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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 THREE

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| HARRY M. FOX,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>JPMORGAN CHASE BANK, N.A., et al.,<br>Defendants and Respondents. | B285069 (Consolidated with B288282)<br><br>(Los Angeles County Super. Ct. No. BC602491) |

APPEAL from a judgment of the Superior Court of Los Angeles County and a separate appeal from an award of attorney fees. Dalila Corral Lyons, Judge. Affirmed.

Law Office of Richard L. Antognini, Richard L. Antognini, for Plaintiff and Appellant.

Parker Ibrahim & Berg, John M. Sorich, Heather E. Stern for Defendants and Respondents.

## INTRODUCTION

Appellant Harry Fox (Fox) challenges the trial court's grant of defendants', JPMorgan Chase Bank, N.A. (Chase), California Reconveyance Company (CRC), U.S. Bank National Association (U.S. Bank) (collectively, defendants) motion for summary judgment. Fox contends that summary judgment was improper because he presented triable issues of material fact in opposition to defendants' motion. Specifically, Fox asserts that defendants failed to negate his allegation that they did not own his loan and, therefore, did not have the authority to collect on it. In addition, Fox challenges the trial court's conclusion that the law precludes certain claims. Finally, Fox complains that he was unable to complete discovery before being required to oppose a motion for summary judgment.

In a consolidated appeal, Fox challenges the trial court's award of attorney fees to defendants.

We find that the trial court correctly concluded that Fox failed to controvert by competent evidence that U.S. Bank is the trustee for the trust pool that held the beneficial interest in Fox's loan. We also find that the trial court properly found that Fox failed to controvert by competent evidence that Chase is the servicer of Fox's loan and has possession of the original Note and Deed of Trust (DOT). The trial court also properly found that Fox failed to controvert by competent evidence that CRC is the trustee under the DOT. In short, we agree with the trial court that the record is devoid of any competent evidence to support Fox's allegation that these entities are strangers to his loan and that there is a different real creditor to whom his mortgage payments are due and owing.

The only evidence submitted by Fox in opposition to the defendants' motion for summary judgment was a declaration of his attorney, which attached, inter alia, certain documents that had been produced by defendants in discovery. The declarant was unable to explain the meaning of these documents within the context of the issues presented in defendants' motion. Only six of them were referenced in Fox's responsive separate statement. As observed by the trial court, one exhibit was "incomprehensible" and failed to provide competent evidence of any factual proposition.

We also conclude that Fox's myriad objections to the circumstances of the origination and securitization of his loan by Washington Mutual Bank (WaMu) do not constitute a legally sufficient ground to void the DOT and the 2011 Corporate Assignment of the Deed of Trust (ADOT). Fox's claims against WaMu for its alleged conduct or omissions in the origination and securitization of his loan are barred because he failed to administratively exhaust these claims. Further, Fox lacks standing to challenge the way in which WaMu securitized his loan.

As there were no triable issues of material fact adduced to support Fox's claimed breach of the lending agreements, the trial court properly granted summary judgment for the defendants on Fox's causes of action for breach of contract, declaratory relief, cancellation of instruments, slander of title, and breach of the covenant of good faith and fair dealing.

We also affirm the trial court's ruling on the remaining causes of action for accounting and negligence. An accounting is unavailable when, as in this case, the Fox is seeking to know how much he owes on an obligation. And, we concur with the trial

court's grant of summary judgment on the negligence claim. Defendants owed Fox no duty of care given the uncontroverted facts of this case.

Further, we reject Fox's contention that the trial court abused its discretion by denying his request to continue the defendants' motion for summary judgment to complete discovery. (Code Civ. Proc., § 437c, subd. (h).)

Finally, in the consolidated appeal, we find no error in the trial court's award of attorney fees to the prevailing parties on claims that were brought on contract.[1]

## BACKGROUND

As supported by substantial evidence in the record, the essential facts regarding this lending relationship are as follows:

Fox obtained a residential loan from WaMu in 2006 (Subject Loan.) The Subject Loan was evidenced by an Adjustable Rate Note (Note) dated December 6, 2006, and executed by Fox. The Note shows that WaMu is the lender. The Subject Loan was further evidenced by a DOT executed by Fox and encumbering real property located at 14130 Mulholland

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[1] Fox's notice of appeal in B288282 states that he is appealing a post-judgment order entered December 14, 2017. On that date, the court also denied Fox's motion to strike defendants' memorandum of costs and granted in part and denied in part Fox's motion to tax defendants' costs. In Fox's opening brief, however, he fails to assert any error with regard to the trial court's awarding of costs. Accordingly, the appeal of the cost-related aspects of the trial court's December 14, 2017 order has been abandoned and is waived. (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002.)

