

DIRT Periodic Development for Wednesday, March 5, 2014  
*Quintana v. Bank of America*

Guest Editor: Dale Whitman  
James E. Campbell Missouri Endowed Professor Emeritus  
University of Missouri School of Law

**SYNOPSIS: A borrower who is “jerked around” by a mortgage servicer may have claims in fraud or on other theories.**

*Quintana v. Bank of America*, 2014 WL 690906 (D.Ariz. Feb. 13, 2014) (not reported in F.Supp.2d)

Karoly Quintana’s home mortgage loan was serviced by Bank of America. When she began having difficulty making her payments in 2009, she was told by B of A that she would have to miss three payments to be considered for a loan modification, and that the servicer would forbear foreclosure while it did so. She missed the payments and applied for a modification, but (she alleged) B of A did not consider it, and instead accelerated her loan and commenced foreclosure.

Quintana filed a suit in federal court to stop the foreclosure. In March 2012 the suit was dismissed voluntarily on the assurance that B of A would again consider a loan modification, but again it did not do so. (Oddly, B of A’s counsel conceded these facts.)

The court held that the allegations of both the 2009 and 2012 conduct of B of A stated claims of fraud, sufficient to withstand a motion to dismiss. The statements that she would be considered for a modification were false, she relied upon them, and was damaged. Her damages were the expenditure of additional attorney’s fees, and the court found this sufficient, even though in general attorneys’ fees are not recoverable in a fraud action.

The court also held that the plaintiff’s count for breach of the implied covenant of good faith and fair dealing survived a motion to dismiss. While the loan documents did not require the servicer to consider the mortgage modification or to forbear foreclosure, when it promised to do so and then did not, it breached the implied covenant. The promise was only oral, and B of A asserted it was inadmissible under the Statute of Frauds, but the court found that Quintana’s detrimental reliance (in missing the payments) provided a basis for promissory estoppel, overcoming the Statute of Frauds defense.

However, the court dismissed Quintana’s claim under the Arizona Consumer Fraud Act (on the ground that it was barred by the 1-year statute of limitations). There’s a

convoluted argument about whether B of A can be liable under the FDCPA, but the court ultimately refused to dismiss that claim.

**COMMENT:** Borrowers have often tried to claim that they should have received loan modifications, but have not in fact received them. In general, of course, there's no legal right to a modification. But this court holds that a false promise to *consider* a modification is enough to make out a claim of fraud.

DIRT provides an informal forum for the expression and discussion of ideas, theories, and concepts about legal issues relating to real estate. Creativity, speculation and rumination are encouraged. The comments published here should not be taken to represent the commentator's position or opinion in any present or future client representation or litigation; they should be regarded as tentative thoughts, based on particular facts as the commentator understood them, and subject to later rethinking and revision. They are not legal advice and do not create an attorney-client relationship. They are not electronic records, electronic signatures, or agreements to conduct any transaction by electronic means pursuant to UETA, ESign, or any similar law.