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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ANDREW EGBE, Plaintiff and Appellant, v. U.S. BANK, N.A,. as Trustee, etc., Defendants and Respondents.	B277259 (Los Angeles County Super. Ct. No. BC507833)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Sotelo, Judge. Affirmed.

Law Offices of Levi Reuben Uku, Levi Reuben Uku for Plaintiff and Appellant.

Albertson Law, Gina L. Albertson for Defendants and Respondents.

Plaintiff and appellant Andrew Egbe brought an action against defendants and respondents U.S. Bank National Association[1] (U.S. Bank), Mortgage Electronic Registration Systems, Inc. (MERS), and Select Portfolio Servicing, Inc. (SPS) (collectively, Defendants) asserting claims related to Defendants' alleged failures to account for loan payments and abide by the terms of a loan modification agreement. The trial court granted Defendants' motion for summary judgment and entered judgment in their favor. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are either undisputed, or based on evidence submitted by Egbe in connection with the motion for summary judgment.

In 2007, Egbe and his wife refinanced a home loan and executed a promissory note in favor of the lender, Home Funds Direct Inc. (Home Funds). The note was secured by a deed of trust (Deed of Trust) that named MERS as the beneficiary solely as nominee for Home Funds.

Sometime in late 2010 or early 2011, Egbe applied for a loan modification with Bank of America, who at the time was the servicer on the loan. Bank of America approved the loan modification and sent Egbe a loan modification approval package, which included a loan modification agreement (Modification Agreement). The Modification Agreement required Egbe to make certain representations and covenants, including that he had made, or would make, any required payments during a trial

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[1] U.S. Bank was sued in its capacity as Trustee, in Trust for the Registered Holders of Citigroup Mortgage Loan Trust, Asset Backed Pass-Through Certificates, Series 2007-AHL3.

period. The Modification Agreement did not explain when the trial period began or expired, nor did it set forth a schedule of trial period payments. The modification was to automatically become effective on July 1, 2011, unless the representations or covenant were no longer true or Egbe had failed to make any required trial period payments. Per the terms of the Modification Agreement, Egbe was to make specified monthly payments on the first of each month, with the first payment due on July 1, 2011. The final monthly payment would be due in 2037.

The package also included a letter stating the Modification Agreement would become effective once Egbe returned a signed and notarized copy of the agreement to Bank of America. The letter indicated that Bank of America would set up an appointment with a notary, who would be responsible for returning the agreement to Bank of America. Alternatively, Egbe could use his own notary and send the executed Modification Agreement to Bank of America. Bank of America encouraged Egbe to send the executed agreement via certified mail.

The letter additionally made reference to trial period payments that were a prerequisite to the permanent loan modification. The letter stated the following: "In order to have enough time to process your modification after we received your final trial period payment, we have extended your trial period by one month and the effective date reflects this extension. You are not required to make another trial period payment during the extension month." The letter did not identify any outstanding trial period payments.

Egbe received the loan modification packet on June 13, 2011. After he did not receive a phone call to schedule an appointment with a notary, Egbe hired a private notary. He then sent to Bank of America via FedEx[2] the executed and notarized Modification Agreement and cashier's checks for three monthly trial period payments. Egbe did not retain a copy of the executed Modification Agreement. After sending the Modification Agreement and trial period payments, Egbe made several phone calls to Bank of America, and was informed by a representative that Bank of America had not received the agreement or payments.

On August 22, 2011, MERS executed an assignment of deed of trust, which transferred its beneficial interest under the Deed of Trust to U.S. Bank. Notice of the assignment was recorded on September 8, 2011 (Notice of Assignment).

On May 2, 2012, U.S. Bank executed a substitution of trustee, which substituted Reconstruct Company N.A. (Reconstruct) as the non-judicial foreclosure trustee. The substitution of trustee was recorded on May 3, 2012. The same date, Reconstruct caused to be recorded a notice of default and election to sell under deed of trust (Notice of Default), which indicated that Egbe and his wife were in default for failing to make payments on the loan since March 2009. On November 5, 2012, Reconstruct caused to be recorded a notice of trustee's sale (Notice of Trustee's Sale), indicating that Reconstruct intended to sell the property at auction.