Drive, Beverly Hills. The DOT was recorded on December 14, 2006 as instrument number 06-2777744.

The DOT expressly provides that the loan or a partial interest in the loan, together with the DOT, "can be sold one or more times without prior notice to Borrower." "A sale might result in a change in the entity (known as the 'Loan Servicer') that collects Periodic Payments due under the Note and or . . . this Security Instrument, and Applicable Law." Further, in paragraphs O and Q of the DOT, there are definitions of the terms " 'Periodic Payment' " and " 'Successor in Interest of Borrower,' " respectively. These provisions do not impose requirements under the DOT, but rather define terms used in that instrument.

In 2007, WaMu sold the loan to a securitized trust pool. A Pooling and Service Agreement was executed between WaMu Asset Acceptance Corporation, as depositor, WaMu, as servicer, LaSalle Bank National Association as trustee, and Christiana Bank & Trust Company as Delaware Trustee. Under this agreement, WaMu Asset Acceptance Corporation deposited the Subject Loan into the WaMu Mortgage Pass-Through Certificates Series 2007-HY1 Trust and WaMu retained the servicing rights of the Subject Loan. The Pooling and Service Agreement's closing date was January 24, 2007.

In October 2008, the Office of the Controller of the Currency issued a certificate to merge LaSalle Bank National Association into Bank of America, National Association. On December 30, 2010, pursuant to a purchase agreement, U.S. Bank succeeded Bank of America as the trustee for the trust pool.

After WaMu failed and went into receivership with the Federal Deposit Insurance Corporation (FDIC), Chase acquired

certain WaMu assets from the FDIC, including the servicing rights to the Subject Loan.

In 2010, Fox failed to make payments on the Subject Loan for eleven consecutive months. Fox then started the loan modification process and Chase executed a Home Affordable Modification Agreement on November 4, 2011. As a result of the loan modification, the loan was brought current with a new start date of December 1, 2011. The ADOT also memorialized the previous granting, assigning and transferring of the beneficial interest in the Fox DOT to Bank of America, N.A., successor by merger to LaSalle Bank National Association, as trustee for the trust pool.

In November 2015, Fox filed a complaint against U.S. Bank, CRC and Chase, alleging eleven different causes of action. Fox's principal objection to his mortgage banking relationship with these defendants was that his loan modification process resulted in adding $52,845.26 to the principal balance and in the introduction of changes to the original mortgage note, including the addition in unpaid or deferred interest, attorney fees and court costs, and escrow fees. Further, Fox complained that Chase, the loan servicer, "failed, or refused, to provide any accounting . . . made on the loan prior to the . . . Modification or to provide an accurate explanation of the amounts of interest being reported to the IRS on [Fox's] loan."

Demurrers ensued and after amending the complaint, the operative complaint alleged seven causes of action: declaratory relief, cancellation of instruments, slander of title, breach of contract, accounting, negligence and breach of the covenant of

good faith and fair dealing.[2] Fox's causes of action were predicated on a number of claimed misdeeds by WaMu and resulted in none of the defendants being his "real creditor" and Chase not being the "legal valid servicer" of the Subject Loan.

In the first cause of action for declaratory relief, Fox sought a judicial determination as to the "validity [of the] Borrower's Contracts, which [Fox] challenges as void." Claiming "uncertainty" over whether defendants have an enforceable interest in the borrower's contracts, Fox alleged that he was making "mistaken payments to strangers" and asked for the creation of a trust fund during the pendency of the litigation until the "real creditor" is determined and that "[d]efendants be enjoined and restrained from further collection attempts on the loan."

Similarly, in the second cause of action, Fox re-alleged illegal conduct by WaMu that voided the DOT and alleged that the ADOT was void because "Chase held no beneficial interest in the debt or Borrower's Contracts and therefore, had no authority to transfer interest." No tender is required by Fox as "defendants are strangers with no legal, equitable or pecuniary interest in his debt." Cancellation of the DOT and ADOT is necessary because Fox continues to be subject to "strangers seeking to collect on a debt to which those stranger (*sic*) have no legal valid interest."

