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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

CHARLES E. JANEKE, Plaintiff, Cross-defendant and Appellant, v. JULIETTE Z. ALLEN et al., Defendants, Cross-complainants and Respondents.	B281155 (Los Angeles County Super. Ct. No. BC583198)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Sotelo, Judge. Affirmed as modified, and remanded with direction.

Law Offices of Abraham A. Labbad and Abraham A. Labbad; Lania Glaude for Plaintiff, Cross-defendant and Appellant.

Law Office of Julian Bach and Julian Bach for Defendants, Cross-complainants and Respondents.

Appellant and debtor Charles Janeke entered Chapter 11 bankruptcy. He believed bankruptcy protection was required, in part, due to the "shenanigans" of one of his creditors, respondent Juliette Allen and the Allen Family Trust (collectively, Allen). A plan of reorganization was amended multiple times and confirmed by the bankruptcy court. The plan required Janeke to refinance the loan on his main asset, a multi-unit apartment building, and to make certain payments to his creditors, including Allen. Allen took actions which Janeke believed hindered his efforts to obtain a refinance loan at a reasonable rate. He therefore stopped paying Allen the amounts required under the confirmed plan. Janeke sued Allen, seeking damages for her interference, under theories of fraud and slander of title, among others. Allen cross-complained for the payments due her under the confirmed plan.

Allen obtained summary judgment on both Janeke's complaint and her cross-complaint. Janeke appeals. We conclude the summary judgment was correct, although the calculation of damages on Allen's cross-complaint is erroneous. Allen was entitled to unpaid principal in the amount of $180,000, not $190,000. We modify the judgment in that respect, remand for recalculation of interest, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying Facts*

The course of conduct leading to Janeke's bankruptcy is not at issue in this case.[1] Briefly, Janeke owned an apartment

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[1] The trial court ruled that any causes of action based on Allen's alleged conduct prior to the order confirming Janeke's bankruptcy plan were barred by the order confirming the plan. Janeke does not contest this ruling on appeal.

building, known as the Ingraham property, as a rental investment. The Ingraham property was encumbered by a first mortgage, in favor a traditional lender, which was ultimately assigned to the Federal National Mortgage Association (Fannie Mae). Between 2007 and 2009, Janeke obtained a series of smaller loans from Allen, secured by junior trust deeds. When those loans became due in 2010 and Janeke was unable to pay, Allen commenced foreclosure. Janeke ultimately sought bankruptcy protection to preserve the Ingraham property.

2. *The Confirmed Reorganization Plan*

In December 2012, the bankruptcy court confirmed Janeke's fourth amended plan of reorganization. As to Allen's debt, the confirmed plan required the following four things: (1) Allen would reconvey her security interest in the Ingraham property; (2) Janeke would convey to Allen a security interest in certain patents as substitute security; (3) until such time as Janeke paid off the Fannie Mae encumbrance by refinance, Janeke would pay Allen $500 per month (calculated as 3% interest-only on a principal obligation of $200,000); and (4) once the Fannie Mae obligation is paid off, Janeke would pay Allen $10,000 per month until the $200,000 principal is paid off.

By order dated February 12, 2014, this order was further modified to include 3 percent interest on the $10,000 monthly payments. The February 12, 2014 modification order would ultimately be recorded by Allen – an act which is at the heart of Janeke's current complaint against her. We will discuss this further below.

3. *Allen Reconveys Her Interest*

Allen recorded reconveyances of her junior liens on the Ingraham property. Indeed, Allen had recorded the

reconveyances months prior to the bankruptcy court's order confirming the fourth amended plan of reorganization.

4. *Janeke Cannot Obtain the Refinance Loan He Seeks*

Janeke attempted to obtain a refinance loan for the Ingraham property in the approximate principal amount of $4 million at an interest rate between 4.5 and 5.5 percent. He could not do so. Instead, in April 2015, he obtained a refinance loan at 7 percent interest. The higher interest rate required higher monthly payments, which would, he alleged, cost him hundreds of thousands of dollars over the life of the loan. Janeke believed his inability to obtain a loan at a lower interest rate was the direct result of two acts by Allen.

