PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed March 8, 2019

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of YELENA ANELEY GUREVICH, State Bar No. 269487, and LAUREN ANN RODE, State Bar No. 281803.	)	Case Nos. 16-O-16743; 16-O-16744 (Consolidated) OPINION AND ORDER

The Office of Chief Trial Counsel of the State Bar (OCTC) charged Yelena Aneley Gurevich and Lauren Ann Rode in count one with receiving illegal advance fees for loan modification services in a single client matter. The hearing judge concluded that Gurevich and Rode were not culpable because they were retained to litigate against the imminent foreclosure of their client's home, and not to perform loan modification services. The judge dismissed this count with prejudice, along with five charges against Gurevich that alleged she violated her disciplinary probation based on count one.

OCTC appeals. It argues, as it did at trial, that Gurevich and Rode are culpable because the evidence proves they performed loan modification services as opposed to litigating a potential home foreclosure.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge that Gurevich and Rode are not culpable. We affirm the dismissal, but without prejudice.

I. PROCEDURAL BACKGROUND

OCTC filed a Notice of Disciplinary Charges (NDC) on June 14, 2017, charging Rode and Gurevich in count one with charging and collecting an illegal advance fee for loan modification services. Count two charged that Gurevich committed the misconduct in count one and therefore did not comply with the State Bar Act as a condition of her disciplinary probation in a prior case. Counts three through six charged Gurevich with moral turpitude for not reporting to the State Bar Office of Probation that she committed the misconduct alleged in count one.

On October 13, 2017, the parties filed an extensive Stipulation as to Facts and Admission of Documents (Stipulation). Trial was held on October 13 and 27, and December 7, 2017. On April 2, 2018, the hearing judge issued her decision, dismissing the case with prejudice. The primary issue on review concerns whether Gurevich and Rode illegally collected advance fees for performing loan modification services. We conclude they did not, as analyzed below.

II. LEGISLATION REGULATING LOAN MODIFICATION SERVICES

In 2009, the Legislature amended the law to regulate an attorney's performance of home loan modification services. California Senate Bill No. 94 (SB 94),[1] which became effective on October 11, 2009, provided two safeguards for borrowers who employ someone to assist with a loan modification: (1) a requirement for a separate notice advising borrowers that it is not necessary to employ a third party to negotiate a loan modification (Civ. Code, § 2944.6, subd. (a));[2] and (2) a proscription against charging pre-performance compensation, i.e., restricting

[1] SB 94 added sections 2944.6 and 2944.7 to the Civil Code and section 6106.3 to the Business and Professions Code (Stats. 2009, Ch. 630, §§ 2, 9-10).

[2] Civil Code section 2944.6, subdivision (a), requires that a person attempting to negotiate a loan modification must, before entering into a fee agreement, disclose to the borrower the following information in 14-point bold type font "as a separate statement":

> It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free

the collection of fees until all contracted-for loan modification services are completed (Civ. Code, § 2944.7, subd. (a)).[3] The intent of the legislation was to "prevent persons from charging borrowers an up-front fee, providing limited services that fail to help the borrower, and leaving the borrower worse off than before he or she engaged the services of a loan modification consultant." (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009–2010 Reg. Sess.) as amended Mar. 23, 2009, pp. 5–6.) At all times relevant to this matter, a violation of either Civil Code provision constituted a misdemeanor (Civ. Code, §§ 2944.6, subd. (c), 2944.7, subd. (b)), which is cause for imposing attorney discipline (Bus. & Prof. Code, § 6106.3).

III. FACTS[4]

Gurevich was admitted to practice law in California in 2010, and Rode was admitted in 2012. They are partners in the firm Consumer Action Law Group (CALG). Gerolyn Howard retained CALG on June 17, 2015, after a foreclosure notice had been posted on her home.

A. Howard Attempted to Obtain a Loan Modification Before Hiring CALG

During 2014, Howard engaged another law firm, Veritas Law Group (VLG), to obtain a home mortgage loan modification from her lender, Seterus. Howard paid VLG $14,000 in fees. In response to VLG's efforts, Seterus offered Howard a three-month trial loan modification in October 2014. After this trial period, Seterus sent VLG a letter offering Howard a permanent

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> of charge. A list of nonprofit housing counseling agencies approved by the United States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting www.hud.gov.

[3] In relevant part, Civil Code section 2944.7, subdivision (a), provides that "it shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to . . . [¶] . . . [c]laim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform."

