financial elder abuse as PNC would like to argue. This can be seen with the recent holding in *Bounds v. Superior Court*, supra, 229 Cal.App.4th 468. The *Bounds* Court found financial elder abuse upon the homeowner despite the fact that she always retained title to her property. She never lost title to her property through foreclosure or eviction, only through Defendant's attempts to gain title, i.e. getting escrow documents, filing a lawsuit, and lis pendens. The court found there was a taking, and financial elder abuse, because case law recognizes differing degrees of damages to a property owner's complex “bundle of rights.” *Id.* at p. 328; *Estate of Sigourney* (2001) 93 Cal. App. 4th 593, 604 [That bundle includes the rights to possess the property, to use the property, to exclude others from the property, and to

dispose of the property by sale or by gift.] *Bounds* explained that the law sought to protect **elderly** individuals with limited or declining cognitive abilities from overreaching conduct that resulted in a deprivation of their property rights. *Id.* at 481.

From the time PNC foreclosed on the property up to the time Ms. Wong was able to repurchase the property it was not in her name and a taking occurred. Ms. Wong was not able to use the property, obtain a loan on the property, or dispose of the property as she saw fit. Her “bundle of rights” was impaired. She suffered harm. This is **financial elder abuse**.

Next, PNC argues that Ms. Wong's claim for **elder abuse** appears to “derive from their negligence and fraudulent concealment claims, which fail for the reasons stated herein, and therefore cannot serve as a predicate claims to recover under a claim for **financial abuse** of an **elder**.” MTD, 9:3-7. To be clear, the claim does not derive from either of these claims for relief, nor does it need to. **Financial elder abuse**, unlike *Business and Professions Code §17200*, does not need to derive from another claim for relief. It can stand on its own. This is seen in the *Bounds* case where the court held there was **financial elder abuse**, which was not derivative of another claim. In the instant case, the court should find Ms. Wong has stated a valid claim and PNC's motion to dismiss Ms. Wong's **financial elder abuse** claim should be denied.

#### **D. MS. WONG'S FIFTH CLAIM FOR RELIEF PROPERLY ALLEGES INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.**

Under *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050--1051, intentional infliction of emotional distress exists: when there is ‘(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.’ A defendant's conduct is ‘outrageous’ when it is so ‘extreme as to exceed all bounds of that usually tolerated in a civilized community.’ And the defendant's conduct must be ‘intended to inflict injury or engaged in with the realization that injury will result.

PNC argues that Ms. Wong failed to state what PNC did that was so outrageous, and how it constituted “emotional distress of such substantial quantity of enduring quality that no reasonable man in a civilized society should be expected to endure it.” MTD, 9:8-16. However, in her First Amended Complaint she states that PNC wrongfully foreclosed upon her. FAC, ¶ 9. After the foreclosure PNC attempted to evict Ms. Wong on five separate occasions. *Id.*, ¶ 11. Due to the foreclosure and the repeated attempts to evict her, she suffered stress and as a result she lost her job and became permanently disabled. *Id.*, ¶ 12. She suffered from elevated blood pressure, suicidal tendencies and was repeatedly hospitalized. *Id.* She even had her doctor prepare a letter to send to the bank discussing her mental health situation. *Id.*, ¶ 13.

Thus, Ms. Wong clearly states what PNC did wrong, how this impacted Ms. Wong, and how it constituted severe emotional distress. The court should find Ms. Wong has stated a valid claim and PNC's motion to dismiss Ms. Wong's intentional infliction of emotional distress claim should be denied.

Respectfully submitted,

January 8, 2015

/s/ Tiffany R. Norman

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Attorney for Plaintiffs WAI CHEUNG & YIN WONG

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