First, Allen had recommended Janeke hire a loan broker named Joseph Galindo to help him obtain a loan. Janeke did hire Galindo, but alleged Galindo was unable to help. Janeke also alleged that Galindo caused him unnecessary delay in obtaining a loan, by refusing to tell Janeke which lenders he had already contacted on Janeke's behalf, so that Janeke would not waste his time reapplying to the same lenders.

Second, on October 30, 2014, Allen recorded the February 12, 2014 order modifying the bankruptcy plan. Janeke alleges that this recordation slandered his title to the Ingraham property, forcing lenders to withdraw their (low interest rate) offers, and prompting title insurers to refuse to issue policies until the cloud on title had been removed.

Because the recordation of this order is central to Janeke's complaint, we quote its relevant language. The order states that, by stipulation, the treatment of Allen's claim in Janeke's bankruptcy is modified to read as follows: "The lien of the Allen Creditors, as created postpetition by the substitution of the

Existing Patents (as defined in the Modified Third Amended Disclosure Statement) as security for the Debtor's obligation to the Allen Creditors, in lieu of the prior security, the property located at 1322-1330 Ingraham Street, Los Angeles, California 90017 (the 'Ingraham Property'), is impaired and modified consistent with the Stipulation between Debtor and secured creditor Julie Allen (the 'Stipulation'), entered into on February 2, 2012 and approved by the Court. [¶] Until such time as the encumbrance of Fannie Mae on the Ingraham Property has been paid in full, the Debtor shall pay to the Allen Creditors, payments, on a monthly basis, of interest only at the rate of 3.0 [percent] per annum of the principal sum of $200,000.00, or $500.00 per month. [¶] At such time as the encumbrance of Fannie Mae on the Ingraham Property has been paid in full, the Debtor shall pay the principal sum of $200,000.00 to the Allen Creditors in equal monthly installments of $10,000.00 per month, payable on the first day of each month until such amount is paid in full, plus interest at the rate of 3.0 [percent] per annum, payable on the same date as installments are due."

We immediately observe that, although the language is not a model of clarity, it begins by stating that Allen's lien was created by the substitution of the patent security "in lieu of" the security in the Ingraham property. In other words, the document confirms that Allen's security interest is in the patents, not the Ingraham property. The document then goes on to address Janeke's payment obligations to Allen, including the $10,000 per month principal payments once the Fannie Mae encumbrance has been satisfied.

5. *Janeke's Operative Complaint*

Janeke's operative complaint is his first amended complaint, filed December 31, 2015.[2] Although the complaint acknowledges that the court had already ruled that Janeke could not assert claims based on Allen's conduct prior to the confirmation of the bankruptcy plan, Janeke nonetheless alleged Allen victimized him from her initial loans onward.[3] For our purposes, Janeke alleges eight causes of action, all arising out of Allen's recommendation of Galindo, Allen's recordation of the February 12, 2014 bankruptcy court order, or both. We discuss the allegations of each cause of action briefly.

A. *Fraud (Cause of Action 1) and Negligent Misrepresentation (Cause of Action 2)*

Janeke's first two causes of action are for fraud and negligent misrepresentation. As to the recommendation of

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[2] By this time, Janeke had deeded the Ingraham property to a limited liability company of which he was the sole member. He did not, however, make the limited liability company a plaintiff in this action. That Janeke was not the proper plaintiff to pursue certain of his causes of action, such as quiet title, was a fact not lost on the trial court on summary judgment. While this was an alternative basis for the court's grant of summary judgment in some respects, we prefer to overlook this pleading defect and resolve the summary judgment appeal on its substantive merits.

[3] When Allen had demurred to Janeke's initial complaint, the court sustained the demurrer with leave to amend, but had specifically concluded that "all claims based on [Allen]'s allegedly wrongful conduct before December 27, 2012 are barred." In light of this ruling, the trial court would subsequently grant a motion to strike portions of the first amended complaint, striking every allegation of conduct occurring prior to December 27, 2012.

