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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

JACQUELINE MOMOLI and SAI
MOMOLI,

Plaintiffs and Appellants,

v.

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

Defendants and Respondents.

B283820

Los Angeles County
Super. Ct. No. BC599377

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail R. Feuer, Judge. Affirmed.

Barry E. Cohen for Plaintiffs and Appellants.

Anglin Flewelling Rasmussen Campbell & Trytten, Robert Collings Little and Benjamin G. Diehl for Defendant and Respondent Wells Fargo Bank, N.A.

INTRODUCTION

Plaintiffs Jacqueline and Sai Momoli¹ appeal from the judgment entered in their wrongful foreclosure action after the court granted defendant Wells Fargo Bank, N.A.'s (Wells Fargo) motion for summary judgment. The Momolis contend triable issues of fact exist concerning their application for a loan modification. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. The Foreclosure Proceedings

In October 2006, the Momolis borrowed \$416,000 from World Savings Bank, FSB (World Savings). The loan was memorialized by an "Adjustable Rate Mortgage Note" (World Savings Loan). Later that month, the Momolis executed a deed of trust in favor of World Savings, securing the World Savings Loan against real property the Momolis owned in Carson, California (Property). The Momolis stopped making monthly payments on the World Savings Loan around October 2008.

In April 2013, Wells Fargo recorded a notice of default and election to sell the Property.² At that time, the Momolis were behind on their payments on the World Savings Loan in the amount of \$116,968.03. In July 2013, Wells Fargo recorded a

¹ Because plaintiffs share the same last name, we separately refer to them by their first names.

² In December 2007, World Savings changed its name to Wachovia Mortgage, FSB (Wachovia). Wachovia eventually changed its name to Wells Fargo Bank Southwest, N.A., which later merged with Wells Fargo. Accordingly, Wells Fargo, as the successor in interest to World Savings, held the beneficial interest in the Deed of Trust as of April 2013.

notice of trustee's sale, advising the Momolis that the Property could be sold in August 2013.

In August 2013, the Momolis filed a first lien loan modification application. In November 2013, Wells Fargo sent the Momolis a letter advising them that Migdalia Burns had been assigned as their "single point of contact."

On August 6, 2014, Wells Fargo advised the Momolis that their loan modification application had "been pending for a considerable period of time." Wells Fargo informed the Momolis that because it had yet to receive a complete loan modification application, it could not offer them "assistance options."

On August 7, 2014, Tyon Gates, a "Home Preservation Specialist" for Wells Fargo, informed the Momolis that he had been assigned as their "primary contact." Gates advised the Momolis that he was "not able to help [them] find a mortgage assistance solution." In September 2014, Gates again advised the Momolis that because they had yet to submit a complete loan modification application, the bank could not offer them "assistance options."

On October 3, 2014, Wells Fargo sent the Momolis a letter stating that the bank couldn't "complete the final modification of [the Momolis'] loan" until a "title issue" concerning the Property was resolved. Wells Fargo's records showed that the World Savings Loan was subordinate to a loan the Momolis had obtained from "Citifinancial Services" in April 2006 (Citi Loan). Wells Fargo asked the Momolis to provide proof that the Citi Loan had been paid off or that it had been subordinated to the World Savings Loan.

On October 6, 2014, Wells Fargo sent the Momolis a letter offering them a "Trial Payment Period" (Trial Plan). Sai

acknowledged receiving the offer for the Trial Plan, later testifying that he was “overjoyed” to receive the offer because the Momolis “could afford to make the payment[s] stated in the modification letter.”

The Trial Plan required the Momolis to make three monthly payments of \$1,639.37: one payment on November 1, 2014, a second payment on December 1, 2014, and a third payment on January 1, 2015. According to the October 6, 2014 letter, Wells Fargo would offer the Momolis a final loan modification “[u]pon successful completion of the outlined payments[.]” However, the Trial Plan could be extended if “other liens ... on [the] property” needed “to be cleared prior to final approval” of a loan modification. Because the Trial Plan could “extend beyond the dates provided,” Wells Fargo advised the Momolis to “continue making [their] trial period payments in the same amount by the same day of each month” until Wells Fargo advised them that they “may move forward with a final modification or that [they] are no longer eligible for the modification.” Wells Fargo also advised the Momolis that any failure to comply with the Trial Plan’s requirements, including failing to make any of the required payments, would allow the bank to terminate the plan.

