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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ALICE WINTHER FRAZIER et al., Plaintiffs and Appellants, v. BEAR STEARNS RESIDENTIAL MORTGAGE CORPORATION et al., Defendants and Respondents.	B267671 (Los Angeles County Super. Ct. No. BC450293)

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

Law Office of Nick A. Alden and Nick A. Alden for Plaintiffs and Appellants.

Parker Ibrahim & Berg, John M. Sorich, Bryant S. Delgadillo and Mariel A. Gerlt-Ferraro for Defendants and Respondents.

INTRODUCTION

The collapse of much of our country's home lending market over the last decade produced rubble of varying compositions. The debris in this case included an old fashioned Ponzi scheme. When one perpetrator's bankruptcy and a Securities and Exchange Commission investigation effectively eliminated suit against the schemers, the borrowers here sued their lender on various common law theories, asserting generally the lender had made a loan the lender knew the borrowers could not repay. The trial court granted summary judgment, concluding no triable issue of fact existed that the lender was in cahoots with the Ponzi operators, nor was the lender liable under any other theory. We agree with the trial court and affirm the grant of summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Leland and Alice Frazier were convinced by a fraudster to refinance their home and invest the proceeds in what turned out to be a Ponzi scheme. When they discovered they had been defrauded by the Ponzi artist, they sued, among others, (1) the lender with which they had refinanced, Bear Stearns Residential Mortgage Corp. (Bear Stearns); and (2) the current holder of their mortgage, JPMorgan Chase Bank, N.A. (JPMorgan).[1]

At least as far as this appeal is concerned, there is no real dispute that the Fraziers were defrauded by an entity known as Diversified Lending Group (DLG). DLG was a Ponzi scheme, run by its president, Bruce Friedman, until it was shut down by the Securities and Exchange Commission. Other participants in DLG included Diane Cano, who was the president of a DLG wholly-owned subsidiary.

The particulars of the DLG fraud are unnecessary to this opinion. In broad outline, DLG convinced its marks to refinance their homes so that they would be in a position to invest with DLG. The delicious carrot was a promise of a guaranteed return ranging from 9 to 12 percent. DLG claimed it would secure that high return by investing in income-producing property. DLG promised to use the profits from its investments to directly make the monthly payments on its victims' mortgages, and on to-be-acquired life insurance premiums as well. If everything went according to plan, homeowners would access the equity in their home, invest that equity with DLG, and, after sufficient time had passed, end up owning their home outright and have free life insurance. But everything went according to Friedman's Ponzi

[1] We refer to the two plaintiffs as the "Fraziers." References to "Frazier" alone are to plaintiff Leland Frazier.

scheme instead; he lived large off DLG's funds, and did not invest them as promised. Eventually, the Securities and Exchange Commission froze DLG's assets and charged Friedman with securities fraud. The result was that the homeowners who had invested with DLG were left robbed of their equity and on the hook for monthly payments on their refinanced mortgages.

That is, in summary, what happened to the Fraziers. A life insurance agent handling their policy suggested that they invest with DLG. In late 2005, the Fraziers attended a meeting at their home with their insurance agent, and DLG's Friedman and Cano. The Fraziers became sold on the DLG program. Once they agreed to invest, Cano handled the refinance transaction for them, doing all of the necessary paperwork to obtain a loan from Bear Stearns. The loan was dated January 26, 2006, and ultimately settled on February 1, 2006. Bear Stearns loaned the Fraziers $4.25 million at a variable interest rate. Approximately $1.2 million was used to pay off existing loans on their home. After closing costs, the remaining amount, nearly $3 million, was transferred directly to DLG. The dream investment appeared to be working as promised for three years, as DLG made the Fraziers' mortgage and insurance premium payments. But, the scheme came crashing down in March 2009 when the Securities and Exchange Commission froze DLG's assets.

The Fraziers and other DLG victims were barred from suing DLG, Friedman, Cano and other DLG principals due to a court-ordered stay. Instead, the Fraziers and numerous DLG victims filed related complaints (known as the "DLG Related Cases"), seeking to recover against the investment advisors and financial planners who had advised them to invest in DLG.[2] The operative complaint is the fourth amended complaint, which consolidates the allegations of numerous DLG victims against their financial advisors. Unlike the consolidated plaintiffs, the Fraziers also sued Bear Stearns, and its successor, JPMorgan. The Fraziers are the only plaintiffs in the DLG Related Cases who sued a lender; the remaining plaintiffs sued only their financial planners. According to the operative complaint, the Fraziers' main theory of liability against Bear Stearns was that Cano, while an agent of DLG, was also an agent of Bear Stearns. It would ultimately be revealed, however, that despite any representations Cano may have made to that effect, she was not a Bear Stearns agent. The Fraziers would then turn to the theory of ostensible agency, and other factual bases on which Bear Stearns could be held liable for DLG's fraud.