Galindo, Janeke alleged that he relied to his detriment on Allen's representation that Galindo was an "amazing" broker and that she would cooperate with Janeke if he hired Galindo. As to the recordation of the order, Janeke alleged that it was misleading as Allen recorded only a portion of the relevant bankruptcy court terms, which was done "with the explicit clear and misleading intent to represent a lien or ownership interest in the subject property when [Allen] has explicitly relinquished any and all liens."

B. *Unfair Business Practices (Cause of Action 3)*

Janeke's third cause of action, for unfair business practices (Bus. & Prof. Code, § 17200) alleges that Allen committed fraud by recording the bankruptcy court order.

C. *Slander of Title (Cause of Action 4) and Quiet Title (Cause of Action 5)*

Janeke's next alleged that, by filing the bankruptcy court order, Allen slandered his title to the Ingraham property. His next cause of action sought to quiet title to the Ingraham property against Allen's apparent claim.

D. *Breach of Contract (Cause of Action 6)*

Janeke's sixth cause of action for breach of contract is somewhat unclear, as it appears to be based on conduct predating the bankruptcy court's order, and does not specifically allege a breach during the period at issue.

E. *Negligent (Cause of Action 7) and Intentional (Cause of Action 8) Infliction of Emotional Distress*

Janeke's last two causes of action allege negligent and intentional infliction of emotional distress in that Allen's

recordation of the order caused him financial losses and mental suffering.[4]

6. *Allen's Cross-Complaint*

Allen filed her cross-complaint on August 11, 2015. In it, Allen alleges that the confirmed bankruptcy plan is enforceable as a contract, and Janeke breached it. Specifically, she alleges that Janeke made all of the interest-only payments as required. However, when he refinanced his mortgage in April 2015, he paid off Fannie Mae, triggering the obligation to commence monthly $10,000 payments to pay off the $200,000 principal owed Allen. Allen alleges that Janeke made the May and June 2015 payments of $10,000 each, but defaulted in July. Allen demanded Janeke cure his default, but he did not. Allen

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[4] We liberally construe Janeke's complaint, which is, in some respects, difficult to comprehend. The allegation of intentional infliction of emotional distress reads as follows: "Plaintiff therefore avers that Plaintiff may be awarded damages as a matter of law as a consequence of ALLEN'S outrageous **breach of duty of trust** (negligence) ensuing (1) the February 2, 2012 stipulation (2) December 27, 2012 Chapter 11 order and (3) TRUSTEE of the CLASS 5 ALLEN FAMILY TRUST beneficiaries and (2) **bait-and-switch** (intent) Chapter 11 plan attacks (supra), invasion of the 1330 Ingraham Street property (supra), coercing Plaintiffs (ex) BK attorney (supra), publication of the February 12, 2014 ORDER with the Los Angeles County Recorder (supra) that **proximately and factually** caused Plaintiff to suffer **extreme mental distress** in addition to incurring a **$500,000 charge** as to Plaintiffs life savings and pension investment in the 1330 Ingraham Street property."

therefore sought the $180,000 in unpaid principal, plus interest and attorney fees.[5]

7. *Answers and Continuance*

Janeke answered Allen's cross-complaint in December 2015. Allen answered Janeke's complaint on June 29, 2016.

On August 2, 2016, Janeke filed an ex parte application to continue the trial and related dates. Janeke sought a six-month continuance to "allow the pleadings in this matter to be settled and the parties to complete discovery." Janeke sought a trial date in or after January 2017. Allen agreed to the request; the trial date was set for February 21, 2017.

8. *Allen's Motion for Summary Judgment*

On October 26, 2016, Allen moved for summary judgment on both Janeke's complaint against her and her cross-complaint against him. Although she addressed the allegations of each individual cause of action, the motion came down to the proposition that all of Janeke's claims against her were based on her recordation of the bankruptcy court order and recommendation of Galindo – neither of which supported any cause of action as a matter of law. We will ultimately conclude that Allen was correct on this point.

