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

GWENDOLYN JACKSON,  
Plaintiff and Appellant,

v.

AMERICA'S SERVICING  
COMPANY,

Defendant and Respondent.

B284351

Los Angeles County  
Super. Ct. No. BC547723

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

Gwendolyn Jackson, in pro. per., for Plaintiff and Appellant.

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

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## INTRODUCTION

Plaintiff and appellant Gwendolyn Jackson (plaintiff) lost her home in a nonjudicial foreclosure sale. She subsequently filed this action against parties involved in the foreclosure including, as is pertinent here, America's Servicing Company, a division of Wells Fargo Bank, N.A. (ASC). In plaintiff's prior appeal to this court, we largely affirmed the trial court's judgment in favor of ASC, which judgment was entered by the court after it sustained ASC's demurrer to the original complaint without leave to amend as to all causes of action. We concluded then that there was a reasonable probability that plaintiff could amend her negligence claim to state a valid claim and, upon remand, plaintiff amended her complaint to allege ASC negligently handled her request for a loan modification. ASC moved for summary judgment. The court granted the motion and entered judgment in favor of ASC.

Plaintiff, who represented herself below and does so on appeal, asserts three cognizable arguments. First, she claims the court violated her rights under the Seventh Amendment to the United States Constitution by denying her a jury trial. Second, she contends the court erred in denying a request to compel further discovery responses from ASC, which request she filed on an ex parte basis on the morning the court was scheduled to hear ASC's motion for summary judgment. Third, plaintiff argues the court erred in denying her motion to continue both the hearing on ASC's summary judgment motion and the trial so that she could conduct further discovery. These arguments are without merit. And to the extent plaintiff challenges the court's ruling on the summary judgment motion itself, she has failed to provide an adequate record to facilitate our review. We affirm the judgment.

## **FACTS AND PROCEDURAL BACKGROUND**

In January 2006, plaintiff obtained a home loan in the amount of \$382,000. She defaulted on the loan and in early February 2008, she received a notice of default. Plaintiff contacted the mortgage loan servicer, ASC, repeatedly to ask for a loan modification. ASC offered plaintiff one loan modification, but she rejected it as “unreasonable.” ASC rejected approximately 10 other modification requests over the course of the next six years. In January 2014, the property was sold at a nonjudicial foreclosure sale.

In June 2014, plaintiff filed the complaint in the present case, naming ASC and other entities, as well as the purchaser of the property, as defendants. Her complaint asserted 10 causes of action relating to the sale, generally alleging the foreclosure and sale were unlawful. The court sustained the defendants’ demurrers without leave to amend and plaintiff appealed. In an unpublished decision, we affirmed the court’s judgment in favor of the defendants with regard to all of plaintiff’s causes of action except her claim of negligence. As to that claim, we concluded plaintiff might be able to amend her complaint to state a valid negligence claim and should be given the opportunity to do so.

On remand, plaintiff amended her complaint twice. The operative third amended complaint, filed in November 2016, alleges primarily that ASC misled plaintiff by failing to respond to her request for a loan modification in a timely manner, i.e., until after her home was sold.

The court set a trial date of July 10, 2017. In March 2017, ASC filed a motion for summary judgment, arguing the new claims asserted in the operative complaint were unsubstantiated.

The court granted the motion and entered judgment in favor of ASC. Plaintiff timely appeals.

## DISCUSSION

### **1. Plaintiff failed to demonstrate error in the court's summary judgment ruling.**

As noted, plaintiff represents herself on appeal. Nonetheless, she is bound to follow the most fundamental rule of appellate review which is that the judgment or order challenged on appeal is presumed to be correct, and “it is the appellant’s burden to affirmatively demonstrate error.” (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) “ ‘All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) To overcome this presumption, an appellant must provide a record that allows for meaningful review of the challenged order. (*Ibid.*) If the record does not include all of the evidence and materials the trial court relied on in making its determination, we will not find error. (*Haywood v. Superior Court* (2000) 77 Cal.App.4th 949, 955.) Rather, we will infer substantial evidence supports all of the court’s findings. (*Ibid.*)

In addition, parties must provide citations to the appellate record directing the court to the supporting evidence for each factual assertion contained in that party’s briefs. When an opening brief fails to make appropriate references to the record in connection with points urged on appeal, the appellate court may treat those points as waived or forfeited. (See, e.g., *Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 384; *Dietz v. Meisenheimer & Herron* (2009)

177 Cal.App.4th 771, 779–801 [several contentions on appeal “forfeited” because appellant failed to provide a single record citation demonstrating it raised those contentions at trial].) Further, “an appellant must present argument and authorities on each point to which error is asserted or else the issue is waived.” (*Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867.) Matters not properly raised or that lack adequate legal discussion will be deemed forfeited. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655–656.) In short, an appellant must demonstrate prejudicial or reversible error based on sufficient legal argument supported by citation to an adequate record. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556–557.)