On October 8, 2014, Wells Fargo denied the Momolis’ request to reduce their “principal and interest payment by 10% or more.”

After receiving the October 3, October 6, and October 8 letters, the Momolis’ attorney, Steven Loizzi, tried contacting Gates “on at least five different occasions and either left him messages or talked to other Wells Fargo employees in an attempt to resolve the confusion regarding the Momolis’ loan modification

request.” At some point, Loizzi spoke to a Wells Fargo representative who told him that the Momolis could not start making payments on the Trial Plan until the bank received proof that the Citi Loan had been paid off or subordinated to the World Savings Loan. Loizzi eventually spoke to Gates, who advised Loizzi “that the title issue with Citi Finance ... needed to be solved before the Momolis[] could be approved for a permanent modification.” Loizzi told the Momolis not to make any payments under the Trial Plan until the title issue concerning the Property had been resolved “in [their] favor.”

On November 4, 2014, Wells Fargo advised the Momolis that Melissa Groff was their new primary contact.

Around the middle of December 2014, Loizzi spoke to the Momolis’ single point of contact,³ who told him that the Momolis were “about to fall out of the trial plan” because they failed to make their first payment on November 1, 2014. According to the single point of contact, the Momolis were required to make payments under the Trial Plan as outlined in the October 6, 2014 letter regardless of any issue concerning the priority of the World Savings Loan. The Momolis could make a double payment in December 2014 and a single payment in January 2015 to continue participating in the Trial Plan. After Loizzi informed the Momolis about his conversation with the single point of contact, they asked Wells Fargo if they could make a single payment in December 2014 and a double payment in January 2015. Wells Fargo denied the Momolis’ request.

The Momolis do not dispute they never made any payments under the Trial Plan. On January 9, 2015, Wells Fargo sent the

³ Loizzi did not identify the single point of contact with whom he spoke.

Momolis a letter informing them that they did not meet the requirements for “assistance associated with [their] loan” because they “withdrew [their] request for assistance.” The letter also advised the Momolis that Wells Fargo could resume the foreclosure process.⁴

On April 2, 2015, Wells Fargo sent the Momolis a letter explaining that they did not qualify for “assistance options” because they did not have a complete loan modification application pending with the bank.

In July 2015, Wells Fargo recorded a notice of trustee’s sale stating the Property could be sold on July 29, 2015. On October 12, 2015, Wells Fargo advised the Momolis that Dyllan Hudelson was their new primary contact. On October 30, 2015, Wells Fargo sold the Property at a trustee’s sale. A trustee’s deed upon sale evidencing the sale of the Property was recorded on November 13, 2015.

2. The Momolis’ Lawsuit

The Momolis sued Wells Fargo in October 2015 for claims arising out of Wells Fargo’s foreclosure of the Property. In August 2016, the Momolis filed the operative first amended complaint, alleging four causes of action against Wells Fargo: (1) dual tracking in violation of former Civil Code⁵ section 2923.6; (2) failure to provide a single point of contact in violation of former

⁴ Although he did not deny receiving the January 9, 2015 letter, Sai testified that he never withdrew the Momolis’ loan modification application or received a letter explicitly denying that application.

⁵ All undesignated statutory references are to the Civil Code.

section 2923.7;⁶ (3) negligence; and (4) violation of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200).⁷ The Momolis concede the UCL claim is entirely derivative of the first three causes of action.

The claims in the first amended complaint are based on two theories of liability. First, Wells Fargo failed to take any action with respect to the Momolis' loan modification application, including notifying the Momolis that their application had been denied, before foreclosing on the Property. Second, Wells Fargo failed to assign the Momolis a single point of contact, instead requiring them to speak to "alternate individuals" who were unable to adequately advise the Momolis about their loan