1. *Allegations of the Complaint*

As against Bear Stearns and JPMorgan, the Fraziers alleged the following causes of action: negligence; concealment;

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[2] The Fraziers initially sued their insurance agent, but removed him from the complaint when he entered bankruptcy.

constructive fraud; breach of the implied covenant of good faith and fair dealing; unfair competition (Bus. & Prof. Code, § 17200); and unjust enrichment. They alleged that their insurance agent had recruited them for the DLG scheme and induced them to invest in it. They specifically alleged that they were "directed to receive" their refinance from Bear Stearns. Their insurance agent had introduced them to Cano, who, in addition to being a representative of DLG, was "a mortgage broker" and "an agent or representative of Bear Stearns." Through Cano, the Fraziers entered into a confidential relationship with Bear Stearns. They relied on representations made by Cano and Bear Stearns that DLG was a safe investment and that DLG, not them, would be responsible for making the payments on their loan.

The Fraziers also alleged that, in connection with the loan, three appraisals were done on their property, all of which over-valued it. Two of the appraisals were obtained by DLG and the third by Bear Stearns. The Fraziers alleged that they "voiced their concerns regarding this excessively high appraisal value to Cano (an agent of Bear Stearns)," and Cano told them not to worry because they would never be responsible for paying off their mortgage.

At one point in their complaint, the Fraziers alleged that Bear Stearns never inquired as to their net income or net worth.[3] The complaint stated that when the plaintiffs asked why the lending procedures were so lax, they were told that Bear Stearns had "thoroughly investigated DLG and that they were confident in its success." This particular allegation, however, did not identify the Bear Stearns individual who allegedly made that representation, or the circumstances in which it was made.

As to JPMorgan, the complaint alleged that JPMorgan acquired Bear Stearns in 2008, and was therefore liable for Bear Stearns's acts under a theory of successor liability. Although, the Fraziers alleged that they were making mortgage payments to JPMorgan "on a temporary loan modification agreement," they did not allege that there was anything actionable with regard to JPMorgan's handling of their request to make the loan modification permanent. We return to this latter point in Part 7 of our Discussion.

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[3] This was partially true. The loan application the Fraziers submitted did not ask for their net income, only gross income. It did, however, ask for their net worth. At deposition, Frazier admitted that, when he signed the application, he believed the nearly $7 million figure listed for the Fraziers' net worth was "appropriate," although, in retrospect, he now believed it was, in part, based on the over-inflated appraisals of their home.

2. *Demurrer*

Bear Stearns and others in the consolidated cases demurred. The record on appeal does not contain the briefing on the demurrer, only the court's ruling. The minute order indicates the demurrer was overruled in large part, but sustained as to the cause of action for breach of the implied covenant of good faith and fair dealing. Counsel for plaintiffs in each of the DLG Related Cases, apparently including the Fraziers' counsel, represented to the court that they did not intend to file an amended complaint, and the case proceeded on the remaining causes of action.

3. *Motion for Summary Judgment*

Bear Stearns and JPMorgan then moved for summary judgment. As JPMorgan had been alleged to be liable only as Bear Stearns's successor, we focus on Bear Stearns's arguments.[4]

The summary judgment motion was supported by a great deal of evidence, and discussed in detail the Fraziers' refinance transaction. Bear Stearns's arguments basically boiled down to three: (1) Cano was neither an actual nor an ostensible agent of Bear Stearns; (2) no other Bear Stearns agent did anything to sell the Fraziers on DLG; and (3) without liability for representations

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[4] JPMorgan also argued that there was no basis for successor liability, so that even if Bear Stearns were liable, JPMorgan would not be responsible for its wrongdoing. As our ensuing discussion explains, we need not and do not reach that issue.

about the advisability of investing in DLG, Bear Stearns cannot be liable for simply loaning the Fraziers more money than they could afford to repay. We address Bear Stearns's points in more detail next.

a. *Lack of Agency*

As to the first argument, lack of agency, Bear Stearns submitted the declaration of Cano that she has never been an employee, authorized agent, or representative of Bear Stearns. It also submitted the declaration of Joseph G. Devine, Jr., a legal specialist officer at JPMorgan, who had reviewed the relevant documents, and stated that none of the documents reflect that Cano had ever been an employee, authorized agent, or representative of Bear Stearns. Based on this evidence, Bear Stearns argued that Cano was not, in fact, its agent. Bear Stearns also argued that Cano was not its ostensible agent, either, in that there was no evidence that Bear Stearns itself had done anything to lead the Fraziers to believe that Cano was its agent.