However, Allen raised alternative grounds for summary judgment in her favor; Janeke's attempts to oppose these alternative grounds would form a large part of the trial court record and appellate briefing. For example, Allen argued that her recordation of the bankruptcy court order was absolutely privileged under Civil Code section 47, subdivision (b), which

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[5] Allen sought attorney fees due to an attorney fee clause in her initial notes. Whether that contractual basis for fees justifies an award in this case is not at issue in this appeal.

provides a privilege for communications in judicial proceedings or other proceedings authorized by law. The parties then disputed whether recording the document is subject to the absolute or qualified privilege, and, if qualified only, whether Allen acted with malice. Similarly, Allen argued that there was no admissible evidence that the recording of the bankruptcy order caused Janeke any damage, as Janeke could not establish any lender had offered a lower interest rate but revoked it upon her recordation of the document. This would lead the parties down the rabbit hole of document authentication – in that Janeke proffered a letter from Open Bank, offering a low interest rate, but Allen responded with Open Bank's custodian of records declining to authenticate the document. The parties would spend a great deal of time and effort on both of these issues – Allen's purported malice and whether the Open Bank letter could be authenticated. As we will resolve the appeal on the more straightforward issue of none of Allen's conduct being in any way actionable, we will not discuss these issues further.

As for Allen's cross-complaint for breach of contract, Allen sought damages in a different amount than she had sought in her complaint. Allen still relied on the bankruptcy plan which required Janeke to pay her $200,000 in $10,000 monthly payments, and still argued that he had made only two payments. However, she now took the position that she had applied one of the $10,000 payments as repayment of a *different* loan – a postbankruptcy $10,000 loan she made to Janeke so he could pay his bankruptcy counsel. Crediting one payment to the bankruptcy counsel loan meant that Janeke had only paid Allen $10,000 toward the $200,000 debt. As a result, Allen now sought $190,000 in unpaid principal, plus interest and attorney fees.

9. *Janeke's Opposition to Summary Judgment*

In opposition to Allen's motion, Janeke argued that Allen had intentionally interfered with his ability to refinance at a lower rate by recording the bankruptcy document. As to the specific elements of fraud, Janeke argued that the recordation was misleading because it did not include all the documents referenced in it, "claiming or making it seem" as if Allen still had an interest in the Ingraham property. At the very least, the filing of the order informed potential lenders that his income would decrease by $10,000 per month. Recognizing the weakness of his argument, he raised the alternative point that Allen's act of omission in not *immediately* recording the document was a misrepresentation of her intent on which he had relied to his detriment.

As to Janeke's breach of contract cause of action, which had not been clearly alleged in his complaint, Janeke now argued that Allen had breached her obligations under the confirmed reorganization plan because she had failed to perfect her security interest in Janeke's patents. Janeke filed a declaration in which he explained that he believed Allen's failure to perfect her security interest in the patents constituted a failure to mitigate her damages.

Janeke submitted the declaration of an expert, Enrique Rodriguez, who is the founder of a consultancy firm which helps formulate creative workout and loan restructure resolutions. Rodriguez's declaration set forth multiple conclusions as his "professional opinion," including that recording the bankruptcy order was not privileged, and that it was a clear and deliberate act clouding title to the Ingraham property. He also opined that

he was "highly confident" that Janeke could have obtained a 4.625 percent interest rate if Allen had not recorded the order.

10. *Janeke's Ex Parte Application to Continue Trial*

The day after Janeke filed his opposition to the summary judgment motion, he filed an ex parte application to continue trial and all hearing dates. The application requested continuance of the summary judgment hearing date amongst all other existing deadlines. The document appeared to be a cut-and-paste of the continuance request Janeke had filed in August 2016. That is to say, just as he did in August 2016, Janeke argued that good cause existed to continue the trial in December 2016 "because this matter is not yet at issue because defendants recently answer to the operative complaint and discovery is still in its preliminary stages. [*Sic*.]" Counsel submitted a declaration indicating his daughter was suffering from a serious, undiagnosed medical condition, which was making it difficult for him to keep current with his legal tasks.