⁶ When Wells Fargo processed the Momolis' loan modification application and foreclosed on the Property, the dual tracking prohibition and single point of contact requirement were found in former sections 2923.6 (dual tracking) and 2923.7 (single point of contact). (Stats. 2012, ch. 86, § 7.) Section 2923.6 expired pursuant to its sunset provision on January 1, 2018. (See former § 2923.6, subd. (k).) On January 1, 2019, the Legislature reenacted the provisions of former sections 2923.6 and 2923.7 in nearly identical form. (Compare former §§ 2923.6 and 2923.7 with current §§ 2923.6 and 2923.7.) Because the former and current statutes are virtually identical and because the Legislature expressed its intent via a savings clause that claims brought under the original pre-2018 statutes be permitted to proceed, all further references to those statutes in this opinion omit the word "former." (See Stats. 2018, ch. 404, § 26 ["[t]he section [of the HBOR], or part of a section, that was amended, added, or repealed [effective as of January 1, 2018] shall be treated as still remaining in force for the purpose of sustaining any proper action, suit, or proceeding for the enforcement of such a liability, as well as for the purpose of sustaining any judgment, decree, or order"].)

⁷ The first amended complaint also names "NDEX WEST, LLC" as a defendant. NDEX WEST, LLC is not a party to this appeal.

modification request or the foreclosure process. Notably, the Momolis did not allege any facts related to Wells Fargo's request that they provide proof that the World Savings Loan was a first-priority lien on the Property. Rather, the Momolis alleged that Wells Fargo never informed them that they had qualified for the Trial Plan or sent them any documents concerning that plan.

In December 2016, Wells Fargo moved for summary judgment, which the Momolis opposed. Neither party filed any objections to the other party's evidence.

In March 2017, the court heard Wells Fargo's summary judgment motion.⁸ The court granted Wells Fargo's request for judicial notice of numerous documents related to the bank's foreclosure of the Property, the bank's acquisition of the World Savings Loan, and various prior filings and rulings from the underlying litigation. The court denied the Momolis' request for judicial notice of a "title report and tax report relating to [the Property]," which shows the World Savings Loan had been a first-priority lien on the Property since October 2006. The court did, however, consider the "title report and tax report" as "evidence submitted by the Momolis in opposition to the motion [for summary judgment]."

The court granted Wells Fargo's summary judgment motion, finding no triable issues exist as to any of the Momolis' causes of action. As to the first cause of action for dual tracking, the court rejected the Momolis' argument that a disputed issue exists based on Wells Fargo's request that the Momolis provide proof that the World Savings Loan was a first-priority lien on the

⁸ The Momolis have not provided a copy of the reporter's transcript of the hearing on the summary judgment motion or a suitable substitute.

Property before they could qualify for a permanent loan modification. The court reasoned the Momolis failed to plead any facts supporting that theory in the first amended complaint.

As to the second cause of action for violation of section 2923.7, the court found the Momolis lacked legal support for their argument that Wells Fargo violated the statute because their attorney had difficulty contacting one of their single points of contact. With respect to the third cause of action for negligence, the court rejected the Momolis' argument that Wells Fargo breached any duty of care it owed to them by requesting they provide proof that the title issue concerning the Property had been resolved before they could be approved for a loan modification, concluding that argument also fell outside the scope of the first amended complaint's allegations. Finally, the court found no triable issue exists as to the Momolis' fourth cause of action for violation of the UCL because that claim was dependent on the Momolis' first three causes of action.

In April 2017, the court entered judgment in Wells Fargo's favor. The Momolis filed a timely notice of appeal from the court's judgment.

DISCUSSION

The Momolis contend the trial court erred in granting summary judgment because triable issues of material fact exist as to each of their four causes of action. As we explain below, the Momolis have forfeited their claims on appeal by failing to include a summary of the relevant facts in their opening brief. In any event, the court properly found no triable issues exist as to any of the Momolis' claims.

1. The Momolis' opening brief is defective.

We begin by addressing the opening brief submitted by the Momolis in this appeal. It is a fundamental principle of appellate review that the judgment or order challenged on appeal is presumed to be correct, and “it is the appellant’s burden to affirmatively demonstrate error.” (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) “ ‘All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

To satisfy this burden, the appellant must, among other things, supply an adequate record of the trial court proceedings (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295); support each claim with “ ‘reasoned argument and citations to authority’ ” (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799); and file an opening brief that includes “a summary of the significant facts limited to matters in the record[,]” with “citation[s] to the volume and page number of the record where the matter[s] appear[].” (Cal. Rules of Court, rule 8.204(a)(1)(C), (2)(C).) Failure to comply with any of these requirements may result in a waiver or forfeiture of the appellant’s claims on appeal. (See *Maria P.*, at pp. 1295–1296; *Dietz*, at p. 799.)

