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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

NATHANIEL J. FRIEDMAN, Plaintiff and Appellant, v. NATIONSTAR MORTGAGE LLC, Defendant and Respondent.	B271024 (Los Angeles County Super. Ct. No. SC123958)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Lisa Hart Cole, Judge. Affirmed.

Nathaniel J. Friedman, in pro. per., for Plaintiff and Appellant.

Akerman, Karen Palladino Ciccone and Parisa Jassim for Defendant and Respondent.

SUMMARY

Plaintiff Nathaniel J. Friedman refused to comply with the requirement in his home loan modification agreement that he pay taxes and insurance premiums ("escrow items") to the lender, and instead paid the taxes and insurance directly. He sued the loan servicer, defendant Nationstar Mortgage LLC, when a notice of default was issued. Plaintiff sought to enjoin the foreclosure proceedings, and alleged several other causes of action. The trial court granted defendant's motion for summary judgment.

Plaintiff's first claim on appeal is that the trial court erred in allowing defendant to amend a supporting declaration, to add the required statement that the declaration was made under penalty of perjury "under the laws of the State of California" (rather than, as originally stated, "under the laws of the United States of America"). Because the amendment did not result in any prejudice to plaintiff, we find no error.

We also find no error in the trial court's grant of summary judgment. There is no merit in plaintiff's claim that summary judgment was improper because Civil Code section 2954 operated to prevent the lender from requiring payment of escrow items to the lender. Loans modified in connection with a lender's homeownership preservation program are excepted from the statute, and plaintiff presented no evidence this exception did not apply. Plaintiff likewise identifies no disputed issue of material fact preventing summary adjudication of any of his other claims.

Finally, we reject plaintiff's contention the trial court erred in refusing to order a refund of his deposit of jury fees.

FACTS

Plaintiff, a practicing attorney, obtained a $2.1 million loan secured by his residence in Beverly Hills in April 2006. In June

2013, plaintiff entered into an agreement with Bank of America to modify the loan. The servicing of the loan was transferred from Bank of America to defendant on July 1, 2013.

The loan modification agreement provided a new principal balance and interest rate, and also obligated plaintiff to pay the lender sums for specified "escrow items," including taxes and insurance premiums, unless the lender waived this obligation in writing. We will refer to this as the escrow requirement.

Plaintiff first contacted defendant on July 9, 2013, to request a waiver of the escrow requirement, and made several follow-up telephonic inquiries. By letter dated December 19, 2013, defendant acknowledged a November 26, 2013 letter from plaintiff. Defendant's letter declined plaintiff's request to rescind the escrow requirement, stating defendant had disbursed the first tax payment for 2013-2014 on November 14, 2013, and that a previous tax installment due December 2012 had been delinquent, "which caused the requirement of an Escrow Account for the life of the loan." Defendant also advised plaintiff that its annual escrow analysis resulted in a recalculated total monthly payment of $12,625.85, and that plaintiff's November and December payments of $10,375.87 (principal and interest only) were "short of the full amount due."

Plaintiff continued to make monthly payments of $10,375.87, covering principal and interest only. Defendant sent another letter dated February 11, 2014. The letter referred to a December 31, 2013 letter from plaintiff and again declined his request to rescind the escrow requirement. Defendant advised that incomplete payments would be placed in a suspense account and would not be credited for the month intended, so that plaintiff's account would be at risk for delinquency. By letter

dated March 26, 2014, defendant again explained the placement of incomplete payments in the suspense account and that plaintiff's loan was approximately two payments delinquent. Correspondence in April 2014 again declined to remove the escrow requirement and advised plaintiff the account was approximately three payments delinquent. Plaintiff continued to pay only principal and interest.

In late January 2015, a notice of default, reflecting arrearages of $81,232.58, was executed and recorded. On February 26, 2015, plaintiff demanded cancellation of the notice of default. On March 26, 2015, defendant by letter again reiterated its decision not to remove the escrow requirement, and reserved its right to proceed with foreclosure unless plaintiff's account was brought current.

On March 25, 2015, plaintiff filed his complaint against defendant. Plaintiff's first amended complaint, filed in September 2015, sought to enjoin defendant from commencing foreclosure proceedings and alleged causes of action for negligence, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, slander of title and declaratory relief. Plaintiff alleged that after the loan modification, he continued to pay (directly) all real estate taxes and hazard insurance applicable to the property, that all such amounts were current, that defendant had "no right to demand payment into an impound account" and plaintiff "has not defaulted on the Deed of Trust."

Defendant moved for summary judgment, supporting its separate statement of undisputed facts with declarations from Fay Janati, a litigation resolution analyst for defendant, and from Karen Ciccone, defendant's attorney. These declarations

(mostly the Janati declaration) established the facts we have recited. (Ms. Ciccone's declaration presented excerpts from plaintiff's deposition, at which he acknowledged receiving defendant's correspondence and his refusal to pay any amount beyond $10,375 (principal and interest) to defendant as a monthly payment.)