In the third cause of action, Fox alleged that both the DOT and ADOT contain false representations and were undertaken by defendants to "obscure and conceal" the true and valid creditor. Because of this slander of title by defendants, Fox has been

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[2] Fox did not assert any error in the trial court's rulings on the demurrers.

unable to refinance his property with more competitive lenders and incurred "unnecessary charges and uncredited payments added to the loan" as well as emotional distress and a lower credit rating.

In the fifth cause of action for breach of contract, Fox asserted seven acts by which defendants breached the Note and Deed of Trust. Specifically, Fox alleged that they breached the note by failing to properly credit payments paid on the loan, assessing charges and fees not allowed by the Mortgage Note or DOT, violating paragraphs P and Q of the DOT, and improper securitization practices by WaMu.

In the ninth cause of action, Fox complained that he had not required an accounting of all monies that he has paid on the loan and to whom. He sought such an accounting by the cause of action so that he could recover the "wrongfully taken funds in order to tender them to the real creditor less any set offs."

In the tenth cause of action, Fox alleged that Chase had breached its duty of care to report accurately to the IRS the interest amounts paid. In addition, Fox alleged that US Bank, through its agent, breached its duty of care regarding the mortgage interest.

In the eleventh cause of action, Fox alleged that defendants breached the covenant of good faith and fair dealing by misrepresenting the "true lender," misrepresenting the "true balance on the loan," misrepresenting that Chase purchased the loan from the FDIC, misrepresenting that Chase has the authority to transfer the beneficial interest in the DOT, misrepresenting the indorsement on the note for the purpose of claiming rights to payment, assessing improper fees and charges, and falsely reporting improper amounts to the IRS.

In this action, Fox asserted under a number of causes of action and in the prayer for relief that he was entitled to recover his attorney fees from defendants.

On March 30, 2017, defendants filed a motion for summary judgment, or in the alternative, summary adjudication. In support of the motion, defendants submitted the declaration of Eric Bovee, a Chase employee and authorized signer for Chase. Bovee authenticated the Note and the DOT and explained the relevant documents that showed how U.S. Bank came to be the trustee for the trust pool and how Chase came to be the servicer on the loan. Bovee also authenticated the ADOT and explained that the signatory had authority. Bovee also stated that Chase, as the servicer, had and maintained the original DOT and Note in its capacity as servicer. Defendants also addressed Fox's remaining claims and why they failed as a matter of law.

In opposition, Fox filed an untimely memorandum of points and authorities. Fox failed to include any declaration from the borrower or anyone else purporting to have personal knowledge of matters pertaining to the Subject Loan. The only declaration supporting Fox's opposition was from Ronald Freshman, who was Fox's lawyer. He attached documents that he asserted were produced in discovery, but failed to include evidence from any declarant with personal knowledge of their contents or who would be capable of explaining their meaning.

One of the exhibits repeatedly referenced in the opposing separate statement was exhibit 11, a record entitled 3270 Explorer: Loan Transfer History. According to Freshman, this was a "loan history transfer file" that had been produced by Chase. When asked by the trial court to identify a fact that supported Fox's claim that the loan had not been properly

securitized, Freshman identified this exhibit. When the trial court characterized the "bunch of numbers" that had not been explained, Freshman asserted that "[we] just had the deposition taken of the person most knowledgeable," and "in those records, it doesn't show that the loan followed the path of the pooling and servicing agreement." There was, however, no citation to the deposition transcript supporting that argument provided to the court—either in opposition or at oral argument.

After hearing from counsel, the trial court adopted its tentative ruling as the final order of the court, and judgment in favor of defendants was entered.

On December 17, 2017, the trial judge ruled on defendants' motion for attorney fees. The trial court awarded attorney fees pursuant to Civil Code section 1717 and the DOT.

Two appeals followed. These appeals were consolidated on July 8, 2019.

## DISCUSSION

I. Standards of Review

On appeal from a grant of summary judgment, the court exercises its independent judgment, deciding whether undisputed facts have been established that negate the opposing party's claim or state a complete defense. (See *Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal.App.4th 33, 37.)

Summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (*Starzynski v. Capital Public Radio, Inc.*, *supra*, 88 Cal.App.4th at p. 37 citing Code Civ. Proc., § 437(c).) A defendant meets his burden of showing that a cause of action has no merit if that party has shown that one or more

elements of the cause of action cannot be established. (*Starzynski*, at p. 37.) Once the moving party meets its burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists. (*Id.* citing Code Civ. Proc., § 437(c), subd. (o)(2).)

Error is not presumed on appeal. (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) "All intendments and presumptions are indulged to support it on matters as to which the record is silent and error must be affirmatively shown." (*Id*.) Also, if we find no issue of material fact, we affirm the summary judgment if it is correct on any legal ground applicable to the case "whether that ground was the legal theory adopted by the trial court or not." (*Moghadam v. Regents of University of California* (2008) 169 Cal.App.4th 466, 475.)

On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1004.) However, to the extent that an appellate court construes and defines the statutory requirements for an award of attorney fees, its review is de novo. (*Ibid.*; *La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2018) 22 Cal.App.5th 1149, 1155.)

II. Analysis[3]

A. Fox failed to adduce any facts to support his argument that defendants were strangers to the subject loan.

In their opening brief on the motion for summary judgment, defendants presented a sworn declaration and supporting business records establishing that U.S. Bank was the trustee of the trust pool that held the beneficial interest in the Subject Loan, that Chase was acting as a servicer of the loan and had possession of the original Note and DOT in its capacity as servicer, and that CRC was the trustee under the DOT. Thus, this evidence clearly established that these defendants were not strangers to Fox's loan.

The burden then shifted to Fox to adduce competent evidence showing a triable issue of fact with respect to his claim that defendants were strangers to the loan. In response, Fox submitted a declaration of counsel. The attorney's declaration and its attachments failed to provide any factual basis for any contention that the "real creditor" was an entity other than U.S. Bank, as trustee for the trust pool, with Chase acting as servicer and CRC as the trustee under the DOT. Fox did not provide a declaration to the effect that he had been paying a different bank, or received bills from a different bank. Nor did Fox provide any evidence to controvert that CRC was the appointed trustee under the DOT, as it was the original trustee identified in the DOT that

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[3] We decline to affirm summarily the trial court's ruling based on Fox's failure to provide the reporter's transcript. On February 28, 2019, appellant filed a copy of the reporter's transcript of the summary judgment hearing.

Fox signed. As correctly observed by the trial court, a declaration of Fox's lawyer with a set of attached exhibits is merely argument and did not constitute evidence that would establish a controverted fact.[4] (Cf. *C.L. Smith Co., v. Roger Ducharme, Inc.* (1977) 65 Cal.App.3d 735, 740.)

Another item attached to Freshman's declaration was a "Forensic Report" from Dr. James M. Kelly. That report was not signed under penalty of perjury, nor did it contain information regarding the declarant's background or qualifications to render an opinion. Rather, his qualifications are simply that he is "a forensic computer scientist with five [years'] experience in this specific type of examination, and a PhD in Electrical and Computer Engineering." Nothing in that unattested declaration created a factual basis for Fox's claim that these defendants were strangers to the loan.[5]

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[4] Fox mischaracterizes the problems with counsel's declaration and exhibits as one addressed under the Rules of Evidence. That was not the trial judge's concern; defendants' evidentiary objections were overruled. Rather, even if admissible, the declaration and exhibits failed to establish a disputed fact. Exhibit 11 failed to establish "multiple owners of the loan," as Fox contends. Nor does it establish the ownership of the Subject Loan at the time of the WaMu bankruptcy. Nor were those facts established by a competent witness, such as a Chase employee, at any deposition. Nor did Chase's admissions help establish a controverted fact.

[5] The expert's examination focused only on the Adjustable Rate Note, DOT and Fixed Adjustable Rate Rider from 2006. As discussed *infra*, Fox's contentions that the origination and securitization of his loan by WaMu were improper do not present

Freshman also attached partial transcripts of two depositions. However, none of the testimony in those transcripts created a factual dispute. The only testimony cited in Fox's separate statement was from Rosemary Martin. Her testimony simply showed that she did not know what certain specific codes meant when she was confronted with them at her deposition. That fact fails to support any factual inference, particularly when, as here, the record does not include a deposition notice that would indicate the topics she was going to be expected to testify about as the "person most knowledgeable," or the exhibit she was going to be asked to explain. (See *Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 242–244 [discovery responses admitting that certain items were difficult to calculate did not support an inference that they were unable to be calculated for proving same for summary judgment].) There is nothing in the Martin testimony or the unidentified codes in exhibit 11 that creates the existence of a disputed issue of fact regarding the ownership of the Subject Loan.[6]

Nor is there any law in California that requires, as Fox asserts, that defendants provide an unbroken chain of endorsements to obtain summary judgment against a claim that they do not own a loan. Rather, what is required is that the

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justiciable issues in this case and do not support a claim against the present defendants.