[4] The factual background is based on the Stipulation, trial testimony, documentary evidence, and factual and credibility findings by the hearing judge, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A); *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032–1033.)

loan modification in January 2015. Seterus required Howard to accept the offer by February 1, 2015. Howard signed the proposed agreement and provided the documentation to VLG to submit to Seterus, which VLG failed to do. As a result, on March 27, 2015, Seterus sent a letter to VLG denying Howard's loan modification request. Unaware of this letter, Howard continued to make her mortgage loan payments to Seterus until it rejected her June 2015 payment.[5]

In June 2015, Seterus began foreclosure proceedings on Howard's home and scheduled a foreclosure sale for June 25. Seterus informed Howard that it had not received the loan modification documents from VLG and that she should provide them to Seterus immediately. When she contacted her attorney at VLG, he told her that he had her documents and would provide them to her if she paid him an additional $5,000. Not wanting to pay more money to VLG, Howard contacted Seterus. Her attempts to obtain a loan modification directly from Seterus were unavailing. Facing an imminent home foreclosure, Howard contacted Rode. Rode emailed Howard back on June 16, 2015, before their meeting scheduled for the next day, stating that they could go to court "to stop the sale and request enforcement" of the loan modification she believed Howard had secured in January.

B. Howard Retains CALG to File Litigation Against Seterus

On June 17, 2015, Howard met with Gurevich and Rode to discuss the pending foreclosure sale and her desire to remain in her home. Howard entered into a retainer agreement with CALG.[6] Pursuant to the agreement, CALG was to provide professional negotiation and litigation representation for home owners. Specifically, the agreement stated that CALG was retained to

[5] On February 28, March 30, and May 4, 2015, Seterus received and accepted monthly payments of $1,543.88 from Howard for the payments due on February 1, March 1, and April 1, respectively.

[6] The agreement required a $2,000 initial deposit fee and monthly payments of $1,200. In June, Rode informed Howard that the work involved in maintaining the active litigation would be at least 10 to 15 hours ($3,500 to $4,500) a month. Rode explained that this was the reason Howard was given a flat monthly rate of $1,200. Between June 17, 2015 and March 9, 2016, Howard paid CALG $9,440 in fees.

"file suit against Seterus and MORTGAGE LAW FIRM PLC for breach of modification agreement and proceeding with foreclosure sale." Other legal services listed in the agreement stated that CALG will: "Assist with, prepare, and file a Motion for Temporary Restraining Order (TRO) and Preliminary Injunction (if necessary) to attempt to stop any upcoming sale dates on Client's property." A handwritten note was added: "If TRO is not granted then our firm will file [chapter] 13 at no additional charge."

Notably, the retainer agreement provided the following disclaimer in a larger font:

> You must know and understand that you do not need to pay an attorney or anyone else for loan modification services. *It is imperative that you understand you are not hiring our firm for loan modification services.* We cannot submit a loan modification for you directly outside of litigation. After a lawsuit is filed, during the litigation negotiation and settlement process, a loan modification may be offered as a way to settle the litigation case. You will need to decide whether you wish to accept the modification as settlement or whether you wish to continue with the litigation. (Italics added.)

C. CALG Filed and Maintained a Lawsuit Against Seterus on Howard's Behalf

On June 19, 2015, days before the June 25 scheduled foreclosure, Rode filed a lawsuit against Seterus in superior court alleging eight counts including: breach of contract, promissory estoppel, and declaratory and injunctive relief to enjoin Seterus from foreclosing on Howard's property.[7] On June 23, Seterus informed CALG that the June 25 foreclosure sale was postponed to September 10. On June 24, Seterus sent Rode a letter via two-day delivery regarding correspondence Howard had with Seterus prior to her retention of CALG. In the letter, Seterus offered Howard a new loan modification agreement with an offer to reinstate the permanent loan

[7] Other causes of action were violation of the Homeowner's Bill of Rights, breach of the covenant of good faith and fair dealing, negligence, fraud and intentional misrepresentation, and a violation of Business and Professions Code section 17200 (unfair or unlawful business practice).

modification offer contained in its January letter to her.[8] The hearing judge found it was unclear from the record if Rode communicated this offer to Howard.[9]

On June 25, 2015, Howard emailed Rode asking her about a $150 jury fee. Rode informed her that the foreclosure sale had been postponed to September 10. Howard wanted to suspend litigation activity now that the sale had been delayed. But Rode told her that she was in an active lawsuit and that Seterus postponed the sale because of that lawsuit. Rode emphasized that the litigation "puts pressure on [Seterus] to offer a good settlement to you. This is what we are pushing and fighting for, for you, through the lawsuit."

On September 8, Rode filed a first amended complaint, and the lawsuit continued. The foreclosure sale was postponed to December 17, 2015, and again to March 17, 2016. During this time, Rode and Michael Stoltzman, Seterus's attorney, continued settlement discussions. On October 9, 2015, Rode emailed Stoltzman: "For settlement proposals, my client was in a trial period plan and made all payments there under [*sic*]. My client would like that permanent modification." Stoltzman responded in November that he would discuss potential settlement with his client, including "whether it is possible to implement the previously-offered modification." On November 18, the court sustained Seterus's demurrer as to one count of the first amended complaint, and overruled it as to the other causes of action. On December 16, Rode filed a second amended complaint, and the lawsuit and further negotiations continued.