Plaintiff's opposition, filed December 23, 2015, consisted of evidentiary objections to defendant's declarations, along with his own declaration and a separate statement, as follows.

Plaintiff objected to the Janati declaration in its entirety, because Ms. Janati made the declaration in Texas and under penalty of perjury "under the laws of the United States" rather than under the laws of the State of California, contrary to Code of Civil Procedure section 2015.5. He also objected to the Ciccone declaration as "irrelevant" in light of the expected striking of the Janati declaration.

Plaintiff's separate statement first posed "constitutional objections" to the separate statement requirement. Plaintiff then objected to all defendant's undisputed facts as irrelevant, for lack of any competent evidence. He offered as undisputed facts the proposition that the " 'impound account' was voidable per Civil Code § 2954"; he never paid into the impound account, but rather paid directly to the Los Angeles County Tax Collector and the California Fair Plan all sums required for property taxes and fire insurance; and "[a]ll of Plaintiff's checks [to defendant] bore the legend, '. . . Pursuant to California Commercial Code § 3311 "Accord and Satisfaction," cutting off any "right" of [defendant] to seek recovery of all alleged arrears.' "

Plaintiff's declaration presented copies of his checks to defendant and to the tax and insurance authorities,

"demonstrating that Plaintiff is current in any obligation re: property taxes and fire insurance."

Six days later, defendant filed an amended declaration from Ms. Janati. The only change from the first Janati declaration was that Ms. Janati made the declaration under penalty of perjury under the laws of the State of California.

The next day, plaintiff filed an objection to the amended Janati declaration and a request for sanctions.

On December 31, 2015, defendant served a reply brief, evidentiary objections and other reply papers, including a declaration from Parisa Jassim, an attorney for defendant. The declaration explained defendant had filed the amended Janati declaration as quickly as possible and had told plaintiff that defendant was willing to stipulate to continue the hearing to give plaintiff additional time to prepare an opposition.

A few days later, plaintiff served an evidentiary objection to the Jassim declaration (as "untimely" and "unauthorized") and a request for additional sanctions.

The trial court issued a detailed tentative decision granting defendant summary judgment, and at the conclusion of a hearing on January 6, 2016, adopted the tentative decision in its entirety.

Plaintiff then requested an order refunding his $150 deposit for jury fees. The clerk observed the deposit was no longer refundable. The court told plaintiff he could "make a motion to do that," but plaintiff replied, "No. It will not be done here. That's for sure."

Judgment was entered on January 20, 2016, and plaintiff filed a timely appeal.

DISCUSSION

1. The Standard of Review

A defendant moving for summary judgment must show "that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) Where summary judgment has been granted, we review the trial court's ruling de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where all the papers submitted show that no triable issue of material fact exists and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

2. This Case

We find no merit in any of plaintiff's claims of error.

a. The Janati declaration

A declaration signed under penalty of perjury outside California is not admissible in summary judgment proceedings unless the contents are certified as true " 'under the laws of the State of California.' " (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 606 (*Kulshrestha*), quoting Code Civ. Proc., § 2015.5 (section 2015.5).) Thus the Janati declaration, as initially filed, was not admissible. Plaintiff contends that under *Kulshrestha*, amendment of the defective declaration is not permitted, and so no evidence supported defendant's motion.

We disagree. We find nothing in *Kulshrestha* to support the proposition that a trial court may not permit amendment of a declaration, so long as there is no prejudice to plaintiff.

In *Kulshrestha*, the plaintiff's declaration opposing summary judgment, like the Janati declaration here, did not state it was made "under the laws of the State of California." The defendants in *Kulshrestha* contended in their reply papers that the plaintiff's declaration, for that reason, could not be used to defeat summary judgment. A hearing was held, the matter was submitted, and several weeks later the trial court sustained the defendant's objection and granted summary judgment, finding no admissible evidence to support the plaintiff's claims. (*Kulshrestha, supra,* 33 Cal.4th at p. 607.) After summary judgment was granted, plaintiff sought to vacate the judgment under Code of Civil Procedure section 473, subdivision (b). He contended that "through mistake or other excusable circumstance, counsel overlooked the omission, and forgot to offer to amend the declaration at the summary judgment hearing." (*Kulshrestha*, at pp. 607-608.) The trial court denied the plaintiff's motion to vacate, finding no excusable neglect or other basis for relief. (*Id.* at p. 608.)

On appeal, the plaintiff in *Kulshrestha* took a different tack, contending the declaration substantially complied with section 2015.5, and the trial court erred in not considering it in opposition to summary judgment. (*Kulshrestha, supra,* 33 Cal.4th at p. 608.) The Supreme Court rejected the plaintiff's substantial compliance argument, finding the plain statutory language defeated his claim, and the declaration was properly excluded under section 2015.5. (*Id.* at pp. 610, 619.)

