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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PAYMAN EMAMIAN,

Plaintiff and Appellant,

v.

NATIONSTAR MORTGAGE, et al.,

Defendants and Respondents.

B271942

(Los Angeles County
Super. Ct. No. EC063169)

APPEAL from a judgment of the Superior Court of Los Angeles County, William D. Stewart, Judge. Affirmed.

JT Legal Group, Armine Singh, Vincent Russo and Kenley Dygert for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton and Kerry W. Franich for Defendants and Respondents.

Plaintiff and appellant Payman Emamian appeals a judgment following a grant of a motion for summary judgment brought by defendants and respondents Nationstar Mortgage LLC (Nationstar) and The Bank of New York Mellon fka The Bank of New York as Trustee for the Holders of the Bella Vista Mortgage Pass-Through Trust 2004-1 Mortgage Pass-Through Certificates, Series 2004-1 (BONY) (collectively, defendants).

Because Emamian failed to meet his burden as the appellant to present an adequate record for review, the judgment must be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2004, Emamian obtained from Countrywide Home Loans, Inc. a \$699,000 loan (the subject loan) with an adjustable rate rider, secured by a deed of trust on the subject real property at 1550 Knollwood Terrace in Pasadena, California. In June 2011, the beneficial interest in the subject deed of trust was assigned to BONY. Nationstar began servicing the subject loan in July 2013.

On January 4, 2012, a notice of trustee's sale was recorded stating the unpaid balance for the subject loan was \$758,033.81. Although foreclosure proceedings were initiated, a foreclosure sale has not taken place and the foreclosure process is on hold due to ongoing litigation.

In December 2014, Emamian filed suit against Nationstar and BONY, alleging the following causes of action: (1) violation of Civil Code section 2424.11, subdivision (f); (2) breach of contract; (3) violation of Civil Code section 2924.17, subdivision (b); (4) violation of the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. §§ 2605, 2609, et seq.); (5) violation of the Rosenthal Fair Debt Collection Practices Act

(Rosenthal Act) (Civ. Code, § 1788 et seq.); (6) negligence; and (7) unfair business practices (Bus. & Prof. Code, § 17200 et seq.).

Emamian alleged, inter alia: he was improperly charged late fees and interest on the late fees while he was being considered for a first loan modification, in violation of Civil Code section 2924.11, subdivision (f); defendants were in breach of contract, as they failed to honor the adjustable rate rider in the deed of trust; defendants failed to review competent and reliable evidence to substantiate the borrower's default and the right to foreclose, in violation of Civil Code section 2924.17, subdivision (b); defendants violated RESPA by failing to respond to his qualified written request disputing the amount owed; defendants violated the Rosenthal Act by trying to collect a debt to which they were not entitled; defendants were negligent in failing to charge him interest in accordance with the deed of trust and loan documents; and by virtue of the acts and omissions described above, defendants engaged in unfair, unlawful or fraudulent business practices.

Defendants filed a motion for summary judgment, contending: the first cause of action failed because defendants removed any late fees and thus corrected and remedied the alleged violation; the breach of contract claim failed because Emamian failed to perform under the subject loan and lacked an excuse for nonperformance; the third cause of action failed because all documents recorded after Nationstar began servicing the subject loan pertained to a junior loan for which Nationstar did not act as servicer; the RESPA claim failed because Nationstar properly responded to Emamian's written request and the other alleged violations did not give rise to a private right of action; the Rosenthal Act claim failed because a residential

mortgage loan is not a consumer debt within the meaning of the statute; the negligence claim failed because defendants properly responded to Emamian's requests and because the economic loss rule bars Emamian from recovering in tort for an alleged economic injury based on contract; and the unfair competition claim failed because Emamian lacked standing, there was no remedy available to him, and he could not prevail under the statute.

In opposition, Emamian contended the motion for summary judgment should be denied because triable issues of material fact existed as to all seven causes of action.

