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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LEON W. WATTS III,

Plaintiff and Appellant,

v.

U.S. NATIONAL BANK et al.,

Defendants and Respondents.

B284563

(Los Angeles County  
Super. Ct. No. SC124742)

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

Law Offices of Joseph R. Manning, Jr., Joseph R. Manning, Jr. and Craig Cote for Plaintiff and Appellant.

Locke Lord, Regina J. McClendon and James C. Magid for Defendants and Appellants.

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Appellant Leon W. Watts III appeals from the trial court's entry of judgment following its grant of a motion for summary judgment. We affirm.

## **FACTUAL AND PROCEDURAL HISTORY**

In 2005, Watts obtained a loan, secured by a deed of trust, on his property in Los Angeles from the predecessor to U.S. Bank. (the Bank). In 2013, Watts sought a loan modification; he entered into an executed modification agreement with the Bank in May 2014. In 2015, the Bank recorded notices of default and trustee's sale.<sup>1</sup> Alleging that he had made necessary payments on the property, Watts sued the Bank (and others, who are not parties to this appeal), in 2016 for breach of contract, violation of Business and Professions Code section 17200, violations of Civil Code section 2932.55, negligence, and negligent misrepresentation.

The Bank demurred, and the trial court overruled the demurrer as to the causes of action for breach of contract, violation of section 17200,<sup>2</sup> and negligence. The court sustained the demurrer without leave to amend as to the remaining causes of action. The Bank answered the complaint, and in 2017, moved for summary judgment. The trial court granted the motion on May 24, 2017 and entered judgment the following month. Watts timely appealed.

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<sup>1</sup> As of the close of briefing in this appeal, Watts remains in possession of the property.

<sup>2</sup> Further statutory citations are to the Business and Professions Code.

The trial court found there had been no breach of contract by the Bank and that the evidence demonstrated that Watts had breached the terms of the deed of trust. The trial court also found that Watts had failed to show any damages from the Bank's alleged breach. As to the Section 17200 claim, the court found no triable issue of material fact as to the nature of the Bank's actions that would support the claim. Finally, with respect to negligence, the court found that the Bank owed Watts no duty of care in this case, as the undisputed evidence does not demonstrate facts on which such a duty could be premised, but in fact negates any allegation of negligence.

## DISCUSSION

### A. The Standard of Review

“The standard for deciding a summary judgment motion is well-established, as is the standard of review on appeal.’ [Citation.] ‘A defendant moving for summary judgment has the burden of producing evidence showing that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to that cause of action. [Citation.] The burden then shifts to the plaintiff to produce specific facts showing a triable issue as to the cause of action or the defense. [Citations.] Despite the shifting burdens of production, the defendant, as the moving party, always bears the ultimate burden of persuasion as to whether summary judgment is warranted. [Citations.]’ [Citation.]” (*Hypertouch, Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th 805, 817, 123 Cal.Rptr.3d 8 (*Hypertouch*).) “On appeal, we review de novo an order granting summary judgment. [Citation.] The trial court must

grant a summary judgment motion when the evidence shows that there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citations.] In making this determination, courts view the evidence, including all reasonable inferences supported by that evidence, in the light most favorable to the nonmoving party. [Citations.]’ [Citation.]” (*Id.* at p. 818.) ““The same standards apply to motions for summary adjudication.” (*Id.* at p. 817, fn. 3.)” (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1443–144.)

B. Watts Failed To Demonstrate Any Triable Issues of  
Material Fact With Respect to Breach of Contract

Watts argues that the trial court erred in finding that the Bank did not breach the 2014 modification contract because that agreement specifically excluded any obligation for him to make tax and insurance payments into an escrow account with the Bank, and because he made those payments directly to the appropriate recipients. As to the first issue, he asserts, without citation to authority, that the interpretation of the contract is a factual issue. As to the second, he asserts that the evidence he presented with respect to payment created a triable issue of material fact.

The interpretation of a contract is a judicial function and, in the absence of conflict in extrinsic evidence admitted to demonstrate the meaning of an ambiguous term, is a question of law rather than one of fact. (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 68-69.)

In this case, the initial deed of trust required Watts to make monthly payments for taxes and insurance. Watts asserted that the lender could, and did, waive this requirement. Watts

argued that Section 3(E) of the modification agreement provided that his payments to the Bank excluded escrow payments for taxes and insurance and that he made payments to the Bank that did not include those amounts in May, June, and July of 2014.<sup>3</sup> He also claimed that, prior to the modification agreement, he had timely made payments to the relevant tax agency and insurance companies.

Even accepting Watts' interpretation that the modification agreement was ambiguous, and that he understood it to delete the escrow requirement, the undisputed evidence demonstrates both that he was advised that he was to make those payments to the Bank, and that he failed to make payments to either the Bank or the tax and insurance agencies.