This case is not like *Kulshrestha*, which decided only the "narrow question" of compliance with section 2015.5 – not whether a defective declaration may be amended. (See *Kulshrestha, supra,* 33 Cal.4th at p. 606.) Here, defendant amended the Janati declaration as soon as the defect was discovered. Defendant did so before the summary judgment hearing. Defendant offered to stipulate to a postponement to allow plaintiff time to respond on the merits. At the hearing, the court asked plaintiff if he would like a continuance, and he declined. None of these things occurred in *Kulshrestha*, which in any event did not address the question whether a defective declaration may be amended.

Plaintiff suggests that *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 312, supports his assertion that the defect in the Janati declaration could not be cured by filing an amended declaration. It does not. In *San Diego Watercrafts,* the court reversed a summary judgment for the defendant because the trial court erred in considering evidence, containing new facts to rebut the plaintiff's opposition evidence, that was first submitted with the defendant's reply. (*Id.* at pp. 310, 312.) The new evidence "not only was omitted from the [defendant's] separate statement, it also was not filed until after [the plaintiff] had responded to the issues raised in the separate statement." (*Id.* at p. 316.) This violated the plaintiff's due process rights, because the plaintiff "was not informed what issues it was to meet in order to oppose the motion. Where a remedy as drastic as summary judgment is involved, due process requires a party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail." (*Ibid.* [trial court has discretion whether to consider

evidence undisclosed in the separate statement, but should consider due process implications].)

Here, plaintiff identifies no conceivable prejudice from the trial court's decision to consider the amended Janati declaration. (Cf. *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1183 [no error in admitting an amended declaration with reply papers where the plaintiff was in no way prejudiced; "a trial court may properly consider new evidence submitted with a reply brief 'so long as the party opposing the motion for summary judgment has notice and an opportunity to respond to the new material' "; original declaration (which had omitted a statement of testimonial competence) identified the substantive evidence on which the defendant sought summary judgment, and the plaintiff "never identified any prejudice" from admission of the amended declaration].) The same is so here. Plaintiff's derivative objection to the Ciccone declaration is likewise without merit.

b. Civil Code section 2954

Civil Code section 2954 (section 2954) prohibits impound accounts such as the one imposed in this case, except (among other circumstances) "where a loan is refinanced or modified in connection with a lender's homeownership preservation program . . . ." (*Id.*, subd. (a)(1)(G).)[1] Plaintiff contends there

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[1] "No impound, trust, or other type of account for payment of taxes on the property, insurance premiums, or other purposes relating to the property shall be required as a condition of a real property sale contract or a loan secured by a deed of trust or mortgage on real property containing only a single-family, owner-occupied dwelling, except: . . . (G) where a loan is refinanced or modified in connection with a lender's homeownership preservation program . . . . [¶] An impound, trust, or other type

was no evidence his loan modification agreement was made "in connection with a lender's homeownership preservation program" and that it was defendant's burden to produce such evidence, so reversal of summary judgment is required. We think not.

First, defendant had no obligation to produce evidence on this issue in its motion for summary judgment. Plaintiff's complaint alleged that defendant had "no right to demand payment into an impound account," but the only basis plaintiff stated was his repeated allegation that defendant made this demand "even though Plaintiff has already paid the taxes and insurance . . . ." Plaintiff did not allege a violation of, or even mention, section 2954 in his complaint. Nor did any of the pre-complaint correspondence in the record between plaintiff and defendant contain any hint of a claim by plaintiff that the escrow requirement violated section 2954. Under these circumstances, defendant had no reason to offer evidence that plaintiff's contractual obligation was legal under a statute not even mentioned in plaintiff's complaint.

Second, defendant's evidence (and plaintiff's own complaint) confirms there was no section 2954 violation. The evidence and the complaint included a copy of the loan modification agreement. The agreement on its face, in the top left corner of the first page, identified plaintiff's loan number and stated that recording of the modification was requested by Bank of America, "*Attn Home Retention Division*." (Italics added.)

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of account . . . established in violation of this subdivision is voidable, at the option of the purchaser or borrower, at any time . . . ." (§ 2954, subd. (a)(1).)

Third, plaintiff offered no evidence to support his "undisputed fact" that "[t]he 'impound account' was voidable per Civil Code § 2954 . . . ." Plaintiff's declaration did not even purport to claim that his loan modification occurred outside a "homeownership preservation program." (*Id.*, subd. (a)(1)(G).)

