Case No. S258019

In the Supreme Court

of the

State of California

KWANG K. SHEEN,

Plaintiff and Appellant

v.

WELLS FARGO BANK, N.A., et al.

Defendant and Respondent

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B289003
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
CASE NO. BC631510
THE HONORABLE JUDGE ROBERT L. HESS

Reply to Answer to Petition for Review

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases

Page(s)

I. INTRODUCTION

Wells Fargo Bank, N.A. ("Wells Fargo" or "Respondent") argues that the particular facts of this case do not present an appropriate basis for the Supreme Court to review the Second Appellate District's decision below. That decision held that a mortgage lender and servicer do not owe a borrower a duty to handle a mortgage modification application with ordinary care. Wells Fargo implies that the Court of Appeal engaged in a deep analysis of the particular facts of this case in order to reach its holding, and that the Court of Appeal's holding was cabined to the facts of this case.

This is incorrect. The Court of Appeal took pains to make clear that it was reaching a decision with broad implications for literally every negligence action brought against a mortgage lender or servicer in California for mishandling a mortgage modification application. The Court of Appeal stated that "[t]he issue of whether a tort duty exists for mortgage modification has divided California courts for years. The California Supreme Court has yet to resolve this division. We must take sides." (Slip Op. at 2.) There could be no clearer signal from the court below that it intended its holding, in a published opinion, to firmly establish a split among the Courts of Appeal on this issue and that it was calling on the Supreme Court to resolve the split.

II. ANALYSIS

A. The Holding by the Court of Appeal Was Explicitly Designed to Have Broad Implications for Every Negligence Action Brought Against a Mortgage Lender

or Servicer in California and Calls on the Supreme Court to Resolve a District Split.

Most of Wells Fargo's answer is devoted to an analysis of the factual circumstances of this case, and then to an argument that those facts make this case an inappropriate vehicle to resolve the issue of whether a mortgage lender or servicer owes a borrower a duty of care in the mortgage modification context. However, the Court of Appeal's published decision engages in little, if any, analysis of the facts of this case in reaching its holding. Instead, the Court of Appeal devoted the vast majority of its legal analysis to (1) a description of the established, published authority on the issue of whether a mortgage lender or servicer can be sued for negligence by a borrower in California, (2) a broad analysis of negligence liability in California in light of *Southern California Gas Company v. Superior Court* (2019) 7 Cal.5th 391 (*Gas Leak Cases*), (3) a survey of courts in other states and whether those courts have "impose[d] tort duties on lenders about loan modifications" and (4) an analysis of the Restatement's position on negligence liability in cases involving purely economic loss. (Slip Op. at 7-17.)

In fact, in Section III of the opinion, where the Court of Appeal analyzes the law and reaches its holding, the Court engages in no analysis of the particular facts of this case. Instead, the Court makes broad observations and holdings regarding negligence liability generally, and about why the prior published holdings in *Alvarez v. BAC Home Loans Servicing, L.P.* and *Daniels v. Select Portfolio Servicing, Inc.* were wrong.

The Court of Appeal's analysis and signaling underscores that the decision is about negligence liability in California generally, and about the imposition of tort liability on mortgage lenders and servicers in every case involving a mishandling of a mortgage modification application, and that the opinion is not cabined to the facts of this case. As the Court of Appeal makes clear, its decision establishes a clear split among appellate districts in California on the issue of whether negligence liability attaches to lenders and servicers in the mortgage modification context. The decision will be cited in every single negligence case brought by a borrower against a lender or servicer in California, and it will be juxtaposed with *Alvarez* and *Daniels*. Lower courts will be at a loss regarding how to adjudicate these cases in light of this split until the Supreme Court weighs in, which is exactly what the Second District asked this Court to do.

B. Petitioner Alleges Misrepresentations by Wells Fargo.

The nature, impact and broad applicability of the holding by the Court of Appeal make it unnecessary to engage with the particular facts of this case for the purposes of this petition. However, by way of responding to Wells Fargo, Petitioner also notes that his complaint does allege material misrepresentations by Wells Fargo regarding the status of a foreclosure sale. In one example, Petitioner alleges that in or about March 2010, Wells Fargo contacted Petitioner by phone. (3 CT 488 ¶ 22.) Petitioner's wife Jong-Sin Sheen answered the call. During the call, a Wells Fargo representative told Ms. Sheen that there would be no more foreclosure sale of Petitioner's home. (3 CT 488 ¶ 22.)

Wells Fargo once again seeks to narrow the Court of Appeal's holding by suggesting that it is only applicable to cases involving allegations of misrepresentations by a lender or servicer regarding the status of a foreclosure sale. However, the Court of Appeal's holding is that "a lender does not owe a borrower a tort duty of care during a loan modification negotiation." (Slip Op. at 8.) This holding will apply to every single negligence claim arising out of a mortgage modification application brought by a borrower against a lender in California. The holding applies to every fact scenario that forms the basis for such a claim, because the holding is that negligence liability cannot attach, no matter the facts giving rise to the claim, in the mortgage modification context.

C. The Issue of Whether Wells Fargo's Conduct Exceeded the Scope of its Conventional Role is Irrelevant to the Holding by the Court of Appeal.

Wells Fargo also notes that the facts of this case do not show that Wells Fargo exceeded the scope of its conventional role as a lender, and therefore argues that this case is not the appropriate one for review. The fact that Wells Fargo did not exceed the scope of its conventional role, though, is exactly the point: *Daniels*, one of the two prior decisions with which the Court of Appeal disagreed, held that "a loan servicer may owe a duty of care to a borrower . . . even though its involvement in the loan does not exceed its conventional role." *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1158. This case is appropriate for review exactly because it implicates the

competing holdings in *Daniels* and *Alvarez* on the one hand and this case on the other.