b. *Bear Stearns's Lack of Involvement*

As to the second argument, that no other Bear Stearns representative did anything to convince the Fraziers to invest with DLG, Bear Stearns acknowledged that, in Frazier's deposition, he testified to a telephone call with an unnamed "Bear Stearns representative" – but Bear Stearns took the position in its papers that this testimony was hearsay and too vague and speculative to support liability. Bear Stearns's separate statement referenced Frazier's deposition, where he testified that he "actually called Bear Stearns and spoke to a representative and asked if DLG was on the up and up. [¶] And [the representative] said, 'Yes. Absolutely. We've looked into it. We've looked into all of [Friedman's] claims; and this man has a business that is viable, is very successful.' " When asked, Frazier could not identify the person to whom he spoke, or the telephone number he had called. Frazier explained the genesis of the call as follows. When he had expressed skepticism to Friedman regarding why Bear Stearns would loan him $4.25 million based on the Fraziers' income, Friedman said that Bear Stearns would really be loaning the money to DLG, not the Fraziers. Friedman agreed to give the Fraziers the telephone number of someone at Bear Stearns whom he could call. Frazier called the number; the phone was answered, "Bear Stearns." Frazier asked for the person Friedman had named for him, and that person came on the line. At a later deposition, Frazier admitted that Friedman had told him, at the very first meeting at the Fraziers' home, that Friedman would give him the number of someone at Bear Stearns to whom he could talk, but Frazier could not recall whether Friedman immediately gave him that number, and thought Friedman might have waited a few days later, and mentioned it to him over the telephone. Frazier did not check the number against publicly-available phone numbers for Bear Stearns. He did not ask the person to whom he spoke to send anything in writing confirming their conversation. Other than the single telephone call, he had no conversations with anyone at Bear Stearns. Frazier could not remember whether he placed the call from his home, work, or cell phone. He did not check his phone records to see if he could identify the number he had called.

According to the declaration of Devine, the JPMorgan legal specialist officer, the business records of JPMorgan did not show that Bear Stearns, or any Bear Stearns employee or representative, "supported, endorsed, promoted or otherwise recommended" DLG investments.

c. *No Liability as Lender*

On the third point, that Bear Stearns is not liable simply as a lender, Bear Stearns again relied on Devine's declaration, which stated that the business records indicate that the loan "was approved based upon standard application review procedures and underwriting procedures. The Fraziers were qualified for the Loan based upon their submitted application." Based on the premise that Bear Stearns acted only as a lender, it submitted legal authority for the proposition that a lender generally owes no duty of care to the borrower in an arm's length transaction.

4. *Opposition to the Motion for Summary Judgment*

In opposition, the Fraziers relied largely on their own declarations and their view of the transaction. They also submitted evidentiary objections to the Devine declaration, as lacking personal knowledge and foundation, among other grounds. We next summarize their opposition.

a. *Lack of Agency*

As to the first issue, the actual or ostensible agency of Cano, the Fraziers argued that triable issues of fact exist. Specifically, they relied on Frazier's testimony that Cano had been introduced to them as a Bear Stearns representative and that she told them she was a Bear Stearns agent. The Fraziers also raised the new argument that DLG (through Cano) was Bear Stearns's agent in the transaction due to DLG's role as a mortgage broker – allegedly on Bear Stearns's behalf. This argument, in turn, was based on (a) a statutorily-mandated form, the "Statement of Borrower," sent by Bear Stearns to the Fraziers for their signature, which, according to Frazier's declaration, "stat[ed] that Bear Stearns employed DLG as a Broker in the Transaction"; (b) the "Settlement Statement" after the loan closed, which, again, according to Frazier, showed that Cano and DLG were paid $42,500 by Bear Stearns in connection with the loan; and (c) Frazier's testimony that he did not hire DLG or Cano to be their broker for the transaction. The documents on which the Fraziers relied, however, differed from Frazier's characterization. The "Statement of Borrower" disclosed that "[t]here is a broker involved in the transaction," that the broker was DLG, and the broker would be paid sums by both Bear Stearns and the Fraziers; it did not state that Bear Stearns "employed" DLG. Similarly, the settlement statement indicated that $42,500 was paid to DLG as a commission, but that payment was made out of the Fraziers' funds at closing, not out of Bear Stearns's pocket.[5]

b. ***Bear Stearns's Lack of Involvement***

On the second issue, whether a Bear Stearns representative other than Cano made any representations to the Fraziers regarding DLG, the Fraziers again relied on the phone

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[5] The relevant paragraph of the "Statement of Borrower" was titled, "Broker Disclosure." It stated, "There is a broker involved in the transaction. The broker's name is [DLG], the broker's address is [address]. The Broker's license number is 01293666. [¶] If there is a broker involved in the transaction, the broker will receive the following sums in connection with your loan, which are paid or to be paid by . . . both you and [Bear Stearns] $37,852.50." According to the settlement statement, however, the commission was paid not by the parties jointly but only out of the Fraziers' loan proceeds. The only amount paid DLG by Bear Stearns was a $5,312.50 "Yield Spread Premium" paid outside of closing. The Fraziers make no attempt to explain what a yield spread premium is, or to argue that paying a yield spread premium creates an agency relationship.