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[2] Egbe sent the documents via a self-addressed FedEx envelope he received from Bank of America.

SPS succeeded Bank of America as the servicer on Egbe's loan in September 2013.

There is no evidence that the property has been sold at a foreclosure sale or that Egbe has otherwise lost possession of the property.

Complaint

Egbe filed a complaint against Defendants in October 2013. In the operative fourth amended complaint, Egbe asserted that Defendants were negligent for "failing to use due care in processing [his] loan modification request and accurately credit payments made by [him] toward the loan, preparing and filing false documents, and foreclosing on the Subject Property without having the legal authority and/or proper documentation to do so." In addition, Egbe alleged the Notice of Default was invalid because it was recorded "during [] active and approved Loan Modification efforts between the parties," in violation of Civil Code sections 2923.5 and 2923.6.

Egbe asserted causes of action against Defendants for (1) negligence, (2) violations of Civil Code sections 2923.5 and 2923.6, (3) injunctive relief, and (4) concealment.[3]

Motion for Summary Judgment

On March 16, 2016, Defendants moved for summary judgment. Among other things, Defendants argued they owed no common law duties to Egbe because they were acting in traditional roles of lender, servicer, and nominee for the original

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[3] The court sustained Defendants' demurrers to Egbe's causes of action for negligent misrepresentation, fraud, cancellation of instrument, breach of contract, and promissory estoppel. Although the court granted leave to amend some of the causes of action, Egbe did not file an amended complaint.

lender. Defendants further contended that Egbe rejected the offer for a loan modification in July 2011, and as a result, there was no loan modification application pending when the Notice of Default was recorded. In addition, they argued that Egbe could not establish damages because any harm he suffered was the result of his own failure to make the requisite loan payments.

In support of their motion, Defendants submitted a declaration from Michael Piz, who is an SPS employee and reviewed SPS's records related to Egbe's loan. According to Piz, Egbe sought to modify his loan, but failed to satisfy the terms of the required trial period plan and formally withdrew his modification request. Piz further declared that Defendants accurately credited any payments Egbe made during the trial period.

In opposition—and based on evidence establishing the facts summarized above—Egbe argued that Defendants negligently failed to honor the Modification Agreement, acknowledge his monthly payments made between July 2011 and March 2012, and reinstate his loan. This negligence purportedly "caused [his] home to be set for foreclosure." Egbe further argued that Defendants violated former Civil Code section 2923.6 by recording the Notice of Assignment and Notice of Default during an active loan modification process.[4]

The trial court granted Defendants' motion for summary judgment. Although the court recognized authority suggesting that, under certain circumstances, lenders and loan servicers may have a common law duty of care to a borrower in connection with a loan modification, it declined to find a duty in this case

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[4] Egbe did not argue that Defendants violated Civil Code section 2923.5.

because Egbe failed to provide any analysis on the issue. The court further noted that Egbe did not dispute that MERS had no responsibility to process his loan payments, and SPS owed a duty only to U.S. Bank. In addition, the court found it was undisputed that Egbe did not suffer damages as a result of Defendants' alleged negligence.

As to the claims for violations of Civil Code section 2923.6, the court determined that Bank of America had approved the loan modification application before the notices were recorded. As such, there was no modification application pending during the relevant times, and consequently no violations of former Civil Code section 2923.6.

As to the concealment claims, the court determined the undisputed evidence showed Defendants did not conceal information from Egbe.

Finally, the court determined Egbe was not entitled to an injunction because he failed to show any wrongful conduct warranting such relief.

Egbe appealed.

STANDARD OF REVIEW

"Summary judgment is proper where there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) To prevail on a summary judgment motion, the moving defendant has the initial burden to show a cause of action has no merit because an element of the claim cannot be established or there is a complete defense to the cause of action. (*Id*. subd. (o); *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) To satisfy this burden, the defendant must present evidence which either conclusively negates an element of the plaintiff's cause of action,

or which shows the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855.) Once the defendant has made this showing, the burden shifts to the plaintiff to set forth specific facts which show a triable issue of material fact exists. [Citation.]" (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1581.)