[6] Fox's opposition failed to include the deposition notice of Martin. Although Fox's counsel noted her lack of an ability to explain the exhibit at the hearing on summary judgment, Fox failed to include the deposition notice of the person most knowledgeable requesting specifically information on the meanings of various codes or which attached exhibit 11.

party asserting the right under an assigned instrument bears the burden of demonstrating the assignment. (See *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270.) In this case, defendants have met that burden with clear and positive evidence. The declarations submitted in support of defendants' motion for summary judgment presented admissible evidence of their current relationships to the Subject Loan, and the transfers that effectuated that outcome. Further and significantly, Chase, as servicer, holds the Original Note and DOT. The possession of these instruments, without more, corroborates defendants' contentions. Against these facts, Fox failed to adduce one iota of evidence that there is a different, real creditor to whom he owes his mortgage debt.

Freshman's declaration also included certain written discovery responses attached as exhibits. Again, only two exhibits are referenced in the opposing separate statement. As to that reference, Chase's admission in discovery that it never purchased the loan does not create a disputed material fact. Chase only ever claimed to be the servicer here, not the purchaser of the loan. Thus, the discovery responses cited by Fox showed a fact that was not disputed, but also not material.

Based on the undisputed facts establishing defendants' relationship to the loan and Fox, the trial court properly found Fox's claims based on the defendants being strangers to the loan could not survive. Accordingly, summary judgment on the first, second and third causes of action was entirely proper. Additionally, Fox's breach of contract and breach of the implied covenant causes of action based on Fox's claim that the defendants were strangers to the loan were similarly unsupported by evidence in the record.

B. Fox's allegations regarding WaMu's conduct in originating and securitizing the subject loan are not actionable.

Fox asserts several objections to the way in which WaMu, the original bank that made the Subject Loan, perfected that obligation and later securitized it. These allegations support, in part, the first, second and third causes of action and the remaining allegations in support of the fifth cause of action for Breach of Contract and the eleventh cause of action for Breach of the Covenant of Good Faith and Fair Dealing. Fox objects, inter alia, that WaMu improperly funded the Subject Loan, in violation of California law. Fox also objects that WaMu changed its corporate name but still used an earlier form of its name in the original Subject Loan documents. Fox also alleged that WaMu improperly securitized the loan as part of WaMu 1007-HY1 Trust.

There are two legal defects with the portion of Fox's lawsuit that features misdeeds by WaMu. Fox has no standing to complain about the way in which WaMu securitized the Subject Loan in a Trust Pool. Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 809.) Plaintiff, therefore, "bore the burden to allege facts which established" that she had a beneficial interest in the assignment and substitution that is "concrete and actual, and not conjectural or hypothetical." (*Ibid.*) A borrower such as Fox has no such beneficial interest. (*Id.* at p. 815.)

Equally fatal to his claims, Fox's claims against WaMu relating to the origination of the Subject Loan and its subsequent securitization are jurisdictionally barred. The Financial

Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) provides that "no court shall have jurisdiction over—(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as receiver; or (ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver." (12 U.S.C. § 1821 (d)(13)(D)(i–ii).) Where, as here, WaMu failed and the FDIC stepped in as the receiver, the courts were thereafter stripped of any jurisdiction of any claim relating to WaMu's acts or omissions made outside the administrative procedures of title 12, section 1821 (d)(13)(D) of the United States Code. (*Henderson v. Bank of New England* (9th Cir. 1993) 986 F.2d 319, 321.) "A claimant must therefore first complete the claims process before seeking judicial review." (*Id.*) As Fox did not exhaust this administrative remedy, judicial review of his claims against WaMu is barred.

Either because of a lack of standing or because of the jurisdictional bar of FIRREA, Fox's allegations of table funding, incorrect corporate names on documents, forgery of signatures or other misdeeds by WaMu in the origination and securitization of the Subject Loan are legally defective and summary judgment was properly granted.