11. *Hearing, Ruling and Judgment*

The ex parte request to continue trial was apparently on calendar on January 9, 2017, the day before the hearing on the summary judgment motion. It was continued to January 10.

There is no reporter's transcript of the January 10 summary judgment hearing. The trial court had given the parties its tentative opinion; the minute order indicates that both parties submitted "to the court's ruling." The court then issued its order in accordance with its tentative.

The court granted summary judgment for Allen in all respects. Preliminarily, the court struck the expert declaration of Rodriguez, explaining that although the declaration was not expressly objected to, it was inadmissible because it invaded the

province of, and was unhelpful to, the finder of fact. The court then turned to each of Janeke's causes of action and concluded they were meritless, either as alleged, or because Janeke had proffered no admissible evidence to raise a triable issue of fact in support of his allegations.

In contrast, Allen was entitled to summary judgment on her cross-complaint, because the bankruptcy court's order approving the plan is enforceable in contract. Allen had performed the terms of that contract and Janeke had not.

The court then addressed the motion to continue trial, which it deemed moot, given the summary judgment.

Judgment was entered in favor of Allen in the amount of $207,368.37, comprised of $190,000 principal, $8,886.67 in prejudgment interest, and $8,501.70 in attorney fees.

12. *Appeal and PostJudgment Motions*

Janeke filed a timely notice of appeal. He also pursued a motion for reconsideration, and motions relating to enforcement of judgment. These latter motions were the subject of a related appeal, which has since been dismissed. (*Janeke v. Allen*, No. B285651.) Janeke's motion to consolidate the appeals was denied on December 1, 2017. Nonetheless, in February 2018, Janeke filed a motion to augment the record in this appeal with numerous documents, including several of the post-judgment filings. His briefing in this appeal requests that we reconsider consolidation on our own motion; we deny the request. Although we granted Janeke's motion to augment in its entirety, we decline to consider any of the documents filed after the summary judgment was entered in this case.[6]

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[6] At oral argument, Janeke's counsel relied on several cases not cited in his appellate briefs. We decline to consider them.

DISCUSSION

On appeal, Janeke argues the court erred in granting summary judgment. As to his complaint, he argues that each of his causes of action should proceed. He also argues the court erred in striking Rodriguez's expert declaration on its own motion, and in not addressing his continuance request on the merits. Finally, as to Allen's cross-complaint, Janeke argues both that he was justified in withholding payment (due to Allen's alleged misconduct) and that the court erred in its calculation of the amounts due. We agree only with this latter contention.

1. *Standard of Review*

"The policy underlying motions for summary judgment and summary adjudication of issues is to ' "promote and protect the administration of justice, and to expedite litigation by the elimination of needless trials." ' " (*Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323.)

"A party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., § 437c, subd. (a).) The motion and the opposition to the motion "shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (*Id.*, subd. (b)(1).) "Evidentiary objections not made at the hearing shall be deemed waived." (*Id.*, subd. (b)(5).) "The motion for summary judgment shall be granted if all the papers submitted show that 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." (*Id.*, subd. (c); *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1028.)

The pleadings define the issues to be considered on a motion for summary judgment. (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) A defendant or cross-defendant meets his or her burden upon a motion for summary judgment if that party has proved "one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) The defendant need not conclusively negate an element of the plaintiff's cause of action, but must only show that one or more of its elements cannot be established. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) "Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) In opposing the motion, the plaintiff or cross-complainant may not simply rely upon allegations or denials of the pleadings; the plaintiff or cross-complainant must set forth specific facts showing that a triable issue of material fact exists. (*Ibid.*)

A plaintiff or cross-complainant has met his or her burden upon a motion for summary judgment if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the opposition to show a triable issue of fact exists. In opposing the motion, the defendant or cross-defendant may not simply rely upon allegations or denials of the pleadings; the defendant or cross-defendant must set forth specific facts showing that a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(1).)