In short, plaintiff's opposition merely argued, without supporting evidence, that the escrow requirement in the loan modification agreement violated section 2954. Such a claim, without evidence to support it, does not suffice to prevent summary judgment.

c. Plaintiff's other claims of error

Plaintiff argues that summary judgment was erroneously granted on each of his causes of action. None of these claims has merit.

i. Negligence

Plaintiff's complaint alleged defendant owed plaintiff a duty of care "not to charge amounts . . . that Plaintiff already paid, and to act in good faith related to the contract between them." Reversal of summary adjudication on his negligence claim is required, plaintiff says, because the trial court "misstate[d] the law" when it concluded no duty of care applies to loan modifications because they are "within the scope of the conventional role of a money lender." There was no error.

"[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." (*Nymark v. Heart Federal Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) Of course, that is only a general rule, and *Nymark* " '[does] not purport to state a legal principle that a lender can never be held liable for

negligence in its handling of a loan transaction within its conventional role as a lender of money.' " (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 902; see *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 948, 951 (*Alvarez*) [imposing a duty of reasonable care on defendants that agreed to consider modification of the plaintiffs' loan].)

Here, the general rule applies. Cases imposing a duty of care involve defendants that have undertaken to review a loan for possible modification. (See, e.g., *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1182-1183 [concluding the loan servicer owed the plaintiffs a duty of care with respect to the loan modification application process]; *Alvarez, supra,* 228 Cal.App.4th at p. 948.) This case does not involve allegations of mishandling of an application for a loan modification.

Plaintiff insists that "mishandling of the servicing of a modification agreement" is "clearly analogous" to mishandling of an application, but the undisputed facts show no such mishandling. It is undisputed that plaintiff agreed to the terms in the loan modification agreement, including the procedures for payment of insurance and taxes, and deliberately chose not to comply with those terms. Further, contrary to plaintiff's assertion, there is no "presumption of negligence" arising from the violation of a statute, because there is no evidence of any such violation. (See pt. b., *ante.*) Accordingly, no basis exists for a claim of negligence.

ii. Breach of the implied covenant of good faith and fair dealing

Plaintiff alleged defendant breached the covenant of good faith and fair dealing implied in every contract when defendant demanded plaintiff comply with the escrow requirement, and initiated foreclosure proceedings. The claim is legally deficient, because the loan modification agreement expressly permitted defendant's conduct. (See *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374 ["We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement."].)

Plaintiff's contention that summary adjudication of this claim was erroneous is based solely on the proposition that the escrow requirement in the agreement violated section 2954. Because no evidence was presented to support a violation of section 2954, summary adjudication was proper.

iii. Intentional infliction of emotional distress

Plaintiff contends defendant wrongfully refused his requests for waiver of the escrow provision and wrongfully initiated foreclosure proceedings, characterizing this as outrageous conduct causing him severe emotional distress. He challenges the trial court's summary judgment ruling there was no outrageous conduct. Plaintiff cites *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 204 (*Ragland*), claiming the facts are analogous. They are not.

Ragland reversed summary adjudication of an emotional distress claim where the plaintiff produced evidence creating triable issues of fact as to whether the lender induced the plaintiff to miss a loan payment, and refused later to accept

payments, thereby wrongfully placing her loan in foreclosure. (*Ragland, supra,* 209 Cal.App.4th at pp. 187, 204.) There are no such circumstances in this case. Once again, plaintiff's claim is founded on the unsupported proposition that the escrow requirement violated section 2954. There was no error.

iv. Slander of title

Plaintiff's complaint alleged a cause of action for slander of title based on defendant's recording of the notice of default. The elements of slander of title are "(1) a publication, (2) which is without privilege or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss." (*Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1050-1051.)

Plaintiff's undisputed failure to comply with the escrow requirement established a default in his obligations under the loan modification agreement, justifying defendant's recording of the notice of default. Plaintiff's contention on appeal that the publication (the notice of default) was "false" once again depends on his claim that the escrow requirement violated section 2954 – a claim for which he produced no evidence. Summary judgment on this claim was proper.

d. The jury fees

After summary judgment was granted, plaintiff requested a refund of his jury fee deposit, and the trial court stated that he could "make a motion to do that," but that "the clerk has explained to you what the current state of the law is" (that the deposit was nonrefundable). Plaintiff declined to file a motion. On appeal, plaintiff contends the trial court "peremptorily deprived [him] of his $150 jury fee deposit without even a nod to fundamental concepts such as due process."

Plaintiff's claim has no merit. Code of Civil Procedure section 631 specifies that "[a]t least one party demanding a jury on each side of a civil case shall pay a *nonrefundable* fee of one hundred fifty dollars ($150) . . . ." (*Id.*, subd. (b), italics added.) Plaintiff specifically declined the court's offer to entertain a motion on the issue, in which he could have asserted any constitutional or other claims. He cannot do so for the first time on appeal, and in any event presents no reasoned argument on the point.

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.