call Frazier said he had with someone at Bear Stearns. In his declaration, Frazier confirmed that Friedman gave him the name and number to call sometime after their initial meeting. Although he still could not describe the person with whom he spoke with any degree of specificity, he identified the person as a "male Bear Stearns executive." Frazier declared that, were it not for this individual's endorsement of the DLG program, he would not have proceeded with the DLG investment. Frazier has "not been able to find the name or telephone number" of the Bear Stearns executive in his records. The Fraziers argued that the person to whom Frazier spoke was, in fact, a Bear Stearns executive, due to the fact that, when Frazier telephoned, the call was "properly and professionally answered 'Bear Stearns.' "

c. *No Liability as Lender*

On the final issue, Bear Stearns's liability, assuming that Bear Stearns successfully established none of its agents were also working for DLG, the Fraziers argued only that Bear Stearns went beyond the tasks of a regular lender by advising them to enter into the transaction.

In addition, Frazier's declaration claimed, for the first time, that JPMorgan had promised the Fraziers a permanent loan modification if the Fraziers made timely payments on the temporary modification – and then fraudulently failed to offer a permanent modification. This was argued to be a separate basis for direct liability on JPMorgan's part regardless of any Bear Stearns successor liability.

5. *Bear Stearns's Reply*

In reply, Bear Stearns objected to much of the evidence on which the Fraziers relied. Among other things, Bear Stearns argued that Frazier's testimony that Cano told him she was a Bear Stearns agent was inadmissible hearsay as offered against Bear Stearns. It further argued that Frazier's testimony regarding his phone call with the purported Bear Stearns executive was inadmissible as hearsay, speculative, and lacking foundation. Based on its evidentiary objections and the evidence in support of its motion, Bear Stearns argued there were no triable issues of fact.

Bear Stearns also addressed the three issues we have previously identified. As to the first issue, Bear Stearns argued that there was no admissible evidence suggesting that Cano was an actual or ostensible agent of Bear Stearns.

As to the second, it argued Frazier's claim of a phone call with a Bear Stearns executive was unsupported by admissible evidence.

As to the third, Bear Stearns argued there was no evidence that the loan was otherwise irregular.

As to the newly-raised argument that JPMorgan was liable for failing to modify the loan, JPMorgan argued the Fraziers did not plead this theory in their complaint, and could not raise it for the first time in opposition to summary judgment.

6. *First Summary Judgment Hearing*

Prior to the hearing on summary judgment, the Fraziers responded to Bear Stearns's evidentiary objections. Specifically, with respect to Frazier's testimony about his phone call with the Bear Stearns executive, the Fraziers argued that it was not hearsay in that the executive's statements were admissions of a party opponent.

At the hearing, the argument quickly turned to issues of agency and whether there was any admissible evidence that Cano or DLG was acting on behalf of Bear Stearns. The Fraziers again raised the issue of the Statement of Borrower and counsel *represented* that the document stated that "DLG will be acting as a broker on behalf of Bear Stearns." The court reviewed the document and noted that it simply identified that DLG was acting as a broker. This led the court to question whether, if DLG acted as a broker in the transaction, that fact made it the agent of Bear Stearns.

Counsel for the Fraziers then argued, "It was Bear Stearns who chose him. It's Bear Stearns who introduced him to the transaction." The court asked for the evidence which supported that proposition, because the court's understanding was that the insurance agent, Friedman, and Cano brought the Fraziers into the transaction and recommended Bear Stearns – not the other way around. The Fraziers' counsel responded that Frazier testified that, at the first meeting with the Fraziers, Friedman, Cano, and the insurance agent, Cano represented herself to be acting on behalf of Bear Stearns. The court responded that Bear Stearns had raised a hearsay objection to this testimony.

Ultimately, the court sought additional briefing on DLG's exact involvement in the loan. Specifically, if DLG was a broker, for whom was it acting? And, if it received a broker's commission, does that fact alone render it an agent of Bear Stearns?

7. *Further Briefing on the Broker Issue*

In further briefing, Bear Stearns relied on evidence that it was DLG who brought Bear Stearns into the transaction and not the reverse. Bear Stearns noted the loan application, signed by the Fraziers and submitted to Bear Stearns, identified the "interviewer" as one Karen O'Callaghan at DLG. Bear Stearns researched O'Callaghan and learned that, at the time of this transaction, she was a licensed real estate broker, affiliated with DLG. Bear Stearns also noted that, notwithstanding contrary language suggested by the Statement of Borrower, the Settlement Statement showed the commission paid to DLG was in fact paid by the Fraziers, not Bear Stearns. Bear Stearns therefore argued that DLG was the Fraziers' agent, not Bear Stearns's.