On appeal, 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.) "The appellate court must examine only papers before the trial court when it considered the motion, and not documents filed later. [Citation.] Moreover, we construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19; accord, *Lorenzen-Hughes v. MacElhenny, Levy & Co.* (1994) 24 Cal.App.4th 1684, 1686-1687.)

In reviewing objections to evidence offered in conjunction with summary judgment, our standard of review depends on the nature of the objection. "De novo review is proper where evidentiary objections raise questions of law, such as whether or not a statement is hearsay. [Citations.] In contrast, evidentiary objections based on lack of foundation, qualification of experts, and conclusory and speculative testimony are traditionally left to the sound discretion of the trial court [and reviewed for abuse of that discretion]." (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226.) As we explain, the striking of the Rodriguez declaration was at most harmless error regardless of which standard of review we apply.

2. *Summary Judgment in Favor of Allen on Janeke's Complaint*

We conclude, as did the trial court, that Allen has established that Janeke cannot prevail on any cause of action in

his complaint, and that Allen is entitled to judgment as a matter of law. We discuss each cause of action.

A. *Fraud (Cause of Action 1) and Negligent Misrepresentation (Cause of Action 2)*

The elements of fraud are misrepresentation, knowledge of falsity, intent to defraud, justifiable reliance, and damage. (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1249.) "The elements of a negligent misrepresentation are '(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.' Negligent misrepresentation does not require knowledge of falsity, unlike a cause of action for fraud. [Citation.]" (*Id*. at p. 1252.)

Janeke's fraud and negligent misrepresentation causes of action were based on both the recommendation of Galindo and the recordation of the bankruptcy court's order. As for recommending Galindo as a loan agent, there is no actionable representation of fact – there was simply Janeke's opinion of Galindo's abilities. As to the recordation of the bankruptcy court order, Janeke did not allege, and cannot establish, that he relied on any representation made by that recordation.

In apparent recognition that his causes of action were unmeritorious as pleaded, Janeke changed his theory in opposition to the summary judgment motion. He argued that his fraud cause of action was instead based on Allen's initial concealment of her intent to record the bankruptcy document. On appeal, Janeke expands on that new theory, arguing that Allen committed promissory fraud by representing that she

would help Janeke obtain financing "and not previously recording this Plan, when in actuality Allen conceal[ed] her intent to delay and hinder Janeke's refinancing." "If Allen planned or wanted to record the Plan, she has a duty to inform Janeke based on the dealings of the Parties."

This was not the theory pleaded in Janeke's complaint, and Allen was therefore not required to defeat it in summary judgment. In any event, we fail to see how a creditor's initial *inaction* with respect to recording a document can somehow balloon into a promise that the creditor would not, in fact, act.

B. *Unfair Business Practices (Cause of Action 3)*

Janeke's cause of action for unfair business practices alleged that Allen committed fraud by recording the bankruptcy court order. It therefore falls with the fraud cause of action.

C. *Slander of Title (Cause of Action 4) and Quiet Title (Cause of Action 5)*

"To state a claim for slander of title, a plaintiff must allege '(1) a publication, (2) which is without privilege or justification,' (3) which is false, and (4) which 'causes direct and immediate pecuniary loss.' [Citations.]" (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1336.) Janeke's slander of title cause of action was based on the premise that Allen's recordation of the bankruptcy court order slandered his title to the Ingraham property. Similarly, in a quiet title action, a plaintiff seeks "to establish title against adverse claims" to real property. (Code Civ. Proc., § 760.020, subd. (a).) Janeke's quiet title cause of action was based on the purported adverse claim set forth in the recorded bankruptcy court order.

We have reviewed the language of the bankruptcy court order. It does not state that Allen has any interest in the

Ingraham property. Instead, it confirms that her security interest in the property was replaced with a security interest in Janeke's patents. The document is not false; it correctly reflects the bankruptcy court's order. As a matter of law, recording this document did not slander Janeke's title to the Ingraham property and could not provide the basis of a quiet title action.

