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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KEVIN CREY et al.,

Plaintiffs and Appellants,

v.

WELLS FARGO BANK, N.A.,

Defendant and Respondent.

B280837

(Los Angeles County  
Super. Ct. No. BC588877)

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

Rodriguez Law Group and Patricia Rodriguez for Plaintiffs and Appellants.

Severson & Werson, Jan T. Chilton and Kerry W. Franich for Defendant and Respondent.

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Kevin Crey and Toni Crey (the Creys) appeal from a summary judgment motion granted in favor of Wells Fargo Bank, N.A., (Wells Fargo). However, the Creys have failed to provide Wells Fargo's motion for summary judgment or the parties' declarations in support of, and in opposition to, the motion or their statements of undisputed fact or their evidentiary objections. Where, as here, the Creys fail to provide an adequate record of the challenged proceedings, we must presume that the appealed judgment or order is correct and, on that basis, affirm.

### **BACKGROUND<sup>1</sup>**

In 2007, the Creys obtained a \$700,000 loan, the repayment of which was secured by a deed of trust encumbering a piece of property located in Topanga, California. The beneficial interest in the loan was assigned to HBSC. Wells Fargo serviced the loan on HBSC's behalf. The Creys did not make any payments on the loan between October 2010 and April 2016.

On or about April 10, 2015, Wells Fargo received an application from the Creys for a loan modification. Wells Fargo assigned a single point of contact, Ashley Rouston (Rouston), to communicate with the Creys about their loan workout request. On or about April 27, 2015, Rouston sent the Creys a letter identifying the required information that was missing from their application and the deadline to submit that information.

As of May 13, 2015, Wells Fargo had not received all of the information requested in Rouston's letter. That morning, a notice of trustee's sale was recorded against the property. Later that same day, the Creys' counsel stated that the Creys were still

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<sup>1</sup> The following undisputed facts were set out in the trial court's ruling granting Wells Fargo's motion for summary judgment.

“‘working on obtaining the documents and sending them over.’” On or about June 8, 2016, Rouston sent the Creys another letter identifying the required information that remained outstanding from their application and the deadline to submit that information.

On July 22, 2015, the Creys filed suit against Wells Fargo, alleging five causes of action: a violation of former Civil Code section 2924.18, subdivision (a)(1); a violation of Civil Code section 2923.6, former subdivision (c); a violation of Civil Code section 2923.7; a violation of Business and Professions Code sections 17200 et seq. and 17500 et seq.; and a violation of the covenant of good faith and fair dealing.<sup>2</sup>

In August 2015, based on the information it had received from the Creys, Wells Fargo determined the Creys could not afford the modification programs. Rouston then sent the Creys two letters, dated August 19, 2015, and August 24, 2015, explaining why Wells Fargo was denying their loan modification request. In September 2015, the Creys appealed the denial decision. Rouston sent the Creys a letter acknowledging the appeal and subsequently sent the Creys another letter denying the appeal.

In November 2015, the Creys reapplied for a modification. In response, Wells Fargo assigned a new point of contact to Creys’ account, Malavanh Wood (Wood). Wood sent the Creys a letter introducing herself. Wood then sent the Creys a letter

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<sup>2</sup> On October 21, 2015, Wells Fargo filed a demurrer to the first and fifth causes of action and filed a motion to strike portions of the complaint. The court subsequently took the demurrer off calendar once the Creys filed a first amended complaint.

approving them for a trial payment plan and another letter shortly thereafter denying the Creys request for a modification.

On January 21, 2016, the Creys filed their first amended complaint, which alleged three causes of action: a violation of Civil Code section 2923.7; a violation of Business and Professions Code sections 17200 et seq. and 17500 et seq.; and a violation of the covenant of good faith and fair dealing.

Wells Fargo did not receive any of the payments that were required under the trial payment plan. Accordingly, on February 12, 2016, Wood sent the Creys' counsel a letter explaining that the Creys no longer met the requirements for assistance.

In April 2016, Wells Fargo received another loan modification application from the Creys. Wells Fargo then assigned the Creys a new single point of contact. The new point of contact sent the Creys letters regarding the status of their application and identifying information still missing from their application. As of August 11, 2016, Wells Fargo was still waiting for the Creys to submit all of the requested information. At the time of the trial court ruling at issue in this case, no sale had occurred and no trustee's deed had been recorded against the property.

On August 30, 2016, Wells Fargo moved for summary judgment as to all the Creys' claims. The trial court granted the motion. With respect to the Creys' first claim, Civil Code section 2923.7, subdivision (a), provides that: "Upon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact."

A single point of contact means “an individual or team of personnel each of whom has the ability and authority to perform the responsibilities described in [the statute].” (Civ. Code, § 2923.7, subd. (e).) “The mortgage servicer shall ensure that each member of the team is knowledgeable about the borrower’s situation and current status in the alternatives to foreclosure process.” (Civ. Code, § 2923.7, subd. (e).) Only the April 15, 2015 loan modification request was at issue in the first claim.