C. Summary judgment was properly granted on the accounting (ninth) and negligence (tenth) causes of action.

In his ninth cause of action for an accounting, Fox sought an accounting of *his* payments made on his loan so that he could recover amounts wrongfully paid to the stranger banks and tender them to his real creditor. As discussed, *infra*, there was no material dispute established by Fox to support his claim that

these defendants were not the real creditors and were strangers to the Subject Loan. However, even if such an allegation were supported by any competent evidence in the record, a claim for an accounting still would not survive.

A cause of action for an accounting requires a showing that a relationship exists between the parties that requires an accounting and that some balance is due to the plaintiff that can only be ascertained by an accounting. (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) Here, Fox cannot establish that defendants owed such a duty. The relationship between a borrower and a lending institution is not fiduciary in nature. Nor was a factual basis stated by Fox to show that the defendants were in possession of money that they were obligated to surrender. (*Id.* at pp. 179–180.) An accounting is a " 'species of disclosure, predicated upon the Plaintiff's legal inability to determine how much money, if any, is *due*.' " (*Id.* at p. 180, italics added.) It is not an appropriate tool for a disorganized debtor to establish how much he has already paid. (See *Pazargad v. Wells Fargo Bank, N.A.* (C.D. Cal. Aug. 23, 2011, No. CV 11-4524 ODW (PJWx)) 2011 U.S. Dist. LEXIS 94850, at *15 ["[B]ecause it is plaintiffs who still owe money to Defendant, and not the other way around, Plaintiffs cannot properly bring a claim for an accounting."].)

The tenth cause of action for negligence also cannot be asserted as a matter of law. In this claim, Fox sought to sue the defendants because Chase had improperly reported his mortgage payments to the IRS and, derivatively, that U.S. Bank is liable for the actions of its alleged agent. As held by the trial court, summary judgment was proper as Fox could not show any duty of care owed by defendants. (See *McIntyre v. The Colonies-Pacific,*

*LLC* (2014) 228 Cal.App.4th 664, 671 [legal duty of care is an element of a negligence cause of action].) A financial institution owes no duty of care to a borrower where the institution's involvement in a loan transaction does not extend beyond its conventional role as the lender of money. (*Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 466.) The conduct complained about here—the reporting of mortgage payments to the IRS—is within the normal arms-length course of servicing a loan. In such " 'normal commercial banking transaction' " the bank is in no sense a true fiduciary. (*Peterson Development Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 119.)

In addition, the gravamen of Fox's negligence claim was that Chase failed to calculate and report his mortgage payments to the IRS accurately. Banks are required to report mortgage interest to the IRS pursuant to title 26, section 6060H of the United States Code. Under this provision, the bank is required to provide, inter alia, the amount of mortgage interest received for the calendar year and the amount of outstanding principal on the mortgage at the beginning of the calendar year. (*Id*. at (b)(1(A–G).) There is, however, no private cause of action for a bank's failure to comply with this provision. (See *Strugala v. Flagstar Bank, FSB,* (N.D. Cal. Sept. 4, 2015, No. 5:13-cv-05927-EJD) 2015 U.S. Dist. LEXIS 118619, at *4 [no private action for erroneously reporting interest payments to the IRS implied in 20 U.S.C. § 6050H].)

Thus, no triable issue of fact was presented on Fox's negligence claim and the trial court correctly granted summary judgment in defendants' favor.

D. Trial court did not abuse discretion in denying request for continuance.

In opposition to the defendants' motion for summary judgment, Fox noted that discovery had not been completed and, therefore, "it is reversible error" to grant summary judgment. Specifically, Fox noted that there were eight discovery motions outstanding and that these disputes remained unresolved. At oral argument, Fox's counsel failed to renew his objection or to request a continuance.

The trial court did not abuse its discretion in denying Fox's request for additional discovery before ruling on the defendants' motion for summary judgment. As noted by defendants in their opposition, the case had been pending for over a year and a half. Fox had obtained responses to twelve written discovery requests, received over 2,700 documents from the defendants, taken multiple depositions and completed third party discovery. Moreover, the eight discovery motions claimed to be on calendar were, in fact, only one motion to compel investor codes. Fox filed six other motions, but they were not timely filed. In fact, these motions were set for hearing after the trial date.