"We review the trial court's decision de novo, considering all the evidence presented by the parties (except evidence properly excluded by the trial court) and the uncontradicted inferences reasonably supported by the evidence. [Citation.] The evidence is viewed in the light most favorable to the plaintiff, liberally construing the plaintiff's submissions while strictly scrutinizing the defendant's showing, and resolving any evidentiary doubts or ambiguities in the plaintiff's favor. [Citation.]" (*Namikas v. Miller, supra,* 225 Cal.App.4th at p. 1581.)

Our Supreme Court has made clear that the purpose of the 1992 and 1993 amendments to the summary judgment statute was " 'to liberalize the granting of [summary judgment] motions.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542 (*Perry*); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 854.) It is no longer called a "disfavored" remedy. "Summary judgment is now seen as a 'particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Perry*, at p. 542.)

DISCUSSION[5]

I. Negligence Claims

A. MERS

Egbe generally asserts the trial court erred in concluding MERS had no responsibility for processing his loan payments and therefore no duty to properly account to him. Egbe, however, fails to provide any analysis explaining how the court erred, and cites no authority to support his contention that MERS owed him a duty of care. Nor does he explain how MERS, specifically, can be held liable for actions of the other defendants. We are " 'not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record.' [Citation.]" (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

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[5] We decline to address Defendants' argument that Egbe's claims are barred under the doctrine of res judicata based on an earlier judgment entered in favor of Bank of America. Defendants did not raise this issue below. In addition, it is not clear from the record that there was a prior judgment *on the merits*, which is a prerequisite element for applying the doctrine of res judicata. (*People v. Barragan* (2004) 32 Cal.4th 236, 253.) Defendants offer no analysis of this issue.

We similarly decline to consider Defendants' argument, again raised for the first time on appeal, that Egbe lacks standing because he did not declare his claims in certain bankruptcy filings. Those bankruptcy filings do not appear in the record, and " '[s]tatements of alleged fact in the briefs on appeal which are not contained in the record and were never called to the attention of the trial court will be disregarded by this court on appeal. [Citations.]' " (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625; see *Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 450, fn. 5 ["publications that are not a part of the trial record cannot be considered on appeal"].)

Accordingly, we consider Egbe's contentions related to MERS forfeited. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074.)

B. U.S. Bank and SPS

Egbe asserts the trial court erred in determining he failed to show a triable issue of material fact with respect to his negligence claims against U.S. Bank and SPS. We disagree.

As best we can tell, Egbe's negligence claims are based on the following theory: In June 2011, Egbe validly executed the Modification Agreement[6] and made three trial period payments for July through September 2011, which was a condition precedent to the Modification Agreement becoming permanent on October 1, 2011. U.S. Bank and SPS had a duty to properly account for the trial period payments and recognize that the loan modification had become permanent. Their failure to do so resulted in foreclosure proceedings—in the form of the Notice of Default and Notice of Trustee's Sale—being initiated on the property.

We note at the outset that Egbe's theory is premised on a misreading of the Modification Agreement. Egbe maintains that, per the terms of the Modification Agreement, he was required to make three trial period payments for July, August, and September 2011, after which the loan modification would become

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[6] On this point we have serious doubts. The Modification Agreement requires that, with limited exceptions that do not appear to be applicable here, "all persons" who signed the original deed of trust and note also sign the Modification Agreement. Egbe's wife appears to have signed the original deed of trust and note. Egbe, however, failed to submit any evidence showing his wife signed the Modification Agreement and has not otherwise addressed this issue.

permanent on October 1, 2011. The Modification Agreement, however, does not set forth any schedule for trial period payments. Instead, it presupposes that such payments have already been made, or will be made, pursuant to a separate agreement. The Modification Agreement also makes no mention of October 1, 2011, as the date on which the loan modification would become permanent.

Egbe's theory is also inconsistent with his verified fourth amended complaint, in which he asserts the trial period ended in April 2011, several months before Bank of America sent him the Modification Agreement. Egbe does not explain the apparent contradiction between his verified complaint and his arguments on appeal, despite the fact that Defendants reference the contradiction in their briefing.

