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HELEN GALOPE, an individual, Plaintiff - Appellant, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee under Pooling and Servicing Agreement dated as of May 1, 2007 Securitized Asset Backed Receivables LLC Trust 2007-BR4; et al., Defendants - Appellees.

No. 12-56892

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

566 Fed. Appx. 552; 2014 U.S. App. LEXIS 5686; 2014-1 Trade Cas. (CCH) P78,721

February 11, 2014, Argued and Submitted, Pasadena, California

March 27, 2014, Filed

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Motion granted by, Dismissed by, in part *Galope v. Deutsche Bank Nat'l Trust Co., 2014 U.S. Dist. LEXIS 183643 (C.D. Cal., Nov. 14, 2014)*

Later proceeding at *Galope v. Deutsche Bank Nat'l Trust Co., 2014 U.S. Dist. LEXIS 183644 (C.D. Cal., Nov. 14, 2014)*

On remand at, Summary judgment granted by *Galope v. Deutsche Bank Nat'l Trust Co., 2015 U.S. Dist. LEXIS 33637 (C.D. Cal., Jan. 12, 2015)*

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Central District of California. D.C. No. 8:12-cv-00323-CJC-RNB. Cormac J. Carney, District Judge, Presiding.

DISPOSITION: REVERSED, IN PART, AFFIRMED, IN PART, AND REMANDED.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-The district court properly granted summary judgment to a bank on a borrower's claims under *15 U.S.C.S. §§ 1-2* and state law because, while her standing did not turn on whether she actually made interest payments that were adjusted in response to the allegedly manipulated rate and she adequately alleged that she would not have purchased her loan had she known that the rate was being manipulated, she failed to present any evidence that the bank was involved in, or conspired in, the alleged manipulation; [2]-The district court erred in granting summary judgment to the bank on the borrower's claim for breach of the covenant of good faith and fair dealing associated with violation of the automatic bankruptcy stay because there was sufficient evidence to support an inference that the bank had notice of the stay when it executed the trustee's sale and refused to rescind it.

OUTCOME: Judgment reversed in part, affirmed in part, and remanded.

COUNSEL: For HELEN GALOPE, an individual, Plaintiff - Appellant: Lenore Albert, Esquire, Attorney, Law Offices of Lenore Albert, Huntington Beach, CA.

For DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee under Pooling and Servicing

Agreement dated as of May 1, 2007 Securitized Asset Backed Receivables LLC Trust 2007-BR4, WESTERN PROGRESSIVE, LLC, OCWEN LOAN SERVICING, LLC, Defendants - Appellees: Eric D. Houser, Attorney, Robert W. Norman, Jr., Attorney, Houser & Allison, APC, Irvine, CA.

For BARCLAYS BANK PLC, BARCLAYS CAPITAL REAL ESTATE, INC., DBA Homeq Servicing, Defendants - Appellees: David Harold Braff, Yvonne S. Quinn, Jeffrey T. Scott, Matthew J. Porpora, Sullivan & Cromwell LLP, New York, NY; Margaret Anne Grignon, Esquire, Scott H. Jacobs, Attorney, Reed Smith LLP, Los Angeles, CA; James Meadows, Esquire, Jonathan D. Schiller, Boies, Schiller & Flexner LLP, New York, NY; Adam S. Paris, Attorney, Sullivan & Cromwell LLP, Los Angeles, CA.

JUDGES: Before: D.W. NELSON, PAEZ, and NGUYEN, [**2] Circuit Judges. NGUYEN, Circuit Judge, dissenting in part.

OPINION

[*552] MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3*.

Helen Galope appeals the district court's grant of summary judgment in favor of Deutsche Bank National Trust Company ("DBNTC"), Ocwen Loan Servicing, and Western Progressive, LLC ("WPT") (collectively, "DBNTC Defendants") and dismissal of her claims against Barclays Bank PLC and Barclays Capital Real Estate Inc. d/b/a Homeq Servicing (collectively, "Barclays Defendants"). We affirm in part, reverse in part, and remand for further proceedings.

1. We reverse the district court's ruling that Galope failed to establish injury-in-fact necessary for Article III standing on her LIBOR-based claims. Galope adequately alleged that she would not have purchased her loan had she known that the Defendants were manipulating the LIBOR rate. Article III standing exists when a plaintiff purchases a product she would not have otherwise purchased but for the alleged misconduct of the defendant. *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 n.3 (9th Cir. 2013) (citing *Mazza v. Am. Honda Motor*

Co., 666 F.3d 581, 595 (9th Cir. 2012)); [**3] *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011). Contrary to the dissent's assertion, Galope's standing does not turn on whether she actually made interest payments that were adjusted in response to the allegedly manipulated LIBOR rate. Galope's cognizable injury occurred when she purchased the loan, not upon payment of LIBOR-affected interest.¹ *Maya*, 658 F.3d at 1069.

1 At oral argument, the Barclays Defendants argued for the first time that Galope's LIBOR-based claims were not traceable to their misconduct because they did not actually sell the loan to Galope. Galope, however, adequately alleged in her complaint that Barclays PLC simply contracted with another entity to sell the LIBOR-based loan product that is the subject of this litigation. At the motion-to-dismiss stage, Galope's allegations are sufficient to satisfy the traceability requirement of Article III standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

We therefore reverse and remand for further proceedings on Galope's LIBOR claims against the Barclays Defendants [*553] under the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, and her state law claims for breach of the covenant of good faith and fair dealing, [**4] and fraud. However, we conclude that the district court properly granted summary judgment on all LIBOR-based claims against the DBNTC Defendants because Galope failed to present any evidence that DBNTC was involved in, or conspired in, the alleged LIBOR manipulation.