[8] The June letter stated that for Howard to accept the new proposal, she was to return copies of the signed and notarized agreements along with $3,087.76 for the May and June mortgage loan payments. The letter noted that Seterus postponed the foreclosure sale of Howard's home until September 10, 2015, to allow her time to accept the agreement.

[9] Rode testified that she told Howard about the June 24, 2015 settlement offer, but Howard denied it. The hearing judge found Rode's testimony to be "generally credible and typically corroborated by the evidence" even though no documents bolstered Rode's testimony.

As the March 17, 2016 foreclosure sale approached, Rode emailed Stoltzman on March 11, asking if he had discussed resolution with his clients, specifically whether Seterus could "re-approve [Howard] for some type of modification." On March 16, Rode filed an ex parte application for a temporary restraining order to prevent the March 17 sale, and a superior court judge denied the application. Gurevich emailed Howard and advised her to file a chapter 7 bankruptcy case to stop the foreclosure. Howard did not want to file for bankruptcy and Seterus foreclosed on her home.

From March 23 through June 2016, Rode attempted to negotiate a "cash for keys" offer[10] at Howard's request. Seterus and Howard were unable to agree on the terms and negotiations broke down. Thereafter, the attorney-client relationship between Howard and CALG also broke down. On August 22, 2016, the superior court granted CALG's motion to be relieved as Howard's counsel. Howard did not appear or file any pleadings after that date and the superior court ordered her lawsuit dismissed on October 17, 2016.

D. Expert Established Lawsuit Was Not Filed to Obtain a Loan Modification

At trial, Stoltzman testified that he believed the purpose of the lawsuit was to obtain a loan modification for Howard. Charles Hansen, an expert with over 40 years' experience in the area of mortgages and foreclosures, disagreed. He testified that the facts and circumstances of the present case did not establish a standard request for loan modification and that the Howard lawsuit was a typical breach of contract action to enforce an existing permanent loan modification. In other words, he opined the lawsuit was "legitimate, good-old-fashioned litigation." He explained that the object of the lawsuit was to force the lender to honor the borrower's legal rights, rather than to ask the lender to modify the loan or for any other ulterior purpose. The hearing judge accepted Hansen's expert opinion and analysis.

[10] Under a cash for keys offer from Seterus, it would pay Howard a sum of money to vacate the property in a certain timeframe and leave it in good condition.

IV. CULPABILITY

OCTC alleged in count one that on or about June 17, 2015, Gurevich and Rode agreed to "negotiate a home mortgage loan modification or other forms of mortgage loan forbearance for a fee for [Howard]" and from that time until March 9, 2016, collected approximately $9,440 in advance fees from Howard. OCTC charged Gurevich and Rode with a violation of Business and Professions Code, section 6106.3[11] alleging that they illegally collected advance fees from Howard under Civil Code section 2944.7, subdivision (a)(1).[12] The hearing judge correctly found Gurevich and Rode not culpable because they charged for and filed a legitimate breach of contract action to prevent the imminent foreclosure of Howard's home, and not to obtain a loan modification. OCTC did not prove by clear and convincing evidence[13] that Gurevich and Rode illegally charged advance fees to perform loan modification services.

OCTC argues that section 6106.3 and Civil Code section 2944.7, subdivision (a), apply here "because the primary purpose of the litigation was to help Howard obtain a permanent loan modification." In support, OCTC points to Howard's repeated statements that a good settlement for her would be a permanent loan modification. But this is not the only evidence establishing

[11] All further references to sections are to the Business and Professions Code unless otherwise noted.

[12] Prior to January 1, 2017, section 6106.3 provided, "It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to engage in any conduct in violation of sections 2944.6 or 2944.7 of the Civil Code." Effective January 1, 2017, the statute was amended so that the reference to Civil Code section 2944.7 was removed. Gurevich and Rode argue that this amendment precludes OCTC from relying upon section 6106.3 to discipline attorneys for violations of Civil Code section 2944.7, no matter when the misconduct occurred. There is no legal basis for this argument and, therefore, we reject it. The former version of section 6106.3 applies to conduct, such as in the present case, that occurred before January 1, 2017.

[13] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

the purpose of the litigation. As the hearing judge aptly stated, we must look to the retainer agreement and the attorneys' actions to determine the true purpose of CALG's representation.

To begin, CALG did not initiate their representation by requesting a loan modification. By the time Howard came to CALG, she had negotiated with Seterus, made several payments, and was eight days from foreclosure. CALG promptly presented a retainer agreement to her stating the purpose of their engagement—to file litigation to save the home. Rode filed eight causes of action against Seterus and diligently pursued the litigation, while maintaining communication with Howard. Rode met court deadlines and negotiated with opposing counsel to settle the case. Though the TRO was denied, CALG's litigation efforts delayed foreclosure of Howard's home for nine months. And even after this ruling, Rode continued to negotiate a further cash for keys settlement for Howard.