In contrast, the Fraziers argued a triable issue of fact existed as to whether DLG acted as Bear Stearns's agent in the refinance transaction. They relied on the following: (1) the Fraziers said they did not hire DLG to act as their broker; (2) Cano's testimony that she was not a Bear Stearns agent was unworthy of belief; (3) Devine was unqualified to testify as to whether Bear Stearns had hired DLG; and (4) the Statement of Borrower, in which Bear Stearns identified DLG as the broker in the transaction. As to this last point, the Fraziers argued, "Clearly, had Plaintiffs hired DLG as the broker for the transaction, Bear Stearns would not have had to disclose the identity of the broker to Plaintiffs. The only reasonable explanation is that Bear Stearns hired DLG as the broker, and therefore, disclosed this fact to Plaintiffs in this document." The Fraziers also argued that the determination of who DLG was working for was not dependent on the identity of who paid the $42,500 commission, but argued that Bear Stearns's evidence that the commission was paid out of the borrower's funds (the settlement statement) was somehow inadequate without a declaration by Bear Stearns.

8. *Further Hearing*

At the continued hearing, the trial court indicated its tentative position was to grant the motion. The court noted that the Fraziers tried to raise a triable issue of fact that Cano was a Bear Stearns's agent, based on representations by Friedman, Cano, and the insurance agent. The court concluded that the Fraziers' testimony as to these representations was inadmissible hearsay. The court found there was no triable issue of fact of ostensible agency, as the Fraziers could point to no statement of Bear Stearns, the alleged principal, which would have led them to believe in Cano's agency.

As to Frazier's testimony of his phone call with an unknown Bear Stearns's executive, the court concluded that it was all inadmissible hearsay (perhaps with exception of Frazier's testimony that he had called the phone number).

With no liability based on Cano's, or the purported executive's, endorsement of DLG, all that remained were the Fraziers' allegations that Bear Stearns gave them a loan for which they were unqualified. But Bear Stearns's evidence was that the loan was approved in the usual course of business based on statements in their application, and the Fraziers had no admissible evidence to the contrary.

As to the Fraziers' late-asserted theory that JPMorgan was liable for the failure to grant a permanent loan modification, the court stated it would not consider theories of liability not alleged in the complaint.

9. *Ruling, Judgment, and Appeal*

The court granted summary judgment. Judgment was entered in favor of Bear Stearns and JPMorgan. The Fraziers filed a timely notice of appeal.

DISCUSSION

As we see it, this appeal turns on whether there is admissible evidence to create a triable issue of fact that either (1) Cano was an agent of Bear Stearns; (2) DLG was an agent of Bear Stearns, because it was Bear Stearns's broker; or (3) Frazier had a telephone call with a Bear Stearns executive in which the executive endorsed DLG. As there is no triable issue on any of these facts, we affirm.

1. *Standard of Review*

" 'A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail.' [Citation.] The pleadings define the issues to be considered on a motion for summary judgment. [Citation.] As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. [Citation.]" (*Ferrari v. Grand*

Canyon Dories (1995) 32 Cal.App.4th 248, 252.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.)

We exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

2. *No Triable Issue That Cano was an Actual or Ostensible Agent of Bear Stearns*

Bear Stearns submitted evidence from both Cano and Bear Stearns that Cano was not an agent, representative, or employee of Bear Stearns. This evidence is more than sufficient to meet Bear Stearns's initial summary judgment burden of establishing Cano was not its agent.

The Fraziers argue that Cano's declaration cannot be considered dispositive on this point as she "was an operator within the DLG Ponzi scheme." The level of Cano's involvement, while perhaps undisputed between the parties to this appeal, is still disputed by Cano. In any event, the Fraziers have pointed to no legal authority for the proposition that the declaration of a person accused of fraud and deception must be disregarded on summary judgment as not credible. They also argue the declaration of JPMorgan's Devine was not sufficient as he had no personal knowledge and failed to specifically identify the business records on which he relied to conclude Cano was not employed by Bear Stearns. Yet even if we were to exclude Devine's declaration, Cano's testimony was itself sufficient to shift the burden to the Fraziers to establish Cano was a Bear Stearns agent.

The Fraziers point to Frazier's testimony that Bruce Friedman, Cano, and the insurance agent all told him that Cano was a representative of Bear Stearns. The testimony is hearsay. The party opponent exception (Evid. Code, § 1220) does not apply as there is no admissible evidence that one or more of the three individuals is affiliated with Bear Stearns. In fact, none is currently named a defendant in this case, so they cannot be saddled with the "party opponent" label. In short, Bear Stearns met its burden of establishing that Cano was not its agent, and the Fraziers had no admissible evidence to the contrary.

The same analysis applies to ostensible agency. Ostensible agency requires three elements: (1) the person dealing with the agent must do so with a reasonable belief in the agent's authority; (2) the belief must be generated by some act or neglect not of the agent but of the principal who is sought to be charged; and (3) in relying on the agent's apparent authority, the person must not be guilty of negligence. (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1456-1457.) Once the hearsay evidence is ignored, the Fraziers have no evidence of the second element; there is no evidence anyone *actually* affiliated with Bear Stearns did anything to lead the Fraziers to believe Cano was their agent.