Wells Fargo also brings up a red herring in its discussion of whether it played any role in Petitioner's default. Neither *Alvarez* nor *Daniels* arrived at its holding because the lender in those cases was to blame for the borrower's default, and the Court of Appeal in this case never referred to whether Wells Fargo caused Petitioner's default in the first place. Under *Alvarez* and *Daniels*, negligence liability can attach to a lender who mishandles an application for mortgage modification, no matter whether the lender caused the borrower to default, based in part on the moral blame attached to the mishandling itself. *See, e.g. Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 949 (finding during its analysis of the fifth *Biakanja* factor –moral blame – that "it is highly relevant that the borrowers ability to protect his own interests in the loan modification process [is] practically nil and the bank holds all the cards" (internal quotations omitted)); *Biakanja v. Irving* (1958) 49 Cal. 2d 647. The district split is over whether a lender can be held liable for mishandling a mortgage modification application, even if it did not cause the borrower to default.

D. <u>The Courts Below Would Not Have Sustained Wells Fargo's Demurrer on Other Grounds.</u>

Wells Fargo also argues that this case is a poor vehicle for review because its demurrer could have been sustained on other grounds. However, Wells Fargo raised these other grounds in demurrers to the original and First Amended Complaint, and

these grounds were rejected. Wells Fargo claims that it would have prevailed on statute of limitations grounds, but that issue was briefed extensively in front of the trial court, and that court did not accept Wells Fargo's arguments. Petitioner argued below that, "[g]enerally speaking, a cause of action accrues at the time when the cause of action is complete with all of its elements." *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (quoting *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397) (internal quotations omitted). In the case of professional negligence, for example, "[a] cause of action . . . does not accrue until the plaintiff (1) sustains damage and (2) discovers, or should discover, the negligence." *Roger E. Smith, Inc. v. SHN Consulting Engineers & Geologists, Inc.* (2001) 89 Cal.App.4th 638, 650-51; *see also Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 ("Where, as here, damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. Mere threat of future harm, not yet realized, is not enough." (internal quotations and citation omitted)). Since Petitioner's home was sold in 2014 and the Complaint was filed in 2016 within the limitations period, Wells Fargo's limitations argument failed.

Similarly, Wells Fargo's arguments regarding Petitioner's bankruptcy filing failed because, in *Gottlieb v. Kest*, the Court of Appeal explicitly held that the doctrine of judicial estoppel does not bar a plaintiff from asserting a claim that he did not list on his bankruptcy schedules where "the bankruptcy case was dismissed without confirmation of a plan of reorganization."

Gottlieb v. Kest (2006) 141 Cal.App.4th 110, 137. The court in *Gottlieb* held that one of the central factors in the doctrine of judicial estoppel – "success in asserting the prior position" – is not satisfied in the absence of a confirmation of plan of reorganization. *Id.* The court in *Gottlieb* made clear that "[n]either the automatic stay nor the stipulated order satisfie[s] the success factor". *Id.* Instead, "[t]he record [should] show that . . . the bankruptcy court *accepted* the [prior position] as true and *granted relief on that basis*." *Id.* (quoting *Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 376) (emphasis and first alteration in original). Since Petitioner's bankruptcy plan was never confirmed, this argument failed below.

In any event, as Petitioner has already stated, the particular facts of this case did not provide the basis for the Court of Appeal's holding, and the holding is not cabined to the particular facts of this case. There is now a split in published authority regarding whether a mortgage lender can ever be held liable for negligence in connection with a borrower's application for a mortgage modification. The Supreme Court should resolve the split. If the Court of Appeal is reversed, the lower courts can take up Wells Fargo's other arguments based on the facts of this case, but with clear direction regarding whether negligence liability can even attach to Wells Fargo's actions. If the Court of Appeal is affirmed, all lower courts will have the same clear direction.

E. <u>The Issue is of Great Importance.</u>

Aside from the fact that lower courts will be utterly confused and hamstrung by the current split in authority, the issue decided by the Court of Appeal is still of great importance to this Court. Wells Fargo essentially argues that the issue is no longer important because the foreclosure crisis is over. Still, the absence of a national crisis does not mean that servicer negligence cases have disappeared. The existence of a crisis precipitating a particular category of claims cannot be a prerequisite to Supreme Court review of a Court of Appeal decision. Crises happen (hopefully) infrequently, but holdings affecting an entire category of claims can still occur in the interim, and the Supreme Court should not have to wait for another foreclosure crisis to guide lower courts on what they should do when mortgage lender- or servicer-negligence cases appear on their dockets.

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III. CONCLUSION

The Court of Appeal has published an opinion that establishes a district split on an issue affecting every case alleging that a mortgage lender or servicer negligently mishandled a mortgage modification application in California. The Court of Appeal has asked this Court to resolve the split. This Court should grant review in order to do so.

Respectfully submitted,

LOS ANGELES CENTER FOR COMMUNITY LAW AND ACTION

Dated: October 17, 2019 By: _____

Noah Grynberg
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Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 2,079 words, including footnotes and excluding the caption page, table of contents, table of authorities, signature blocks, and certificates. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated this 17th day of October, 2019.

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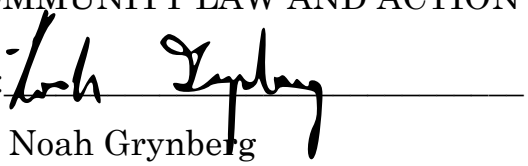
By: 

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