Further complicating matters, Egbe frequently suggests that his negligence claims are premised on breaches of the Modification Agreement. For example, he explains that his "case is based on the theory that at the time [U.S. Bank] took over the deed of trust, he had a valid loan modification agreement and unresolved accounting dispute with [Bank of America], which entitles him to permanent modification of the loan lien in accordance with the terms of the agreement." Elsewhere, Egbe suggests that U.S. Bank had a "duty to account for the payments made and to transit the [trial payment plan] . . . to a permanent modification of the loan," but acknowledges these duties would only arise if the trier of fact concludes he "validly accepted" Bank of America's offer of a loan modification. He also indicates the primary issue for the trier of fact to decide is whether "there was in place a valid and existing Modification Agreement, and that Respondents renege from same." These statements suggest that

Egbe's negligence claims are actually premised on Defendants' alleged breaches of their obligations under the Modification Agreement. If so, the claims are improper because a " 'person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations. . . .' " (*Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1041.)

Even if we overlook these issues, Egbe's claims fail because there is no evidence he suffered any injury caused by Defendants' alleged negligence. Summary judgment is proper where a plaintiff fails "adequately to demonstrate that defendants' negligence was an actual, legal cause" of his injuries. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 766; see *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 292 ["in order to prove facts sufficient to support a finding of negligence, a plaintiff must show that . . . the breach was the proximate or legal cause of the resulting injury"].)

Although Egbe suggests he was harmed by the initiation of foreclosure procedures, he fails to articulate what that harm is, let alone point us to evidence of it.[7] In fact, it is undisputed that Egbe has not been dispossessed of his property, through a trustee's sale or otherwise. Although we acknowledge that the initiation of wrongful foreclosure procedures might, in certain circumstances, cause an injury, Egbe presented no evidence that he suffered such an injury here.

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[7] Egbe does not directly address this issue on appeal, despite the fact that the trial court's decision was premised, in part, on the lack of evidence showing damages.

Moreover, even if Egbe could establish some injury by virtue of the foreclosure procedures, he failed to show that Defendants' alleged negligence was a substantial factor in the initiation of those procedures. (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968 [to establish causation, the defendant's conduct must be a substantial factor in bringing about the injury].) Despite Egbe's insistence that he fulfilled all preconditions to and executed the Modification Agreement, there is no evidence that he made, or even attempted to make, a modified loan payment pursuant to that agreement between October 2011 and May 2012. As a result, even if U.S. Bank and SPS had accounted for the trial payments and recognized a permanent loan modification, Egbe nonetheless would have been behind on his loan by at least eight payments by the time Reconstruct recorded the Notice of Default and Notice of Trustee's Sale. There is also no evidence that Egbe has attempted to make any payments pursuant to the Modification Agreement since that time, meaning he remains in default and his property continues to be subject to foreclosure. Under these circumstances, we cannot say Defendants' purported negligence was a substantial factor in the initiation of the foreclosure procedures or any resulting harm to Egbe. (See *Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 190 [a defendant's "conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct"].)

Finally, although Egbe contends that because of Defendants' negligence he lost opportunities to take other legal actions to protect himself and his property, he fails to point to any evidence in the record to support this assertion. Nor has he provided any meaningful explanation of what alternative

remedies may have been available.[8] Egbe's vague assertions unsupported by evidence are insufficient to show a triable issue of material fact.

II. Claims for Violations of Civil Code section 2923.6

Egbe contends the trial court erred in finding he failed to raise a triable issue that the Notice of Assignment and Notice of Default were recorded in violation of Civil Code section 2923.6 (section 2923.6). We find no reversible error.

In his opposition to the motion for summary judgment, Egbe asserted that Defendants violated former section 2923.6 by recording the Notice of Assignment and Notice of Default during an "active loan modification process." In support of this assertion, Egbe cited a version of former section 2923.6 that prohibited a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording "a notice of default or notice of sale, or conduct[ing] a trustee's sale, while [a] complete first lien loan modification application is pending." (Former Civ. Code, § 2923.6, subd. (c), added by Stats. 2012, ch. 86, § 7.) It further mandated that such notices shall not be recorded until (1) the servicer makes a written determination that the borrower is not eligible for the loan modification, (2) the borrower does not accept the modification within 14 days of the offer, or (3) the borrower accepts the modification but defaults on his or her obligations under the loan modification. (*Id.*, subd. (c)(1)–(3).)