The Momolis’ opening brief does not contain a summary of the facts relevant to their appeal, nor have they included a factual summary in their reply brief. Aside from a short and mostly incoherent procedural background included in their opening brief,⁹ the Momolis’ briefs include only legal analysis

⁹ For example, the first line of the Momolis’ “Statement of the Case” in their opening brief reads: “[The Momolis] took a loan from Respondent

with scattershot citations to parts of the record that the Momolis claim are relevant to the issues they've raised on appeal.

By failing to provide a summary of the significant facts in their opening brief, the Momolis have not met their burden to affirmatively demonstrate the court erred in granting Wells Fargo's summary judgment motion. For that reason alone, we could find the Momolis have forfeited their claims on appeal and affirm the court's judgment. Nevertheless, we address—and reject—the Momolis' claims on the merits.

2. Standard of Review

Summary judgment is appropriate where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476 (*Merrill*).) A defendant moving for summary judgment must demonstrate that one or more elements of the plaintiff's claim cannot be established or that there exists a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant meets this burden, the plaintiff must present evidence establishing a triable issue of material fact. (*Ibid.*) A triable issue of fact exists if the evidence would allow a reasonable trier of fact to find the fact in favor of the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).)

We independently review a trial court's ruling on a motion for summary judgment. (*Aguilar, supra*, 25 Cal.4th at p. 860.) We

Wells Fargo Bank ... after summary judgment was granted on [the Momolis'] operative First Amended Complaint," a claim that is not supported by the record or consistent with the arguments the Momolis raise on appeal.

liberally construe the evidence in favor of the opposing party and resolve all doubts about the evidence in that party's favor. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) We consider all evidence the parties submit in connection with the motion, except that which the court properly excluded. (*Merrill, supra*, 26 Cal.4th at p. 476.)

3. The Momolis have forfeited any challenge to Wells Fargo's evidence submitted in support of summary judgment.

In their opening brief, the Momolis contend the court erred in granting summary judgment because it relied on the declaration of Sarah Lee Stonehocker, Wells Fargo's Vice President of Loan Documentation, who authenticated many of the documents Wells Fargo submitted in support of its summary judgment motion. The Momolis argue the court erred in relying on Stonehocker's declaration because she lacked personal knowledge "pertaining to [the Momolis'] loan modification process."

Under Code of Civil Procedure section 437c, subdivision (d), "[s]upporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." To preserve a challenge to a declaration submitted in support of summary judgment on any of the grounds identified in the statute, the opposing party must object at the hearing on summary judgment. (Code Civ. Proc., § 437c, subd. (d).) Otherwise, any objection to that evidence is deemed waived on appeal. (*Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1045 ["Under the summary judgment statute, objections to

declarations are generally forfeited when not asserted before the trial court.”].)

The Momolis never filed any written objections to Wells Fargo’s evidence supporting its summary judgment motion. The Momolis also have not provided a copy of the reporter’s transcript from the hearing on the summary judgment motion, a settled statement of those proceedings, or a suitable substitute. We therefore presume the Momolis never orally objected to Wells Fargo’s evidence at that hearing. (See *Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127 [“ ‘[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.’ ”].) Consequently, the Momolis have forfeited any challenge to the court’s reliance on any of Wells Fargo’s evidence in granting summary judgment. (Code Civ. Proc., § 437c, subd. (d).)

4. The First Cause of Action for Violation of Section 2923.6

The Momolis’ first cause of action alleges Wells Fargo engaged in dual tracking in violation of section 2923.6. Under that statute, a mortgage servicer is prohibited from “record[ing] a notice of default or notice of sale, or conduct[ing] a trustee’s sale ... while [a] complete first lien loan modification application is pending.” (§ 2923.6, subd. (c).) Once a complete application is filed, the lender “shall not record a notice of default or notice of sale or conduct a trustee’s sale until any of the following occurs: [¶] (1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired. [¶] (2) The borrower does not accept an offered first lien loan

modification within 14 days of the offer. [¶] (3) The borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification.” (*Ibid.*)

If the mortgage servicer denies the borrower a loan modification, it cannot record a notice of default or a notice of sale or conduct a trustee’s sale until 31 days after the borrower was notified of the denial in writing. (§ 2923.6, subd. (e)(1).) A mortgage servicer is not required “to evaluate applications from borrowers who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower’s financial circumstances since the date of the borrower’s previous application and that change is documented by the borrower and submitted to the mortgage servicer.” (*Id.*, subd. (g).)