3. *No Evidence that DLG was Retained by Bear Stearns*

The Fraziers next argue that DLG was retained by Bear Stearns to act as the broker in the transaction, and that, in this way, DLG was a Bear Stearns agent.

"[W]hile there are various guidelines as to what services should be provided by a mortgage broker, the exact nature of the services provided and compensation to be paid to the broker is a matter to be negotiated between the broker and the borrower." (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1148.) The Fraziers take the position that, contrary to the usual scenario in which a mortgage broker is hired by, and provides services to, the borrower, the broker in this case was actually hired by the lender.

First, this argument is directly contrary to the allegations of the complaint, in which the Fraziers alleged that the insurance agent recruited them to invest in DLG; the insurance agent set up the meeting with Friedman and Cano; and, at the meeting, they were "directed to receive [their] mortgage" from Bear Stearns. As we have already concluded that there is no evidence that anybody at the meeting was actually a representative of Bear Stearns, the state of the record is that that DLG brought the Fraziers to Bear Stearns.

Second, all of the documentary evidence confirms that DLG initiated Bear Stearns's involvement in the transaction, not the other way around. The Fraziers submitted loan applications which identify O'Callaghan, a licensed broker at DLG, as the "interviewer." Subsequently, Bear Stearns sought the Fraziers' signature on a Statement of Borrower which identified DLG, by the very same license number, as the broker in the transaction. Third, a commission was paid to DLG by the Fraziers, out of their loan proceeds. This evidence is sufficient to establish that the Fraziers hired DLG as their broker, and shifted the burden to the Fraziers to raise a triable issue of fact with admissible evidence.

The Fraziers respond with their own declarations that they never hired DLG as their broker. Additionally, they rely on the

Statement of Borrower, which was sent to them by Bear Stearns and identified DLG as the broker, and the purported fact that Bear Stearns paid DLG a $42,500 commission. As to the Statement of Borrower, it means nothing. On appeal, the Fraziers argue, in bold, that Bear Stearns "**failed to explain the Broker Disclosure Document, despite the trial court's request for an explanation**." But the Statement of Borrower contains its own explanation; it states that it was "provided pursuant to California Financial Code Section 22337." Subdivision (b) of that section requires every lender to "[o]btain from the borrower a signed statement as to whether any person has performed any act as a broker in connection with the making of the loan. If the statement discloses that a broker or other person has participated, then the finance lender shall obtain a full statement of all sums paid or payable to the broker or other person." In other words, Bear Stearns sent the Statement of Borrower because it was required to do so by statute; from this we cannot reasonably infer that Bear Stearns retained DLG. As to the commission, there is no evidence that Bear Stearns paid it; the settlement statement unambiguously indicates that the commission was paid out of the Fraziers' funds at settlement. The fact that DLG was paid by the Fraziers strongly suggests that it was retained by them.

As neither the Statement of Borrower nor the settlement statement supports the Fraziers' argument that Bear Stearns hired DLG as its broker, the only evidence on which the Fraziers can rely for this point is their own statements that they did not hire DLG to act as their broker – and the undisputed fact that DLG did act as the broker in the transaction. But even if the Fraziers did not hire DLG to act as their broker, this is not evidence that Bear Stearns hired DLG. At most, under the Fraziers' view of the evidence, DLG was a third-party intermediary. DLG committed fraud; its principals lied to the Fraziers about what would become of their investment, and promised a high return it could never supply. Even accepting the Fraziers' evidence, DLG, the party who engineered the entire transaction, injected itself into the loan transaction as broker, in order to generate the $42,500 commission, without the knowing consent of the Fraziers. What is important for our purposes is that Bear Stearns presented sufficient evidence that DLG, presumably acting on behalf of the Fraziers, brought Bear Stearns into the transaction, and the Fraziers offered no evidence tending to establish the contrary.

4. *No Admissible Evidence of a Phone Call with a Bear Stearns Executive*

Initially troubling is the purported telephone call Frazier had with a Bear Stearns executive. Taking Frazier at his word, as we must, Frazier expressed concerns at the initial meeting, and Friedman said he would give Frazier the name and number of a person at Bear Stearns whom Frazier could contact. Sometime later, Friedman gave Frazier the number over the phone. Frazier made no effort to confirm that the number actually belonged to Bear Stearns, but, when he called, the phone was answered, "Bear Stearns," and, when he asked, he was transferred to the person Friedman had identified. Frazier could not recall the name or any further description of the person to whom he spoke, except that it was a male executive. The person represented that Bear Stearns was familiar with DLG and endorsed it. He encouraged Frazier to make the investment. Frazier never obtained anything in writing from the person. He could not find the number he called in his records.