The Creys cited no evidence in their opposition to the summary judgment motion. Nor did the Creys introduce any admissible evidence that they were not assigned a single point of contact or had any issues reaching Rouston pursuant to their modification application. As it was undisputed that Wells Fargo provided the Creys with a single point of contact, the trial court granted Wells Fargo’s motion for summary judgment with respect to the Creys’ first cause of action.

With respect to the Creys’ third claim, which alleged a violation of the covenant of good faith and fair dealing, Wells Fargo argued that the Creys could not support their claim because they failed to make timely payments pursuant to the loan agreement. Indeed, it was undisputed that the Creys had not made any payments under the mortgage to any party since 2010. Thus, they could not satisfy a required element of the claim that the Creys fulfilled their obligation under the contract. Consequently, the trial court found that Wells Fargo met its initial burden on summary judgment as to this cause of action.

As the trial court noted, the underlying contract between Wells Fargo and the Creys was the loan agreement. The Creys breached that agreement by failing to make the required payments. Moreover, the loan agreement did not involve the loan

modification at issue here and did not impose on Wells Fargo any duties as to a later requested loan modification. Accordingly, the Creys could not show that Wells Fargo breached the covenant of good faith and fair dealing with respect to the loan agreement by failing to grant them the requested loan modification.

The Creys' second claim alleged a violation of Business and Professions Code section 17200 et seq. Section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383.) Here, however, the Creys two other claims failed. The Creys also alleged that Wells Fargo impermissibly dual tracked their foreclosure by failing to review the pending loan modification while at the same time recording a notice of trustee sale.<sup>3</sup> Although Civil Code section 2923.6 broadly prohibits dual tracking; that is, pursuing both a loan modification and a foreclosure simultaneously, Wells Fargo maintained that the Creys never submitted a complete loan application. The trial

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<sup>3</sup> “ ‘Dual tracking refers to a common bank tactic. When a borrower in default seeks a loan modification, the institution often continues to pursue foreclosure at the same time.’ [Citations.] The result is that the borrower does not know where he or she stands, and by the time foreclosure becomes the lender’s clear choice, it is too late for the borrower to find options to avoid it.” (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 904.) California legislation then attempted to eliminate the practice of dual tracking and ameliorate its effects, by requiring lenders and loan servicers to designate a single point of contact for each borrower in default. (See *ibid.*; see also Civil Code, § 2924.11 [prohibiting dual tracking by all lenders and mortgage servicers effective Jan. 1, 2018].)

court agreed. The Creys argued that their application was complete as of April 2015 as shown by the fact that they were later offered a loan modification. However, the November 2015 approval of a trial payment plan was based on the Creys' reapplication for a loan modification in November 2015. The fact that they were later approved for a trial payment plan based on this later modification did not establish that the loan application previously submitted in April 2015 was complete. In short, the trial court concluded, when the notice of trustee sale was filed on May 13, 2015, the Creys did not have pending a complete loan modification application. Thus, the Creys could point to no violations of law that could potentially render the unfair competition law independently actionable.

### **STANDARD OF REVIEW**

Our review of the trial court's ruling on the summary judgment motion is governed by well established principles. A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); see *id.* § 437c, subd. (f) [summary adjudication of issues].) The moving party bears the burden of showing the court that the plaintiff has not established, and cannot reasonably expect to establish, the elements of his or her cause of action. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) We review the trial court's decision on a summary judgment motion de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 612.) In the trial court, once a moving defendant

has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff may not rely upon the mere allegations or denials of its pleadings but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

### DISCUSSION

On appeal, the Creys have failed to provide Wells Fargo's motion for summary judgment as well as the parties' declarations in support of, and in opposition to, the motion for summary judgment or their statements of undisputed fact or their evidentiary objections. Correspondingly, the Creys' opening brief fail to provide any pertinent record citations.<sup>4</sup> Although Wells Fargo based its entire response on the Creys failure to include these filings in the record, the Creys did not submit a reply brief to this court explaining their failure. Nor did the Creys seek leave from this court to supplement its initial record on appeal.

Appealed judgments and orders are presumed correct, and error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Consequently, the Creys have the burden of providing an adequate record. Failure to provide an adequate record on an issue requires that the issue be resolved against plaintiff. Thus, where, as here, the appellant fails to provide an adequate record of the challenged proceedings, we

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<sup>4</sup> Although the Creys cite to their first amended complaint, plaintiffs may not rely on the mere allegations or denials in their pleadings to avoid summary judgment. (See *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.)



must presume that the appealed judgment or order is correct and, on that basis, affirm. (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

Lastly, the Creys contend that the trial court abused its discretion by not allowing them to amend their complaint after granting Wells Fargo's summary judgment motion. The Creys did not seek to amend their complaint after the trial court issued its ruling. Nor have the Creys cited to any portion of the record in making this argument on appeal. Thus, we will not address the Creys' final argument here. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 122–123 [arguments not raised below are forfeited on appeal].)

#### **DISPOSITION**

The judgment is affirmed. Wells Fargo Bank, N.A., is awarded their costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.