As for the investor codes, defendants had already provided Fox with the information requested. Thus, even a successful motion to compel would not have provided Fox with any new discovery. Where, as here, Fox's counsel failed to provide the court with the good faith showing required under Code of Civil Procedure section 437c, subdivision (h), a request for continuance is properly denied. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254–255.)

E. Attorney fees were properly awarded.

In the consolidated appeal, Fox challenges the trial court's award of attorney fees to the prevailing defendants. Fox's initial contention is that fees are not warranted because defendants were not entitled to summary judgment. As discussed above, we affirm the trial court's grant of summary judgment for the defendants. Thus, Fox's argument that defendants were not prevailing parties is without merit.

Fox further contends that Chase is not entitled to fees because, as the loan servicer, it was not a party to the DOT. And, the other defendants, who were arguably parties or their successors, are not entitled to attorney fees because only Chase incurred attorney fees arising from this litigation.[7] Fox asserts that because his contractual liability for attorney fees incurred by the servicer was not clear to the borrower, it cannot be legally imposed.

Under the American rule, each party to a lawsuit ordinarily pays its own attorney fees. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751.) Code of Civil Procedure section 1021 codifies this rule by permitting parties to " ' "contract out of the American rule" ' " by executing agreements

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[7] Although Fox speculates on appeal that only Chase incurred attorney fees because the lawyer's bills were sent to Chase, this factual contention was never made in the trial court. Defendants refute Fox's argument and note that the motion for fees was made for all defendants for their jointly incurred attorney fees. As Fox's new argument that only Chase incurred attorney fees implicates a contested fact, it cannot be considered for the first time on appeal. (See *Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal.App.3d 9, 26.)

that allocate attorney fees. (*Mountain Air Enterprises, LLC*, at p. 751.) Thus, parties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves. (*Ibid.*) If such litigation sounds in contract, the provisions of Civil Code section 1717 may come into play. (*Mountain Air Enterprises, LLC*, at p. 751.) Under this provision, " 'it is necessary to determine whether the parties entered an agreement for the payment of attorney fees and, if so, the scope of the attorney fee agreement.' " (*Ibid.*)

Fox's 2006 DOT contained provisions addressing the recovery of attorney fees concerning the loan.

Specifically, section nine of the DOT provides, in relevant part:[8]

"If (a) Borrower fails to perform the covenants and agreements . . . [or] (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument . . . then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including . . . (c) paying reasonable attorney fees to protect its interest in the Property and/or rights under this Security Instrument . . ."

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[8] This same provision requires the addition of attorney fees to the Loan Amount. "These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment." This provision was never cited by Fox—either in the trial court or on appeal—as a basis for his claim of error. As it has not been raised, it has been abandoned and is waived.

The DOT also provides that "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." This sale "might result in a change in the entity (known as the 'Loan Servicer') that collects Periodic Payments due under the Note and this Security Instrument . . . ." It continues, "There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note."

The trial court did not err in concluding that these provisions in the DOT entitled defendants to their attorney fees. Fox sought to cancel or void the Note and DOT and to enjoin defendants from collecting any sums due or from foreclosing. Fox's operative complaint expressly attacked the enforceability of the lender's interest in the property and required the defendants (including, without limitation, Chase) to pay attorney fees to protect these interests.

And, although defendant Chase was not a signatory to the loan documents, it stood in the shoes of a signatory and Fox sued Chase as if it were a party to the DOT. (See *Chacker v. JPMorgan Chase Bank, NA* (2018) 27 Cal.App.5th 351, 356.) In *Chacker*, the court held that virtually identical language in a DOT entitled Chase to enforce the attorney fees provisions even though it was not a signatory or lender. Under Civil Code section 1717, a prevailing party may be entitled to attorney fees under contracts containing express attorney fees provisions even though he or she is not the party specified in the contract. Where, as here, Fox sued Chase and two other defendants and sought attorney fees under the DOT, the "mutuality of the remedy provided by Civil Code Section 1717" authorizes Chase to seek

attorney fees from Fox under the same provisions of the deed of trust. (*Id.*)

As the trial court correctly and properly interpreted Civil Code section 1717 to provide a reciprocal remedy for a non-signatory defendant sued on the contract as if it were a party and where Fox would have been entitled to attorney fees against Chase had he prevailed, there is no legal error here.

**DISPOSITION**

The judgment is affirmed. The award of attorney fees is affirmed. Defendants shall recover their costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

JONES, J.*

We concur:

EDMON, P. J.

EGERTON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.