Janeke suggests that the document did cloud title because it implied that the cash flow from the property was hypothecated (to pay Allen) and could not be relied upon for repayment of any contemplated loan. That Janeke might have been required to use rental income from the Ingraham property to pay a debt not secured by that property is not a cloud on the title, but an inference regarding his financial situation. To the extent Allen's act of recording the document may have informed lenders of Janeke's obligation to repay Allen as ordered by the bankruptcy court, there is nothing false or misleading to that statement.[7]

D. *Breach of Contract (Cause of Action 6)*

Janeke's initial breach of contract cause of action did not clearly allege any actionable breach. In opposition to summary judgment, Janeke changed his theory to allege that Allen breached the bankruptcy court's confirmed plan by failing to accept the substitute security of his patents. Janeke argued that the failure to appraise this security constituted a failure to mitigate damages. The trial court rejected this argument on the basis that the security was, in fact, substituted by operation of law following the confirmation of the bankruptcy plan. Janeke's

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[7] Indeed, the only way in which it could have harmed Janeke's ability to obtain a loan would have been if Janeke had failed to disclose that obligation, or the bankruptcy itself, to lenders during the application process.

premise that Allen was required to exhaust her security (the interest in the patents) before proceeding against him is simply unsupported by the law. California Commercial Code section 9601 provides that, after default, a secured party may foreclose on the security and/or simultaneously reduce its claim to judgment. Because of the substitution of the security, this became a commercial transaction, not a real property secured transaction, and the Commercial Code rules applied.

On appeal, Janeke again changes his theory, arguing, on the basis of evidence he submitted only in connection with post-judgment motions, that Allen wrongfully retained the collateral of the security interest in the patents even after Janeke paid the judgment. This issue is not before us, and we decline to address it.[8]

E. *Negligent (Cause of Action 7) and Intentional (Cause of Action 8) Infliction of Emotional Distress*

As to Janeke's emotional distress causes of action, Janeke concedes that authority requires a plaintiff to establish a breach of duty which threatens "physical injury, not simply damage to property or financial interests. [Citations.]" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 985 (*Potter*).) Janeke recognizes that this authority would bar his claim, but argues that the Ingraham property "is not solely property but Janeke's source of income, retirement and healthcare at the age of 74 which if lost would put him and his wife and son whom he supports [in] great jeopardy. Thus the injury is far greater than to property but to Janeke himself and his ability to care for himself and his family." Yet Janeke cites no authority for the

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[8] We express no opinion on the ownership or legal status of the patents in question.

proposition that a party can recover for emotional distress based on a threat to financial interests if that threat is particularly severe.

In any event, Janeke's emotional distress causes of action are barred for a more fundamental reason. As to negligent infliction of emotional distress, there is no such cause of action in California; the tort is only negligence, and the plaintiff must show a duty and its breach. (*Potter, supra,* 6 Cal.4th at p. 984.) Janeke has not done so. As to intentional infliction of emotional distress, the cause of action requires extreme and outrageous conduct, so extreme as to exceed all bounds of that usually tolerated in a civilized society. (*Id.* at p. 1001.) Janeke's cause of action is based on Allen's act of recording a true bankruptcy court document; this is not extreme and outrageous conduct exceeding all bounds of that usually tolerated in a civilized society.

F. *Any Error in Excluding the Expert's Declaration was Harmless*

Janeke argues the trial court's grant of summary judgment against him was based on the court's erroneous order striking, on its own motion, the declaration of his expert, Rodriguez.

Preliminarily, the trial court raised the issue to the parties in its tentative ruling, and Janeke submitted on the tentative. In the absence of a reporter's transcript, there is no indication that Janeke did anything other than agree with the court's tentative ruling that the Rodriguez declaration was inadmissible.