An appellant has the burden not only to show error but prejudice from that error. (Cal. Const., art. VI, § 13.) If an appellant fails to satisfy that burden, her argument will be rejected on appeal. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.) “[W]e cannot presume prejudice and will not reverse the judgment in the absence of an affirmative showing there was a miscarriage of justice. [Citations.] Nor will this court act as counsel for appellant by furnishing a legal argument as to how the trial court’s ruling was prejudicial. [Citations.]” (*Ibid.*) And it is well established that “ ‘[w]hen a litigant is appearing in propria persona, [s]he is entitled to the same, but no greater, consideration than other litigants and attorneys [citations].’ [Citations.]” (*Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1056.)

Bearing these principles in mind, we must reject plaintiff’s challenge to the court’s summary judgment ruling because several critical documents are missing from the appellate record. Specifically, plaintiff failed to provide a copy of ASC’s separate

statement and the declarations ASC filed in support of its motion for summary judgment. Plaintiff also failed to include a copy of her declaration which was filed in support of her opposition to the motion for summary judgment. We need hardly point out that without the benefit of the evidence that was before the court below, we cannot determine the correctness of the court's summary judgment ruling.

We address plaintiff's remaining arguments in turn.

**2. Summary judgment in favor of ACS did not violate plaintiff's right to a jury trial under either the Seventh Amendment to the United States Constitution or the California Constitution.**

Plaintiff asserts she did not waive her right to a jury trial as guaranteed by the Seventh Amendment to the United States Constitution. She contends the court violated that right by granting ASC's summary judgment motion rather than holding a jury trial. We disagree.

As plaintiff notes, the Seventh Amendment protects the right to a jury trial in civil cases: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (U.S. Const., 7th Amend.) Similarly, plaintiff observes, Article I, section 16 of the California Constitution declares that "[t]rial by jury is an inviolate right and shall be secured to all ... ." On that basis, plaintiff argues "a trial by jury is a fundamental right." According to plaintiff, the summary judgment procedure set forth in Code of

Civil Procedure section 437c<sup>1</sup> is unconstitutional because it deprived her of a jury trial.

As respondent points out, however, the Seventh Amendment's guarantee of a right to a jury trial in civil cases is one of the few remaining rights not yet incorporated to the States through the Fourteenth Amendment. (*McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742, 765, fn. 13.) And even if the Seventh Amendment did apply in this case, the United States Supreme Court held long ago that the summary judgment procedure used in federal courts does not violate the Seventh Amendment. (See *Fidelity & Deposit Co. v. United States* (1902) 187 U.S. 315, 319–321 [summary judgment does not violate the Seventh Amendment]; *Parklane Hosiery Co., Inc. v. Shore* (1979) 439 U.S. 322, 336.) California courts have followed suit in holding that summary judgment does not violate the right to a jury trial in civil cases under the California Constitution. (*Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 70 ["California and federal courts long ago agreed that nothing in the summary judgment procedure is inherently unconstitutional"], citing *Fidelity & Deposit Co. v. United States*, *supra*, at p. 315; *Bank of America, etc., v. Oil Well S. Co.* (1936) 12 Cal.App.2d 265, 270; accord, *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.) We thus reject plaintiff's constitutional challenge to the summary judgment procedure embodied in section 437c.

Apparently conceding the possible viability of the summary judgment procedure, plaintiff also asserts "[t]he role of the trial

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<sup>1</sup> All undesignated statutory references are to the Code of Civil Procedure.

court in a Summary Judgment is to determine whether triable issues of fact exist, not to resolve those issues,” and that here the “[t]rial court should have allowed [the] jury to resolve the conflicts.” As to the former proposition, plaintiff is correct. “ ‘The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.’ (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) Summary judgment is proper only where ‘there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ (Code Civ. Proc., § 437c, subd. (c); see *Aguilar*, at p. 843.)” (*Miller v. Fortune Commercial Corp.* (2017) 15 Cal.App.5th 214, 220.) As to the latter assertion, plaintiff apparently misunderstands the court’s ruling here. In granting ASC’s motion for summary judgment, the court necessarily determined that no conflict existed as to the material facts of this case. In other words, the court concluded no jury was necessary because the facts material to the issues at hand were not in dispute.

In short, the summary judgment procedure did not violate plaintiff’s right to a jury trial.

**3. The court did not err in denying plaintiff’s ex parte application for a continuance and her concurrent ex parte request to compel further discovery.**

**3.1. Additional Facts and Standard of Review**

As noted, ASC’s motion for summary judgment was scheduled for hearing on June 6, 2017. On that day, plaintiff submitted two ex parte applications to the court, one requesting a continuance of both the summary judgment hearing and the trial, and the other seeking to compel ASC to provide further responses



to her second set of requests for admission. The court denied both applications.<sup>2</sup>

We review discovery orders and orders denying continuances for an abuse of discretion. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 [determination of a motion to compel discovery reviewed for abuse of discretion]; *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 772 [same]; *Cooksey v. Alexakis* (2004) 123 Cal. App. 4th 246, 254 [denial of request for a continuance is reviewed for abuse of discretion].)