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[8] Egbe briefly suggests that, but for the loan modification process, he could have filed for bankruptcy. However, it is undisputed that he did file for bankruptcy in November 2012. Egbe does not explain why this was insufficient to protect his interests.

The trial court determined there was no violation of section 2923.6 because Bank of America had already approved Egbe's modification application by the time the Notice of Assignment and Notice of Default were recorded. As such, the trial court reasoned, there was no modification application pending at those times.

Egbe maintains this was error because the trial court overlooked former section 2923.6's additional mandate that a notice of default and notice of sale shall not be recorded until either (1) the servicer determines the borrower is ineligible, (2) the borrower rejects the offer, or (3) the borrower defaults on the loan modification. Egbe asserts that when the notices were recorded, there had not been a written determination that he was ineligible for a modification; nor had he rejected Bank of America's offer. To the contrary, Egbe insists, he was actually approved for the loan modification and accepted the offer.[9]

We agree with Egbe that the trial court erred in its reasoning, but nonetheless find Egbe's claims are meritless. (See *People v. Perkins* (2016) 244 Cal.App.4th 129, 139 ["on appeal we are concerned with the correctness of the superior

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[9] Egbe does not address whether he defaulted on his obligations under the loan modification. As we discussed in the previous section, it is undisputed that Egbe has not made a loan payment since at least September 2011. Accordingly, even if he fully executed the Modification Agreement and made the requisite trial period payments, Egbe would have been in breach of his obligations under the loan modification by the time the Notice of Default was recorded in May 2012. As such, recording of the notice was proper per former section 2923.6, subdivision (c)(3).

court's determination, not the correctness of its reasoning"].) As Defendants correctly point out, Egbe's claims are based on a version of former section 2923.6 that went into effect on January 1, 2013. The Notice of Assignment and Notice of Default, however, were recorded in 2011 and 2012, respectively. "[U]nless there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature . . . must have intended a retroactive application' [Citation]." (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841.) Former section 2923.6 does not contain an express retroactivity provision, and we have not found any extrinsic sources to suggest the Legislature intended it to be applied retroactively. Accordingly, we decline to apply former section 2923.6 retroactively. (See *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 818 [declining to apply Homeowner Bill of Rights, of which former section 2923.6 is a part, retroactively].) As a result, Egbe failed to establish that the Notice of Assignment[10] and Notice of Default were improper.[11]

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[10] We also note that former section 2923.6 places restrictions only on recordings of notices of default and sale, as well as trustee's sales. By its plain terms, former section 2923.6 does not govern the recording of the Notice of Assignment.

[11] For the first time in his reply brief, Egbe asserts Defendants failed to comply with certain requirements found in Civil Code section 2923.5. Egbe did not raise this argument below, nor did he assert it in his opening brief on appeal. Accordingly, we decline to consider it. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764; *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.)

III. Request for Injunctive Relief

Egbe maintains the trial court erred in finding no triable issue on his request for injunctive relief. He asserts that, per former Civil Code section 2924.12 (Stats. 2004, ch. 401, § 4), he is entitled to bring an action for injunctive relief to enjoin a material violation of former section 2923.6. As discussed above, Egbe cannot establish a violation of former section 2923.6. As such, his request for injunctive relief fails as well.[12]

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal.

BIGELOW, P.J.

We concur:

GRIMES, J. ROGAN, J.*

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[12] Because our opinion does not rely on Michael Piz's declaration, we need not address Egbe's assertion that the trial court erred in overruling his evidentiary objections to the declaration.

We also need not address Egbe's concealment claim. In his reply brief, Egbe argues that his concealment claim is not barred by the statute of limitations. The trial court, however, did not decide the issue on statute of limitations grounds. Instead, it found the undisputed evidence showed Defendants did not conceal information, which Egbe does not contest.

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