Bear Stearns raised two principal objections to Frazier's testimony: hearsay and lack of foundation. We discuss lack of foundation, although, in this situation, hearsay and lack of foundation tend to overlap.[6]

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[6] We prefer considering foundation because consideration of the hearsay objection leads us back to foundation. The Fraziers argue that the call is not hearsay because it constitutes an admission of a party opponent (Evid. Code, § 1220), i.e., Bear Stearns. But the exception only applies if the caller actually *was* a Bear Stearns executive – a preliminary foundational fact established, if at all, by the phone call itself.

Two possible explanations for the phone call come to mind. The first is that Frazier spoke with an actual DLG executive, either someone recommending DLG in good faith, or a DLG "inside man" who steered the Fraziers toward DLG at Friedman's request. The second is that Friedman gave Frazier the telephone number of an associate, who had no relation to Bear Stearns at all. Friedman set up his associate's phone to be answered, "Bear Stearns," when Frazier called, and had his associate pose as a Bear Stearns executive in order to allay Frazier's concerns and convince him to invest. The law requires a foundation be established prior to admission of evidence precisely for a situation such as this one – if the so-called Bear Stearns executive was nothing more than another Friedman cohort, Bear Stearns cannot be liable simply because Friedman's accomplice falsely claimed to work at Bear Stearns.

Evidence Code section 403, subdivision (a) provides that the proponent of proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds there is sufficient evidence to sustain a finding of the existence of the preliminary fact. This applies when the proffered evidence is a statement of a particular person "and the preliminary fact is whether that person made the statement." (Evid. Code, § 403, subd. (a)(4).) If there is insufficient evidence that a person in a phone call is the person claimed, the court does not err in excluding the evidence. (*People v. Collins* (1975) 44 Cal.App.3d 617, 627-628.)

Here, the only evidence that the person to whom Frazier spoke was a Bear Stearns executive was: (1) the fact that the call was answered, "Bear Stearns"; and (2) the fact that the person to whom Frazier spoke said he was a Bear Stearns executive.[7] The name of the person is unknown; nothing in the record confirms his identity. His claimed position at Bear Stearns is unknown; the evidence does not establish he was authorized to speak for Bear Stearns on the topic of DLG. The person had never spoken to Frazier before, so his voice could not be identified. Frazier could not identify the phone number he called, so there is nothing to confirm that it belonged to Bear Stearns. Case law is clear that self-identification of a person on the phone, standing alone, is insufficient. (See *People v. Witt* (1975) 53 Cal.App.3d 154, 174 [court did not err in excluding witness's testimony regarding a call he received from a woman identifying herself as Pearle Zalud, when the witness did not know Ms. Zalud and had not received other calls from her].) The only distinction here is that Frazier placed, rather than received, the call. Under the circumstances, this makes no difference -- Frazier never called

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[7] That Frazier states Friedman told him the number belonged to a Bear Stearns executive is also inadmissible hearsay.

the number before, did not confirm the number against publicly-available Bear Stearns information, provided no record of the number, and had received the number from the person he alleges was the mastermind behind defrauding him. There is simply no evidence to lay a sufficient foundation that the person to whom Frazier was connected was in fact a Bear Stearns executive. The testimony of the phone call was therefore properly excluded.

5. *Without Agency, There is No Liability of Bear Stearns*

Without an agency theory on which to rely, the Fraziers argue, at root, that Bear Stearns is liable because it endorsed DLG. But all the alleged endorsements came from: (1) Cano, who the admissible evidence shows is not a Bear Stearns agent; and (2) the unnamed executive, in the phone call that we have also found inadmissible. Without Cano's agency or the phone call, there can be no endorsement. Without endorsement, there is no liability under this theory. The Fraziers argue at length that there was an implied endorsement, based on the fact that Bear Stearns *must have* relied on the promised DLG investment income in approving the loan, because Bear Stearns knew the Fraziers' net income was insufficient without it. But the loan applications list only the Fraziers' gross income. The only way in which the Fraziers allege Bear Stearns was aware of their net income is through disclosures Frazier allegedly made to Cano and the unnamed executive. But, again, without Cano's agency or the phone call with the executive, this theory is unsupported by admissible evidence.[8]

6. *The Fraziers' Additional Arguments as to Specific Causes of Action.*

Although the foregoing discussion compels affirmance of the trial court's judgment, the Fraziers have tailored additional arguments to their various causes of action. We briefly address those points.

a. *Negligence*

The cause of action for negligence alleges that Bear Stearns "negligently failed to use the reasonable care ordinarily exercised by mortgage lenders" in refinancing their home, in that it gave them a loan "greatly in excess of the true value" of the home, and failed to research DLG and advise about it. But a lender owes a borrower no duty of care in approving a loan. Lender liability for negligence arises only when the lender acts beyond the domain of