2. We reverse the district court's ruling that Galope lacks statutory standing to pursue her LIBOR-based Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200*, and False Advertising Law ("FAL"), *Cal. Bus. & Prof. Code § 17500*, claims against the Barclays Defendants and remand for further proceedings. Galope has statutory standing to pursue these claims because she alleged that she purchased a loan that she would not have otherwise purchased but for the Barclays Defendants' alleged misconduct. See *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877, 890 (Cal. 2011); *Cal. Bus. & Prof. Code §§ 17204, 17535*.

3. We affirm the district court's rulings on all claims associated with the "missing-fax-page scheme." Galope

stated in her Third Amended Complaint ("TAC") that the portions of the fax transmission that she received put her on notice that her payments would increase. This admission directly undermines her allegations [**5] that the Barclays Defendants and DBNTC deceived her into believing that the initial payment amounts were fixed throughout the term of the loan.

4. We reverse the district court's rulings that Galope's wrongful foreclosure² and UCL claims based on the DBNTC Defendants' violation of the bankruptcy court's automatic stay are not justiciable. Although rescission of the sale--almost seven months after the violation--mooted Galope's claims for injunctive and declaratory relief, it did not affect her claim for damages. *See Wilson v. State of Nev.*, 666 F.2d 378, 380-81 (9th Cir. 1982). Further, regardless of whether Galope has equity in the home, 11 U.S.C. § 362(k)(1) provides a statutory basis for damages.³

² Although Galope's seventh claim in her TAC is styled as a "wrongful foreclosure" claim, the content of the claim is exclusively focused on violation of the automatic stay under 11 U.S.C. § 362. The panel thus construes this as a claim for damages under 11 U.S.C. § 362(k)(1).

³ The DBNTC Defendants' alternative argument that Galope released her right to pursue her UCL claim when she signed her loan modification agreement fails, in part, because the release only purports to apply to "claims, [**6] damages or liabilities . . . existing on the date of this Agreement" The loan modification agreement is dated April 17, 2008. The alleged violation of the automatic stay did not occur until September 1, 2011.

5. We reverse the district court's grant of summary judgment on Galope's claim for breach of the covenant of good faith and fair dealing associated with violation of the automatic stay. The covenant of good faith and fair dealing "finds particular application in situations where one party is invested with a discretionary power affecting the rights of another." *Hicks v. E.T. Legg & Associates*, 89 Cal. App. 4th 496, 108 Cal. Rptr. 2d 10, 19 (Ct. App. 2001). Discretionary power of this kind "must be exercised in good faith." *Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 2 Cal. 4th 342, 6 Cal. Rptr. 2d 467, 826 P.2d 710, 726 (Cal. 1992). The power of sale in the deed of trust provided the DBNTC

Defendants with discretionary authority to foreclose upon Galope's home in the event of default. Contrary to the [*554] DBNTC Defendants' argument, there is sufficient evidence in the record to support a reasonable inference that the DBNTC Defendants had notice of the automatic stay when they executed the trustee's sale, and that [**7] they refused to rescind it upon Galope's request.

6. Galope argues on appeal that the district court erred because it did not provide her with leave to amend her complaint. On remand, Galope may seek further leave to amend at the district court's discretion. However, leave to amend is foreclosed on all claims associated with the alleged missing-fax-page scheme. No additional allegations will change the fact that the portion of the document Galope received and signed provided her with notice that her payments were subject to change after five years and would increase. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend.").

7. The parties shall bear their own costs on appeal.

**REVERSED, IN PART, AFFIRMED, IN PART,
AND REMANDED.**

DISSENT BY: NGUYEN (In Part)

DISSENT

NGUYEN, Circuit Judge, dissenting in part:

Because I conclude that Galope failed to establish standing on her LIBOR-based claims, I respectfully dissent from the majority's decision reversing these claims as to the Barclays Defendants. Galope does not allege that she suffered any loss due to the Barclays Defendants' purported deceptive conduct, nor does she [**8] allege that any loss is traceable to a misrepresentation related to the LIBOR-rate manipulation or to the LIBOR-rate manipulation itself. *See, e.g., Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013) (concluding that the plaintiff adequately had alleged standing where, "because of the misrepresentation the consumer (allegedly) was made to part with more money than he or she otherwise would have been willing to expend" (quoting *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 757, 246 P.3d 877 (2011))); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) ("To the extent that class members were relieved of their money by Honda's deceptive

conduct--as Plaintiffs allege--they have suffered an 'injury in fact' under Article III (citing *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011)); *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) ("To survive a motion to dismiss for lack of constitutional standing, plaintiffs must establish a 'line of causation' between defendants' action and their alleged harm that is more than 'attenuated.'" (citing *Allen v. Wright*, 468 U.S. 737, 757, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984))). Indeed, as the majority concedes, Galope's payments never were [**9] affected--she paid a fixed interest rate and defaulted before the allegedly manipulated LIBOR rate went into effect on her loan; she then was granted a loan modification with a (lower) fixed interest rate that likewise was unrelated to the LIBOR rate and defaulted again. Although Galope alleges that she would not have purchased the loan but for the

Barclays Defendants' alleged manipulation of the LIBOR rate, Galope alleges no loss from the alleged manipulation--or any related misrepresentation or omission. Therefore, Galope's alleged injury is far too attenuated to establish Article III standing.¹

1 For the same reasons, Galope lacks statutory and antitrust standing. *See, e.g., Rebel Oil Co. v. ARCO*, 51 F.3d 1421, 1433 (9th Cir. 1995) ("To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition." (citation omitted)). The interest rates on Galope's loan were unaffected by the Barclays Defendants' anticompetitive behavior.