Nine days prior to his execution of the modification, Watts had a telephone conversation with a representative of the Bank, in which he was informed of the amount of the monthly payments for property tax and insurance, as well as the impact of that payment on his total monthly payments. In response to that evidence, Watts alleged disputed issues in his separate statement of undisputed facts. While he cited his own declaration, nowhere in the cited paragraphs of that declaration did he deny having

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<sup>3</sup> As discussed below, Watts failed to cite any legal authority for his argument in this appeal that the trial court improperly sustained objections to his declaration. Because on appeal, he must demonstrate error by citation to relevant legal authority (*Multani v. Witkin & Neal, supra*, 215 Cal.App.4th at p. 1457; *Rojas v. Platinum Auto Group, Inc.* (2013) 212 Cal.App.4th 997, 1000, fn. 3) he has therefore waived those objections. Accordingly, this discussion refers only to those portions of his declaration admitted into evidence.

the conversation referred to by the Bank, a transcript of which was in the record. Watts argued that he did not have the obligation to make the payments, but did not argue that he had not been advised of the total amount owed on a monthly basis, which included the challenged amounts.

With respect to taxes and insurance, Watts declared that he had made those payments separately prior to entering the modification agreement, but did not assert that he made those payments after the modification agreement came into effect.<sup>4</sup>

Other evidence in the record supports the conclusion that there is no factual dispute with respect to Watts' breach. He admitted in discovery that he made only one property tax payment in the years 2013 and 2104. He failed to dispute the Bank's showing that it had made the relevant property tax and insurance payments, and made no assertion that those payments duplicated any payment he had made.

Accordingly, even accepting for purposes of this motion Watts' view of his obligations under the Modification Agreement, the undisputed evidence demonstrates that he failed to fulfill those obligations. Watts failed to either perform his obligations under the contract or to establish that his performance was excused; summary judgment is proper as to this cause of action. (See *Miles v. Deutsche Bank Nation Trust Co.* (2015) 236 Cal.App.4th 394, 402 [to establish a breach of contract claim,

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<sup>4</sup> Watts also referred to his deposition testimony; the portions attached related only to a partial payment of property tax in 2013, and did not demonstrate any payment in 2014, or any payment of insurance at any time.

plaintiff must prove, as one of the elements, his performance or excuse for non-performance].)<sup>5</sup>

### C. The Summary Judgment Was Proper As to the Claim of Negligence

Watts alleged in his complaint that the Bank was negligent in its servicing of his account, failing to: accurately account; notify him of foreclosure actions; refrain from taking actions that the Bank did not have authority to take; and provide relevant information with respect to foreclosure prevention. He argues on appeal that the Bank also breached its duty to him with respect to subsequent loan modification applications.

“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.]” (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 62 (*Lueras*).

In *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089 (*Nymark*), the court, after examining factors relevant to a finding of duty under *Biakanja v. Irving* (1958) 49

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<sup>5</sup> Watts argues that the trial court erred in overruling his objections to the Wells Declaration submitted by the Bank but fails to support his argument with relevant legal authority. Although he asserts that Mr. Wells had insufficient personal knowledge, *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 851, fn. 6, does not establish a standard that was not met in this case. Accordingly, he has failed to demonstrate error.

Cal.2d 647, held a financial institution generally owes no duty of care to a borrower when it acts within the scope of its traditional role as a lender; there, the issue was the appraisal of property tendered as security, and the court found that to be within the traditional role. In *Lueras, supra*, 221 Cal.App.4th at p. 67, the court considered whether a bank's consideration of loan modifications and alternatives to foreclosure were within a lender's conventional role; concluding that they were, the court found no basis to impose a common law duty.

In this case, the trial court found that the Bank owed no duty of care to Watts because it took no actions beyond those of an ordinary lender. Watts relied in the trial court on *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941 (*Alvarez*). *Alvarez* came to a different conclusion than *Lueras* had with respect to the existence of a duty arising from the consideration of a request for loan modification. The trial court recognized that *Alvarez* had found a duty of care related to the processing of a loan modification, but distinguished that case because the undisputed evidence in this case negated any claim of negligence in processing any modifications.

On appeal, Watts argues that the factors relied on in *Nymark, supra*, 231 Cal.App.3d 1089, on the facts of this case, properly establish a duty of care because the Bank denied his loan modification request in 2016, after the foreclosure process had commenced. He relies primarily on *Alvarez, supra*, 228 Cal.App.4th 947 and on *Rossetta v. CitiMortgage, Inc.* (2017) 18 Cal.App.5th 628, which also found that a duty of care may arise during loan modification negotiations.

However, as the trial court found, there is no disputed issue of material fact in this regard under the analysis of *Alvarez* and



*Rossetta*. Watt's only factual assertion with respect to any failures in the process is in his declaration at paragraph 16. The Bank objected to that evidence; the trial court sustained the objection; on appeal, Watts asserts the trial court erred but fails to provide any legal argument to support that assertion. Accordingly, Watts has failed to demonstrate error in this ruling.

Because there are no factual allegations in the complaint describing the post-2014 loan modification process, and no admissible evidence with respect to that process other than that provided by the Bank, there is no factual basis to find a legal duty in this case.

#### D. Watts's Claim Under Section 17200 Fails As The Breach of Contract Claim Fails

The trial court found summary judgment proper on the claim of breach of contract. It further found that it was undisputed that the Bank had notified Watts of the amount of his payment obligation, and that he had failed to make any payments on the loan after July 2014. Accordingly, the trial court concluded that there was no evidence of any unfair, unlawful or fraudulent business practice. On appeal, Watts argues only that the facts that support his claims for breach of contract and negligence support this claim as well. As we have found no disputed issues of material fact with respect to those claims, Watts has failed to demonstrate that summary judgment is improper.

### **DISPOSITION**

The judgment is affirmed. Respondent is to recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.