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Court of Appeal, Fourth District, Division 3, California.

Winola RUSSELL, Plaintiff and Appellant,  
v.  
WASHINGTON MUTUAL BANK, FA, Defendant and Respondent.

No. G026703.  
(Super.Ct.No. 788125).

March 11, 2002.

Debtor sued first trust deed holder and others, seeking damages arising from nonjudicial foreclosure sale of her former residence. The Superior Court, Orange County, No. 788125, C. Robert Jameson, J., granted summary judgment to first trust deed holder. Debtor appealed. The Court of Appeal, Rylaarsdam, J., held that: (1) first trust deed holder was not liable on conspiracy claim, and (2) letter issued by first trust deed holder to second trust deed holder accurately reporting debtor's delinquency did not support claims of unfair business practices and infliction of emotional distress.

Affirmed.

Debtor did not establish conspiracy claim against first trust deed holder based on allegations that it aided in a conspiracy to cause a wrongful foreclosure by second trust deed holder by wrongfully imposing charges on first trust deed, as there was no evidence first and second trust deed holder formed a conspiracy or that first trust deed holder participated in any wrongful acts; at most, second trust deed holder asked first trust deed holder for a statement of the current status of debtor's account, and it provided statement accurately reflecting debtor's delinquency on first trust deed holder's loan.

Plaintiff executed an \$85,000 promissory note in favor of Home Savings which was secured by a deed of trust on her Costa Mesa residence. The loan documents required plaintiff to maintain casualty insurance on the property and, if she failed to do so, authorized Home Savings to obtain coverage and collect the premium from her. Subsequently, plaintiff executed a second deed of trust in favor of another party securing another debt.

On several occasions, plaintiff defaulted in making the payments due on Home Savings's loan. Home Savings commenced foreclosure proceedings, but in January 1996, after the second trust deed holder advanced funds to cure the default, plaintiff reinstated the loan.

Thereafter, plaintiff defaulted on both of her secured obligations. As for Home Savings's loan, plaintiff twice failed to submit proof of coverage, forcing it to acquire casualty insurance. Initially, Home Savings charged plaintiff with the entire premium, but later reduced this charge to only a prorated amount when plaintiff presented proof of her own insurance.

In addition, plaintiff filed a bankruptcy petition under Chapter 13 of the Bankruptcy Code in May 1996 to prevent a foreclosure sale by the second trust deed holder. The bankruptcy court confirmed a plan which required plaintiff to remain current on her Home Savings loan payments.

Nonetheless, plaintiff defaulted again on this debt. According to plaintiff's own declaration, between May 15 and November 15, 1996, she made five sporadic payments to Home Savings totaling \$2,202.41. During that time, the loan's monthly principal and interest obligation alone exceeded \$3,900, while the expenses incurred for insurance,

late charges, and other miscellaneous expenses exceeded \$500.

The second trust deed holder sought an order from the bankruptcy court granting it relief from the automatic stay. At that creditor's request, Home Savings sent a letter declaring that, as of October 21, 1996, plaintiff's delinquency on her loan payments amounted to \$2,063.28. The bankruptcy court granted the motion. In December, the second trust deed holder foreclosed on plaintiff's property, selling it to a third party. Home Savings received \$2,636.64 from this sale. Several months later, the third party sold the property in a transaction which discharged the remaining obligation owed on Home Savings's loan.

\*2 Plaintiff sued Home Savings and several other parties. Her complaint's first cause of action for wrongful foreclosure against the second trust deed holder alleged the amount of the outstanding indebtedness listed in the notice of default and election to sell was "fraudulent, misstated, inflated, unauthorized and otherwise violative of law." The second, third, and fourth causes of action named Home Savings as a defendant. The second count alleged it aided in a conspiracy to cause a wrongful foreclosure "by wrongfully imposing charges ... on the First Trust Deed," the effect of which "was to ... deprive the Plaintiff of the ability to refinance the subject home so as to be able to stop the wrongful foreclosure...." The third count for unfair business practices under [Business and Professions Code section 17200](#), and the fourth count for infliction of emotional distress, sought recovery based on the same alleged misconduct.

The trial court granted defendant's summary judgment motion. On the second count, it ruled "there is no evidence of the formation and operation of a conspiracy and damage resulting to Plaintiff," and "the evidence shows that Plaintiff was in default on her loan payments." As for the third count, again noting plaintiff's loan default, the court declared "there is no evidence to show that [defendant] did anything unlawful, unfair or fraudulent," and defendant "acted within its contractual rights...." On the fourth count, the court found "no evidence exists that [defendant] engaged in any intentional or outrageous conduct," or "caused [plaintiff] any actionable emotional distress."

#### DISCUSSION

Plaintiff attacks the trial court's finding that defendant presented evidence disproving one or more elements of each cause of action asserted against it. She focuses on Home Savings's account billing procedures and its purchase of forced casualty insurance.