The trial court granted defendants' motion for summary judgment. Its tentative ruling, which it adopted as its final ruling in the matter, determined: Emamian could not prevail on his first cause of action because the undisputed facts showed that defendants removed the late fees associated with the loan as of November 2, 2015, and no deed of sale had been recorded; the breach of contract claim failed because the undisputed facts established that Emamian had not performed his duty to make payments; Emamian could not prevail on his third cause of action because the undisputed facts showed that defendants did not record any documents while they were servicing his loan; Emamian could not prevail on his fourth cause of action because the undisputed facts showed that defendants were not servicing his loan when he gave notice that he had existing insurance coverage; Emamian could not prevail on the fifth cause of action under the Rosenthal Act because the undisputed evidence showed that defendants were not debt collectors for purposes of the Act; Emamian could not prevail on his negligence claim because the undisputed facts demonstrated the defendant was acting within

the conventional role as a lender and had no tort duty with regard to the interest charged or communications about reinstatement or Emamian's qualified written request; and Emamian could not prevail on the seventh cause of action because the undisputed facts showed that the unfair competition claim was incidental to and dependent on the other six causes of action.

Emamian filed a timely notice of appeal from the judgment.

CONTENTIONS

Emamian contends the undisputed material facts establish that he can prevail on his seven causes of action.

Defendants, in turn, contend the judgment should be affirmed due to Emamian's inadequate appellant's appendix, and in any event, the trial court properly granted their motion for summary judgment.¹

DISCUSSION

1. *Emamian's failure to provide an adequate record for review compels affirmance of the judgment.*

Summary judgment is proper if the "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken" in support of and in opposition to the motion "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, subds. (b), (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; *Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763, 767–768 (*Saelzler*).) "[W]e take the facts *from the record that was before the trial court when it ruled on that motion.* [Citation.]" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th

¹ Emamian did not file an appellant's reply brief.

1028, 1037, italics added.) On appeal, “ “[w]e review the trial court’s decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.” ’ [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. [Citation.]” (*Ibid.*; *Saelzler, supra*, 25 Cal.4th at pp. 767–768.)

Emamian has not provided this court with an adequate record to permit us to review the summary judgment. Defendants’ motion for summary judgment was supported by a separate statement of undisputed facts, a request for judicial notice (RJN), the declarations of Kimberly Cavagnaro and Yaron Shaham, and a separately bound volume of evidence. However, not all of those documents were included in the record on appeal. Admittedly, although the appellant’s appendix does not contain the movants’ separate statement, that omission is not critical because Emamian’s opposing separate statement, which was included in the appellant’s appendix, restated the contents of the movants’ separate statement. Nonetheless, the appellant’s appendix also omitted the movants’ Shaham declaration, the movants’ RJN, and the movants’ separately bound volume of evidence.

The appellant’s appendix also omitted substantial portions of Emamian’s opposing papers. His opposition below was supported by his own declaration and the declaration of Armen Yeghiayan. Neither declaration was included in the appellant’s appendix.

The inadequacy of the appellant’s appendix is not a trivial matter, in that as to all seven causes of action, Emamian’s

opposing separate statement cited portions of the missing declarations.

It is a “cardinal rule of appellate review that a judgment or order of the trial court is presumed correct and prejudicial error must be affirmatively shown. [Citation.] ‘In the absence of a contrary showing in the record, all presumptions in favor of the trial court’s action will be made by the appellate court. “[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented.”’ [Citation.] This general principle of appellate practice is an aspect of the constitutional doctrine of reversible error. [Citation.] ‘“A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.”’ [Citation.] ‘Consequently, [appellant] has the burden of providing an adequate record. [Citation.] Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant].’ [Citation.]” (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187; see generally, 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 628, p. 704 [appellant must affirmatively show error by an adequate record].)

In view of the inadequacy of the appellant’s appendix, the summary judgment obtained by defendants is presumed to be correct and must be affirmed.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

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EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.