Wells Fargo met its burden of showing it complied with the requirements of section 2923.6 before it recorded the notice of trustee’s sale in July 2015. After the Momolis filed their loan modification application in August 2013, Wells Fargo halted the foreclosure process and began evaluating the Momolis’ application. The bank eventually offered the Momolis the Trial Plan in October 2014 as a means of potentially obtaining a permanent loan modification. After the Momolis failed to make the required payments under the Trial Plan, Wells Fargo informed them in January 2015 that their request for assistance had been withdrawn. In April 2015, Wells Fargo advised the Momolis that they did not have a complete loan modification pending. About 90 days later, or in July 2015, Wells Fargo recorded the notice of trustee’s sale, and it sold the Property through foreclosure in October 2015. (See § 2923.6, subd. (e)(1)

[mortgage servicer must wait at least 31 days after denying a loan modification application before recording a notice of sale].) None of the evidence submitted by Wells Fargo established that by the time it sold the Property, the Momolis had filed another complete loan modification application showing a material change in their financial circumstances. (See § 2923.6, subd. (g).)

The Momolis contend triable issues exist as to whether Wells Fargo failed to comply with the requirements of section 2923.6 before recording the July 2015 notice of trustee's sale for the following reasons: (1) Wells Fargo conditioned the Momolis' eligibility for a loan modification on them providing proof that the Citi Loan had been paid off or subordinated to the World Savings Loan, even though the World Savings Loan had been a first-priority lien on the Property since October 2006; and (2) Sai testified in opposition to Wells Fargo's summary judgment motion that he never withdrew the loan modification application or received a written denial of that application before the July 2015 notice of trustee's sale was recorded.

With respect to their first argument, the Momolis are precluded from opposing summary judgment on a theory that Wells Fargo violated section 2923.6 when it asked them to provide proof that the World Savings Loan was a first-priority lien on the Property. The issues that may be considered on a motion for summary judgment are governed by the pleadings. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253 (*Laabs*).) "Thus, a 'defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers.' [Citation.] 'To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the

pleadings. If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion. [Citations.]' [Citation.] '[T]he pleadings "delimit the scope of the issues" to be determined and "[t]he complaint measures the materiality of the facts tendered in a defendant's challenge to the plaintiff's cause of action." [Citation.] [Plaintiff's] separate statement of material facts is not a substitute for an amendment of the complaint. [Citation.]' [Citation.]" (*Ibid.*)

The first amended complaint alleges that Wells Fargo failed to review the Momolis' loan modification application materials and prevented them from completing their application by repeatedly asking them to submit "new iterations of the same documents" The complaint further alleges that, from the time the Momolis filed their loan modification application in August 2013 through the time Wells Fargo sold the Property in October 2015, their application remained " 'pending' " because Wells Fargo refused to acknowledge that they had filed a complete application.

In their opposition papers below and on appeal, however, the Momolis concede the following facts: (1) Wells Fargo deemed their application complete; (2) Wells Fargo offered them the Trial Plan as a means of qualifying for a permanent loan modification; and (3) they received Wells Fargo's offer for the Trial Plan. The Momolis now contend the bank erred in how it advised them to complete the Trial Plan by requiring them to provide proof that the World Savings Loan was a first-priority lien on the Property. Because the first amended complaint does not contain any allegations addressing the title issue concerning the Property or

the manner in which Wells Fargo advised the Momolis to complete the Trial Plan, the court correctly found the Momolis were precluded from relying on those issues to oppose summary judgment. (See *Laabs, supra*, 163 Cal.App.4th at p. 1257 [“if a plaintiff wishes to introduce issues not encompassed in the [operative] pleadings, the plaintiff must seek leave to amend the complaint at or prior to the hearing on the motion for summary judgment”].)