This argument fails to recognize the scope of review on a summary judgment motion. "The trial court may grant a motion for summary judgment 'if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' ([Code Civ. Proc., § 437c](#), subd. (c).) To prevail on the motion, a defendant must demonstrate plaintiff's cause of action has no merit. This requirement can be satisfied by showing either one or more of its elements cannot be established or that a complete defense exists to it. [Citations.] Once the defendant meets this requirement, the burden shifts to the plaintiff to demonstrate a triable issue of material fact exists. [Citations.] [¶ ] An appellate court reviews the trial court's decision de novo, independently examining both the evidence and its legal effect. [Citations.]" ([Brinton v. Bankers Pension Services, Inc. \(1999\) 76 Cal.App.4th 550, 555, 90 Cal.Rptr.2d 469.](#))

[1] The record supports the trial court's findings. To impose liability based on a civil conspiracy, the plaintiff must establish the formation and operation of the conspiracy, the wrongful acts done pursuant to the conspiracy, and the resulting damage. ([Lyons v. Security Pacific Nat. Bank \(1995\) 40 Cal.App.4th 1001, 1018-1019, 48 Cal.Rptr.2d 174.](#)) There is no evidence Home Savings and the second trust deed holder formed a conspiracy or that Home Savings participated in any wrongful acts. At most, the second creditor asked Home Savings for a statement of the current status of plaintiff's account, and it provided the statement. Contrary to plaintiff's claim, the statement accurately reflected her delinquency on Home Savings's loan. Even plaintiff's own attorney admitted to the bankruptcy court that plaintiff was "approximately \$2,000 behind on the mortgage payments ...."

\*3 In opposing defendant's summary judgment motion, plaintiff took the position that it had failed to give her credit for all of her payments and that, if it had done so, no delinquency would exist. This contention is demonstrably false. While there was apparently some confusion on Home Savings's part over whether the prorated insurance premiums should be billed over a three-month or a ten-month time span, plaintiff's payments between mid-May and Mid-November 1996 failed to cover even the monthly principal and interest obligation on her loan. Furthermore, the letter Home Savings sent to support the second trust deed holder's motion calculated the insurance premiums over a ten-month period and thus gave plaintiff the benefit of a lower monthly obligation.

[2] This analysis also supports the trial court's findings on plaintiff's unfair business practice and infliction of emotional distress claims. Home Savings merely issued a letter accurately reporting plaintiff's current delinquency on her loan payments to it. Plaintiff has presented no legal authority this act constituted either an "unlawful, unfair or fraudulent business act or practice" ([Bus. & Prof.Code, § 17200](#)), or "extreme and outrageous conduct" ([Cochran v. Cochran \(1998\) 65 Cal.App.4th 488, 494, 76 Cal.Rptr.2d 540](#)).

[3] To the extent, plaintiff seeks recovery for emotional distress on a negligence theory, the trial court properly found she failed to establish any basis for recovery. Plaintiff's declaration opposing defendant's motion alleged, "[i]n connection with the wrongful foreclosure and resulting eviction, I lost almost all my valuable personal and household possessions .... I have suffered severe and horrible emotional distress at the hands of [defendant] and have been left broken in body, mind, [and] spirit by their conduct, in conjunction with the conduct of the other defendants." "In general, a plaintiff 'incurring neither physical impact nor physical damage, and whose loss (other than emotional distress) is solely economic, is entitled neither to punitive damages nor to a recovery for emotional distress.' [Citations.]" ([Yu v. Signet Bank/Virginia \(1999\) 69 Cal.App.4th 1377, 1397, 82 Cal.Rptr.2d 304](#)). As this court has previously noted, the general rule is "mere negligence will not support a recovery for mental suffering where the defendant's tortious conduct has resulted in only economic injury to the plaintiff." ([Smith v. Superior Court \(1992\) 10 Cal.App.4th 1033, 1040, 13 Cal.Rptr.2d 133](#), fn. omitted.)

Defendant notes that plaintiff's opening brief primarily focuses on accounting issues and makes little or no mention of the other counts asserted against it. In her reply brief, plaintiff contends defendant "misconstrues" her complaint, arguing it "in substance" asserts "only two theories as against [defendant], theories of statutory violations and unfair business practices ...." The "statutory violation" cited in the reply brief is [Civil Code section 2924](#) which regulates private foreclosure sales.

\*4 Again, plaintiff misconstrues the nature of a summary judgment motion. The scope of the issues presented on the motion are limited to those raised by the pleadings. ([Couch v. San Juan Unified School Dist. \(1995\) 33 Cal.App.4th 1491, 1499, 39 Cal.Rptr.2d 848](#).) "If either party wishes the trial court to consider a previously unpleaded issue in connection with a motion for summary judgment, it may request leave to amend. [Citations.] Such requests are routinely and liberally granted. However, ' "[I]n the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings.' " ' [Citations.] Declarations in opposition to a motion for summary judgment 'are no substitute for amended pleadings.' [Citation.] If the motion for summary judgment presents evidence sufficient to disprove the plaintiff's claims, as opposed to merely attacking the sufficiency of the complaint, the plaintiff forfeits an opportunity to amend to state new claims by failing to request it. [Citation.]" ([Bostrom v. County of San Bernardino \(1995\) 35 Cal.App.4th 1654, 1663-1664, 42 Cal.Rptr.2d 669](#).)

Plaintiff made no attempt to amend her complaint before the trial court granted defendant's summary judgment motion. It is too late to do so at this time.

#### DISPOSITION

The judgment for defendant Washington Mutual Bank, FA, as successor in interest to Home Savings of America, FSB is affirmed. Respondent shall recover its costs on appeal.

WE CONCUR: [SILLS](#), P. J., and [MOORE](#), J.

2002 WL 378406 (Cal.App. 4 Dist.) Not Officially Published, (Cal. Rules of Court, Rules 976, 977)

Briefs and Other Related Documents ([Back to top](#))

- [2000 WL 34033219](#) (Appellate Brief) Appellant's Reply Brief (Jul. 27, 2000)Original Image of this Document (PDF)
- [2000 WL 34033220](#) (Appellate Brief) Respondent's Brief (Jul. 07, 2000)Original Image of this Document (PDF)

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