In any event, even if Janeke is correct that the trial court improperly sustained, essentially, its own objection to the declaration, any error in excluding Rodriguez's declaration was necessarily harmless. Summary judgment was appropriately granted against Janeke on his complaint because, as a matter of

law, there was nothing actionable in Allen's act of recording a true bankruptcy court document or recommending a loan agent. No expert opinion on whether Allen had acted with malice, whether her acts could be perceived as clouding title, and what interest rate Janeke could have obtained could change this result.

G. *Any Error in Declining to Rule on the Continuance Motion was Harmless*

Shortly before the hearing on the summary judgment motion, Janeke filed a motion to continue the trial date which, in passing, also sought to continue the hearing on the summary judgment motion. The continuance motion was set for hearing on the same date as the hearing on the summary judgment motion. The court indicated its tentative ruling was to grant summary judgment; the record does not reflect that Janeke made any effort to call to the court's attention the fact that his pending continuance motion also sought to continue the summary judgment hearing.

On appeal, Janeke argues that the trial court erred in not granting the motion under Code of Civil Procedure section 437c, subdivision (h), which provides that, if it appears from the affidavits submitted in opposition to a summary judgment motion that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion and order a continuance to permit affidavits to be obtained or discovery to be had. Specifically, Janeke argues that his own declaration in opposition to the summary judgment motion explained that further discovery was necessary to authenticate the Open Bank document offering him a loan at a reasonable rate. As we have explained, however, summary judgment was appropriately granted, regardless of whether Open Bank had

actually offered Janeke a loan at 4.65 percent. In other words, subdivision (h) of Code of Civil Procedure section 437c did not apply, because any facts Janeke sought to discover were not, in fact, essential to his opposition.

In his reply brief on appeal, Janeke argues that the motion should have been granted not under Code of Civil Procedure section 437c, subdivision (h), but the general rules governing continuances of trial dates, due to the ill health of Janeke's counsel's daughter. This argument is raised for the first time in reply, and we need not address it. Nonetheless, under the circumstances, any failure to grant the continuance was harmless. Janeke's action, as pleaded, was meritless. No amount of discovery could have rendered fraudulent Allen's recommendation of a loan agent or turned her recordation of a true copy of a bankruptcy court order into slander of title. A continuance would have only postponed the inevitable.

3. *Summary Judgment in Favor of Allen on Her Own Cross-Complaint*

The court granted summary judgment in favor of Allen on her cross-complaint for breach of the terms of the confirmed reorganization plan. "A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract. [Citations.]" (*Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n.* (9th Cir. 1993) 997 F.2d 581, 588.) Here, Allen established the terms of the reorganization plan which required Janeke to pay her $200,000 in $10,000 monthly increments, beginning in May 2015 (as well as interest). She further established that Janeke made two such payments, and then failed to make any others. Janeke did not dispute this set of circumstances; he simply argued that his failure to make payments was excused by Allen's

misconduct (as alleged in his complaint) or that she should have exhausted her security interest in the patents first. As we have discussed, both of these arguments are meritless; Allen was therefore entitled to judgment in her favor on her cross-complaint.

We address one final point: In Allen's cross-complaint, she initially pleaded that Janeke made two $10,000 payments which she credited against the $200,000 principal, leaving a balance of $180,000. In her motion for summary judgment, she argued that she instead credited one of those payments to a different loan (made to help Janeke pay his bankruptcy counsel), so she was entitled to the principal balance of $190,000. This recharacterization of one of the payments is in direct contradiction of the allegations and prayer of Allen's cross-complaint. Moreover, there is no evidence supporting it. Allen did not, for example, include any documentation reflecting the terms of repayment of the $10,000 loan, which would allow her to credit one of the $10,000 payments against it. Under the circumstances, Allen has pleaded and proven a claim for $180,000, not $190,000, and the trial court's judgment for the larger amount must be reduced. This will require a corresponding reduction in the interest awarded.

DISPOSITION

The judgment in favor of Allen is modified in the following respect. Judgment should be in the principal amount of $180,000, not $190,000. The matter is remanded to the trial court for a modification of the interest awarded. In all other

respects, the judgment is affirmed. Janeke shall pay Allen's costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J.

DUNNING, J.*

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