The Momolis argue the court erred in rejecting their arguments because the first amended complaint can be construed to encompass issues related to the title issue concerning the Property and the manner in which Wells Fargo advised them to complete the Trial Plan. (See *Laabs, supra*, 163 Cal.App.4th at p. 1257 [a plaintiff may raise new issues in opposition to a motion for summary judgment if the operative pleading, “construed broadly, encompasses them”].) Specifically, the Momolis argue those issues can be interpreted to fall within the allegation that Wells Fargo engaged in a “massive scheme of fraudulent, deceptive, unlawful, deceitful and negligent business practices[.]” This argument lacks merit. Any theory related to the manner in which Wells Fargo advised the Momolis to complete the Trial Plan after the bank deemed their modification application complete directly contradicts the allegations supporting the Momolis’ first cause of action—i.e., that Wells Fargo refused to process their loan modification application.

There is also no triable issue concerning whether the Momolis had a complete loan modification application pending before Wells Fargo recorded the notice of trustee’s sale in July 2015. On October 6, 2014, Wells Fargo sent the Momolis an offer to participate in the Trial Plan, which they needed to complete

before they could qualify for a loan modification. Wells Fargo's offer advised the Momolis that if they failed to make any of the three payments outlined in the Trial Plan, the plan could be terminated. The Momolis do not dispute that they never made any of the payments outlined in the Trial Plan. On January 9, 2015, more than a week *after* the Momolis were supposed to make the final payment on the Trial Plan, Wells Fargo sent them a letter advising that they did not meet the requirements for "assistance associated with [their] loan." While Sai testified that he never withdrew the loan modification application or was advised that the application had been denied, he did not deny receiving Wells Fargo's January 9, 2015 letter stating that the Momolis' request for assistance with their loan had been withdrawn.

The only reasonable inference that can be drawn from this evidence is that the January 2015 letter constituted Wells Fargo's notification to the Momolis that they were not eligible for a first lien loan modification because they failed to complete the Trial Plan by making none of the required payments. (See § 2923.6, subd. (c)(1).) From that point forward, Wells Fargo was required to wait 31 days before it could record a notice of trustee's sale. (§ 2923.6, subd. (e)(1).) As we explained above, Wells Fargo did just that.

5. The Second Cause of Action for Violation of Section 2923.7

In their second cause of action, the Momolis allege Wells Fargo "failed to provide a [single point of contact] to [them]," in violation of section 2923.7. That statute requires a mortgage servicer to promptly establish a single point of contact for a borrower requesting a foreclosure prevention alternative.

(§ 2923.7, subd. (a).) The single point of contact is responsible for “[c]ommunicating ... the deadline for any required submissions to be considered” for the available foreclosure prevention options, and for “notifying the borrower of any missing documents necessary to complete the application.” (*Id.*, subds. (b)(1)–(2).) Further, the contact is responsible for “[h]aving access to current information and personnel sufficient to timely, accurately, and adequately inform the borrower of the current status of the foreclosure prevention alternative.” (*Id.*, subd. (b)(3).)

Here, Wells Fargo produced evidence showing it complied with the requirements of section 2923.7. The Momolis filed their first loan modification application in August 2013, and Wells Fargo assigned them a single point of contact in November 2013. Wells Fargo continued to provide the Momolis a single point of contact while it processed their loan modification application, as well as through the time it recorded the notice of trustee’s sale in July 2015 and sold the Property in October 2015. Although Wells Fargo assigned the Momolis different representatives to act as their single point of contact, section 2923.7 does not prohibit a financial institution from changing a borrower’s single point of contact or assigning a borrower more than one representative to serve as the single point of contact. Indeed, section 2923.7 expressly allows a financial institution to assign a group of representatives to serve as a borrower’s single point of contact. (See § 2923.7, subd. (e) [“ ‘single point of contact’ means an individual or team of personnel”].)

The only argument the Momolis offered below was that the bank violated section 2923.7 because Gates, one of the Momolis’ single points of contact, refused to communicate with Loizzi. That argument, however, is not supported by the evidence. In the

excerpts of his deposition submitted by Wells Fargo, Loizzi testified that he had difficulty reaching Gates on several occasions after Wells Fargo sent the Momolis the October 3, October 6, and October 8, 2014 letters. But Loizzi also testified that he spoke to Gates around mid-December 2014, before Wells Fargo withdrew the Trial Plan. Gates advised Loizzi on how the Momolis could continue to qualify for the Trial Plan even though they had missed their first payment. Similarly, in his declaration submitted in support of the Momolis' opposition, Loizzi testified that he tried contacting Gates five times and was able to speak to him once, when Gates advised him how the Momolis could qualify for a permanent loan modification. There is no evidence in the record to support the Momolis' claim that Gates, or any of the other representatives assigned as their single point of contact, refused to communicate with them or their attorney.