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[8] The Fraziers also represent that Bear Stearns had mandated that the loan proceeds be paid directly to DLG out of escrow. But there is nothing in the Settlement Statement indicating that the money went directly to DLG, as opposed to the Fraziers. The escrow instructions themselves are not part of the record. The only evidence in the record on the point of Bear Stearns's knowledge regarding what the Fraziers intended to do with the money is exactly to the contrary: Frazier's signed Statement of Borrower states that the Fraziers affirmed that they intended "to use the proceeds of the loan . . . for personal, family or household purposes and that Bear Stearns . . . may rely" on that acknowledgement.

a usual lender. (*Nymark v. Heart Federal Savings & Loan Association* (1991) 231 Cal.App.3d 1089, 1096; *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 35.) There is no duty to disclose the lender's knowledge that the borrower's intended use of the loan proceeds is an unsafe investment. (*Nymark,* at p. 1096.) A lender is under no duty to determine the borrower's ability to repay the loan; the lender's efforts to determine ability to repay are for the lender's protection, not the borrower's. (*Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 436.)

The Fraziers contend that Bear Stearns owed them a duty because it went beyond the role of a usual lender by actively endorsing the DLG program through Cano and the executive with whom Frazier spoke on the phone. As we have already explained, no admissible evidence supports the endorsement theory, and, thus, the Fraziers' negligence claim fails.

b. *Concealment and Constructive Fraud*

The causes of action for concealment and constructive fraud were based on a claimed confidential or fiduciary relationship between the Fraziers and Bear Stearns, but a lender is not a fiduciary. (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 476.) In the absence of any admissible evidence that a Bear Stearns representative undertook to give the Fraziers financial advice, these causes of action also fail.

In passing, the Fraziers argue, "[e]ven in the absence of a fiduciary relationship, recovery in a tort action for fraud is allowed for the actual damages suffered by the plaintiff." For this proposition, the Fraziers cite to *Crogan v. Metz* (1956) 47 Cal.2d 398 and *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744. Both cases simply held that, in the absence of a fiduciary relationship, recovery in a tort action for fraud is limited to the actual damages suffered by the plaintiff. These are damages limitation cases that do not stand for the proposition that under the facts alleged there is any liability.

c. *Unfair Competition*

The Fraziers' complaint contains broad general allegations of unfair competition, based on all of the conduct discussed earlier in the complaint. On appeal, the Fraziers argue this cause of action should survive because they would not have invested in DLG were it not for Bear Stearns's endorsement of DLG. But without agency or endorsement the cause of action falls with the rest.[9]

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[9] In their reply brief, the Fraziers argue, for the first time, that Bear Stearns is liable for unfair competition because it paid DLG a commission when Cano was not a licensed broker. We do not consider this argument raised for the first time in reply. In any event, the documentary evidence is clear that the Fraziers, not Bear Stearns, paid the commission to DLG out of the loan proceeds. Moreover, although Cano was not a licensed broker, her co-worker at DLG, O'Callaghan, was.

d. *Unjust Enrichment*

Finally, the Fraziers' complaint contains allegations of unjust enrichment, by "virtue of the fees and expenses paid" to defendants. On appeal, the Fraziers argue that the cause of action should survive because Bear Stearns was "unjustly enriched based upon predatory lending and fraudulent appraisals." There is no unjust enrichment of Bear Stearns as a matter of law. Bear Stearns loaned the Fraziers over $4 million; it has been repaid only a portion of that loan. While the Fraziers argue that Bear Stearns should "seek the funds from DLG," rather than seeking to collect from the Fraziers, this does not support a cause of action for unjust enrichment against Bear Stearns.

7. *No Independent Liability of JPMorgan*

As we have previously observed, JPMorgan's claimed liability was initially based on its position as Bear Stearns's successor. As we have rejected the claims against Bear Stearns, it follows that JPMorgan is also not liable on the asserted theories. In opposition to the motion for summary judgment, the Fraziers argued, for the first time, that JPMorgan should be liable for its own conduct in improperly denying them a permanent loan modification. The trial court, in denying summary judgment, noted that it would not consider the new theory not raised in the complaint. This was correct. A plaintiff seeking to offer new theories in opposition to a motion for summary judgment may not simply raise them in opposition, but must first move and receive leave to amend the complaint. (*580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18.)

In their reply brief on appeal, the Fraziers argue, for the first time, that the court erred in sustaining the demurrer to their cause of action for breach of the implied covenant of good faith and fair dealing without leave to amend because the complaint could be amended to allege that JPMorgan's conduct in denying them a loan modification fell within this cause of action. Raising the argument for the first time in the reply brief on appeal is much too late. It is well-settled law that " '[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.' [Citation.]" (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) This is particularly true in this case, when the appellate record fails to include the briefing on demurrer, and it appears that the demurrer was sustained with leave, but the Fraziers' counsel chose not to amend. Accordingly, we express no opinion on the merits of any claimed refusal by JPMorgan to modify the Fraziers' loan permanently.

DISPOSITION

The judgment is affirmed. Bear Stearns and JPMorgan shall recover their costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J.

GILBERT, J.*

* Justice of the Court of Appeal, Second District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.