**3.2. Plaintiff failed to file a noticed motion to compel further discovery responses as required under the Code of Civil Procedure.**

As we understand it, plaintiff contends the court should have denied ASC's motion for summary judgment as "premature" because plaintiff filed, on the day of the summary judgment hearing, an ex parte application seeking to compel further responses to requests for admissions and special interrogatories. We disagree.

Initially, we note that although plaintiff asserts here that she sought to compel further responses to her requests for admission as well as her special interrogatories, her ex parte application only sought to compel further responses to her second set of requests for admission. We therefore limit our analysis to that issue. (See, e.g., *Children's Hospital & Medical Center v.*

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<sup>2</sup> The basis for the court's ruling is not disclosed in the appellate record.

*Bontá* (2002) 97 Cal.App.4th 740, 776 [refusing to consider issues not raised before the trial court].)

A party seeking to compel further responses to requests for admissions must bring a noticed motion under section 2033.290, subdivision (a).<sup>3</sup> (See §1005, subd. (b) [unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 16 court days before the

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<sup>3</sup> Section 2033.290 states: “(a) On receipt of a response to requests for admissions, the party requesting admissions may move for an order compelling a further response if that party deems that either or both of the following apply:

“(1) An answer to a particular request is evasive or incomplete.

“(2) An objection to a particular request is without merit or too general.

“(b) A motion under subdivision (a) shall be accompanied by a meet and confer declaration under Section 2016.040.

“(c) Unless notice of this motion is given within 45 days of the service of the verified response, or any supplemental verified response, or any specific later date to which the requesting party and the responding party have agreed in writing, the requesting party waives any right to compel further response to the requests for admission.

“(d) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

“(e) If a party then fails to obey an order compelling further response to requests for admission, the court may order that the matters involved in the requests be deemed admitted. In lieu of, or in addition to, this order, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).”

hearing]; Cal. Rules of Court, rule 3.1300 [discovery motions must be served and filed in accordance with section 1005 unless otherwise ordered or specifically provided by law].) Here, plaintiff failed to bring a noticed motion and instead proceeded on an ex parte basis.

Further, a motion to compel discovery responses must be accompanied by a separate statement that includes the requests for admission and responses in dispute. (Cal. Rules of Court, rule 3.1345(a).) The separate statement must set forth each request, the response given, and the factual and legal reasons for compelling a further response. (*Ibid.*) No separate statement is included in the record on appeal. Nor did plaintiff explain, as to each of ASC's responses, the factual and legal reasons why the response is inadequate, as is required. (See *Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 893 [failure to include separate statement required by California Rules of Court justified denial of discovery motion]; *St. Mary v. Superior Court, supra*, 223 Cal.App.4th at pp. 777–778 [same].)

Because plaintiff failed to present her request to compel discovery in a complete and timely manner, the trial court was well within its discretion to deny the request on that basis. (See *Mills v. U.S. Bank, supra*, 166 Cal.App.4th at p. 893.)

**3.3. Plaintiff's failure to conduct discovery in a timely manner does not constitute good cause to continue either the summary judgment motion hearing or the trial.**

Citing section 437c, subdivision (h), plaintiff asserts the court abused its discretion in denying her request for a continuance of the hearing on ASC's motion for summary judgment and the trial in order to allow her to conduct further

discovery. That provision states: “If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.”

Plaintiff’s argument suffers from several significant defects. First, she failed to submit her request for a continuance with her opposition to the motion for summary judgment, as required by the statute. (See *Tilley v. CZ Master Assn.* (2005) 131 Cal.App.4th 464, 490–491 [court not required to grant untimely motion for continuance].)

Second, to support a request for a continuance under this provision, the party opposing summary judgment must provide a declaration explaining what facts may exist, why that information is essential to opposing the motion, the specific reasons such evidence cannot be presented in opposition to the summary judgment motion, and the specific steps or procedures the party intends to utilize to obtain such evidence. (See *Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 532.) No such declaration is included in the record on appeal.

Third, lack of diligence may be a ground for denying a request for a continuance of a summary judgment motion hearing because a good faith showing that further discovery is needed to oppose summary judgment requires some justification of why

such discovery could not have been completed sooner. (See *Johnson v. Alameda County Medical Center*, *supra*, 205 Cal.App.4th at p. 533; *Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at pp. 253–254; see also *Tilley v. CZ Master Assn.*, *supra*, (2005) 131 Cal.App.4th at p. 491 [denial of motion for continuance proper where party appeared to be manipulating the circumstances to delay summary judgment for as long as possible].) Although we do not have the benefit of plaintiff’s supporting declaration—if any—we note that in her request for a continuance, plaintiff explained she had only recently received certain documents from ASC in response to her request for production of documents. As a result, plaintiff urged, she had been unable to rely on those recently-received documents in her opposition, nor had she had time to hire an expert witness to provide an opinion in support of her opposition to ASC’s motion for summary judgment. Importantly, plaintiff conceded that she received the documents “late” because she requested the documents “late.” Taking plaintiff at her word, it appears she failed to conduct discovery in a timely fashion.

In light of the deficiencies in plaintiff’s last-minute request for a continuance, the court did not abuse its discretion in denying the request.

### **DISPOSITION**

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

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.