We have examined the type of conduct that Civil Code section 2944.7 prohibits in three published opinions since 2012. We conclude that the actions of Gurevich and Rode, as described above, do not violate the statute.

We first interpreted Civil Code section 2944.7 in *In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221. There, we found that the statute clearly prohibited collecting any fees in advance of completing all loan modification services. (*Id.* at p. 232.) Taylor provided prospective clients seeking a loan modification a financial analysis (FA) document that included general information such as the interest rate and length of the loan a client might expect to qualify for based on the client's financial circumstances. (*Id.* at p. 227.) If Taylor accepted representation of the client, he charged them for the FA document before all loan modification services had been completed. (*Id.*) He violated Civil Code section 2944.7 because he charged advance fees for the FA before completing all loan modification services. (*Id.* at p. 232.) Taylor never filed litigation on behalf of his clients. (*Id.* at pp. 228–231.)

Next, in *In the Matter of DeClue* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 437, the client hired DeClue's firm for the sole purpose of securing a loan modification. (*Id.* at p. 443.) DeClue filed litigation against the lender, but only after the lender refused to modify his client's home mortgage. (*Id*.) Thus, the litigation served as a pretext to secure a loan modification, and DeClue violated the statute. (*Id.* at p. 444.)

Most recently, in *In the Matter of Golden* (Review Dept., May 30, 2018) 5 Cal. State Bar Ct. Rptr. ___ [2018 WL 3587120],[14] Golden charged and collected advance fees from his clients for seeking loan modifications before he completed all services. He had advised his clients that he would file litigation *if* their lenders denied the loan applications. Golden's primary purpose of the litigation he filed was to obtain loan modifications, and we found that no exception for collecting advance fees exists in the statute for an attorney who plans to file litigation if the loan modification request is denied.

Unlike the attorneys in *Taylor, DeClue, and Golden*, Gurevich and Rode filed a legitimate lawsuit to stop an imminent foreclosure sale on Howard's home and to enforce what they believed was a valid loan modification Howard had negotiated with Seterus. Because Howard's foreclosure was impending, Rode acted quickly. She met with Howard and presented a retainer agreement specifying that the firm was *not* being hired to perform loan modification services (correctly noting that Howard did not need an attorney for such services). After the litigation commenced, Rode informed Howard that she could choose to accept a loan modification as a settlement, if offered, or proceed with the lawsuit. CALG then diligently pursued the litigation. These facts, along with the expert's analysis that the litigation was a standard breach of contract action, demonstrate that Gurevich and Rode are not culpable.

[14] On July 6, 2018, we filed an order granting OCTC's request for publication of our *Golden* opinion.

On a broader challenge, OCTC also proposes that Civil Code section 2944.7, subdivision (a), prevents attorneys from negotiating for a loan modification during even *valid* litigation if the attorney has charged an advance fee. No legal authority exists for this interpretation and to so hold would be wholly inconsistent with the reasoning of SB 94. The bill was intended to reach individuals or companies who lured homeowners with false promises and guarantees, and charged exorbitant fees for loan modification services that HUD-certified counseling agencies provided for free. It targeted scammers who were charging as much as $8,000 to fill out loan modification applications and negotiate with lenders on behalf of homeowners. (Sen. Judiciary Com., Analysis of Sen. Bill No. 94 (2009–2010 Reg. Sess.) as amended Apr. 13, 2009, pp. 4–6.) Nothing in the legislative history suggests that SB 94 intended to have the chilling effect of precluding attorneys from negotiating a loan modification as a settlement after *valid* litigation is filed. Nor does the legislative history support precluding attorneys from charging advance fees for filing legitimate causes of action when a homeowner is in imminent danger of losing his or her home, and has colorable claims that can be made against a lender. Such is the case here.

Based on these unique facts, we find no evidence that CALG's lawsuit on behalf of Howard was pretextual or for any other purpose covered under Civil Code section 2944.7. We conclude, therefore, that Gurevich and Rode did not illegally charge and collect advance fees in violation of Civil Code section 2944.7, subdivision (a). Accordingly, we dismiss count one against Gurevich and Rode without prejudice and the remaining counts against Gurevich without prejudice.

V. ORDER

As Yelena Aneley Gurevich and Lauren Ann Rode are not culpable of the charges alleged in the NDC, we order this case dismissed without prejudice. Gurevich and Rode may move for reimbursement of costs in accordance with section 6086.10, subdivision (d), and rule 5.131 of the Rules of Procedure of the State Bar.

PURCELL, P. J.

WE CONCUR:

HONN, J.

STOVITZ, J.*

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.