On appeal, the Momolis argue a triable issue of fact exists as to whether Wells Fargo complied with the requirements of section 2923.7 because the "Bank's [single points of contact] failed to advise [the Momolis]" as to how to resolve the title issue concerning the Property and the World Savings and Citi Loans. The Momolis also argue "the morass of confusion created by the Bank's conflicting and completely unreconciled letters to [the Momolis] raises questions as to whether the revolving [single points of contact]" were capable of complying with the statute's requirements. The Momolis never raised these arguments in their opposition to Wells Fargo's summary judgment motion, however. And, because the Momolis have not provided a copy of the reporter's transcript of the hearing on the summary judgment motion or a suitable substitute, we must presume they never raised these arguments at that hearing. The Momolis have

therefore waived these arguments on appeal. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3 [“It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal.”].)

6. The Third Cause of Action for Negligence

The Momolis’ third cause of action is for negligence arising out of Wells Fargo’s handling of their loan modification application. “To state a cause of action for negligence, a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff’s damages or injuries. [Citation.] Whether a duty of care exists is a question of law to be determined on a case-by-case basis. [Citation.]” (*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 944 (*Alvarez*).)

“[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.” (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 63.) A lender, therefore, does not owe a borrower “a common law duty of care to offer, consider or approve a loan modification.” (*Id.* at p. 68.) Several courts have held, however, that once a lender agrees “to consider modification of the plaintiffs’ loans,” the lender owes a duty to exercise reasonable care in the review of that application. (See *Alvarez, supra*, 228 Cal.App.4th at pp. 948–949; *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1180–1183.)

Even if we were to assume Wells Fargo owed the Momolis a duty of care when it decided to consider their loan modification application, the bank produced evidence negating the remaining elements of the Momolis’ negligence claim. After Wells Fargo

reviewed the Momolis' August 2013 loan modification application, the bank offered them the Trial Plan as a means of obtaining a permanent loan modification. Wells Fargo explained to the Momolis that, to complete the Trial Plan, they were required to make all three payments outlined in the terms and conditions for that plan. Wells Fargo also warned the Momolis that if they failed to make any of the required payments, the Trial Plan could be terminated. After the Momolis missed their first two payments under the Trial Plan, Wells Fargo provided them an opportunity to make up those payments and continue participating in the plan. The Momolis do not dispute that they never made any of the required payments before Wells Fargo deemed their request for "assistance associated with [their] loan" withdrawn in January 2015. There is also nothing in the record that shows the Momolis filed another complete loan modification application demonstrating a material change in their financial circumstances before Wells Fargo sold the Property in October 2015. Wells Fargo's evidence therefore shows the Momolis' failure to make any of the required payments under the Trial Plan resulted in their ineligibility to obtain a loan modification.

The Momolis argue the court erred in granting summary judgment of their negligence claim because a triable issue exists concerning whether Wells Fargo was negligent when it requested they provide proof that the World Savings Loan was a first-priority lien on the Property before they could be approved for a loan modification. As with their argument regarding the dual tracking claim, the Momolis are precluded from relying on this theory because they did not allege any facts related to it in their first amended complaint. (See *Laabs, supra*, 163 Cal.App.4th at p. 1257.)

In any event, the Momolis' argument lacks merit. To the extent the evidence could support a finding that Wells Fargo's request to provide proof that the title issue had been resolved in the bank's favor caused the Momolis to miss their first two payments under the Trial Plan, Wells Fargo remedied that issue in mid-December 2014, offering the Momolis the opportunity to make up the missed payments and continue to participate in the plan. The Momolis also had been informed that the Trial Plan could be extended to allow additional time to resolve any title issues concerning the Property so long as they continued to make regular payments. The Momolis nevertheless failed to make any of the required payments, thereby rendering them ineligible for a loan modification.

7. The Fourth Cause of Action for Violation of the UCL

As we noted above, the Momolis concede their fourth cause of action for violation of the UCL is entirely derivative of their first three causes of action. Because no triable issues of fact exist as to any of those causes of action, there necessarily is no triable issue of fact as to the fourth cause of action.

DISPOSITION

The judgment is affirmed. Wells Fargo is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.