Filed 2/28/13 Gibson v. Countrywide Home Loans CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

TERRY GIBSON, Plaintiff and Appellant, v. COUNTRYWIDE HOME LOANS, INC., et al., Defendants and Appellants.	B227491 (Los Angeles County Super. Ct. No. BC356053)

APPEALS from a judgment and order of the Superior Court for the County of Los Angeles. Carolyn B. Kuhl, Judge. Judgment and order affirmed. Motion to strike granted in part.

———

The Kick Law Firm, Taras Kick, Thomas Segal; Elkins Kalt Weintraub Reuben Gartside, Jeffrey K. Riffer and Susan C.V. Jones for Plaintiff and Appellant.

Bryan Cave, Douglas E. Winter, Robert E. Boone III, Jennifer A. Jackson and Jed P. White for Defendants and Appellants.

———

Terry Gibson appeals from the judgment entered in favor of Countrywide Home Loans, Inc., Landsafe, Inc. and Landsafe Appraisal Services, Inc. (collectively defendants), contending that the trial court erred by granting summary judgment against him in this class action for violations of Business and Professions Code section 17200 (section 17200) and Financial Code section 50505. Gibson also appeals from the order decertifying the class and subclass. Defendants appeal from the judgment as well, maintaining that, although the court properly granted summary judgment against Gibson, it erred by failing to grant summary judgment in their favor as to all class members. We affirm the judgment and decertification order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Operative Complaint*

On April 21, 2008, Gibson filed the operative third amended complaint, alleging six causes of action: (1) violation of section 17200; (2) violation of Financial Code section 50505[1]; (3) constructive trust; (4) money had and received; (5) breach of contract; and (6) fraud. According to the complaint, Countrywide in connection with real property loan transactions, used Landsafe Appraisal, a third-party settlement service provider, to obtain appraisals. Landsafe Appraisal charged Countrywide more than the amount it paid to the person doing the actual appraisal, and Countrywide passed that markup on to borrowers. Neither Countrywide nor Landsafe Appraisal disclosed to borrowers the fact that the appraisal costs on the HUD-1 Settlement Statement, established by the Department of Housing and Urban and Development (HUD), included an amount in excess of that charged by the individual appraiser. Gibson claimed, in connection with the February 4, 2005 refinance of his Countrywide loan, that the expenses listed on his HUD-1 Settlement Statement included a $555 appraisal fee, a cost "higher than the amount that was paid to the appraiser rendering the appraisal[,]" and that the sum actually paid to the appraiser was not disclosed to him. Gibson also claimed that Countrywide

[1] Financial Code section 50505 provides that a violation of the federal Real Estate Settlement Procedures Act (12 U.S.C. § 2601 et seq.) (RESPA) constitutes a violation of state law.

charged him for an appraisal product called a Desktop Review (2006), even though Landsafe Appraisal did not render such service. Gibson maintained that the markup, failure to itemize all appraisal costs and lack of performance of a Desktop Review (2006) constituted violations of RESPA and unlawful, unfair and fraudulent conduct under section 17200.

Based on these claims, Gibson included in the operative complaint class allegations seeking to certify a class of "[a]ll persons within the State of California who obtained from Countrywide one or more federally related residential mortgage loans and, who at any time on or after July 26, 2002, paid Countrywide an appraisal fee for an appraisal that was obtained through Landsafe Appraisal and was in excess of that paid by Landsafe Appraisal to the appraiser." Gibson also sought to certify a subclass of "[a]ll persons within the State of California who obtained from Countrywide one or more federally related residential mortgage loans and who, at any time on or after July 26, 2002, paid Countrywide a fee for a Desktop Review (2006) that was not rendered." Gibson requested compensatory and punitive damages on behalf of himself and the putative class, plus injunctive relief, restitution, statutory penalties, prejudgment interest, attorney fees and costs.[2]

2. *Class Certification*

Gibson moved for class certification. Defendants opposed the motion. After reviewing the parties' papers and hearing argument, the trial court granted certification of a class and subclass for Gibson's section 17200 and Financial Code section 50505 causes of action. The court denied certification of the causes of action for fraud, constructive trust, money had and received and breach of contract.[3]

---

[2] Gibson also complained about notary fees but did not pursue those allegations.

[3] Gibson did not further pursue his causes of action for fraud, constructive trust, money had and received and breach of contract. On appeal, he contends the trial court erred by declining to certify those causes of action for class treatment. We disagree. The theory supporting Gibson's fraud cause of action was that Countrywide had misrepresented to consumers that an appraisal through Landsafe Appraisal was required to close a loan with Countrywide and had failed to disclose that consumers could use one

3. *The Motions for Summary Judgment and Summary Adjudication*

After certification of the class and subclass and discovery, defendants moved for summary judgment, as to Gibson individually and the class and subclass. Defendants argued the undisputed facts demonstrated as a matter of law that: (1) they did not mark up the cost of the settlement service, as Countrywide had paid Landsafe Appraisal the $555 listed on Gibson's HUD-1 settlement services form; (2) listing the total appraisal fee of $555 on the HUD-1 form satisfied RESPA, and an itemization of services performed in connection with the appraisal was not required; and (3) the appraisal review that Gibson received, although not the Desktop Review (2006), was part of the appraisal process to close his loan transaction and cost the same as the Desktop Review (2006). Gibson opposed summary judgment and moved for summary adjudication. According to Gibson, because the individual who performed the appraisal, Joe Rogers, charged Landsafe Appraisal only $240 for the initial appraisal and $100 for additional work, the $555 fee on his HUD-1 form showed a markup of the appraisal. Gibson maintained that any fees, making up the difference between the $555 listed and the $340 paid to Rogers, were improperly charged to him and, in any case, should have been separately itemized on blank lines of the HUD-1 form. In addition, Gibson argued that the appraisal review actually performed was inferior to the Desktop Review (2006), in fact a useless service, and the discrepancy in services performed should have been disclosed to him.

---

of several other appraisal management companies to obtain an appraisal for a Countrywide loan. The putative class proposed on class certification, however, encompassed those who "paid an appraisal fee for an appraisal obtained through Landsafe Appraisal that exceeded the amount Landsafe Appraisal paid to the appraiser for the appraisal." The putative class thus did not coincide with the theory of the fraud cause of action. No basis thus existed to certify it for class treatment. Gibson did not demonstrate that class treatment was appropriate for his causes of action for constructive trust, money had and received and breach of contract because the class claims, as pleaded in the operative complaint, were statutory, not common law or contract, claims. In any case, Gibson has not shown, in light of the summary judgment rulings, how the failure to certify the common law and contract causes of action prejudiced him. No error, therefore, resulted from the denial of class certification of those causes of action.

4. *The Trial Court's Summary Judgment and Class Decertification Rulings*

Based on the parties' submissions and oral argument, the trial court granted defendants' summary judgment motion as to Gibson and denied Gibson's summary adjudication motion. As to the markup theory, the court concluded that "[d]efendants have provided undisputed facts that, in performing Plaintiff[] [Gibson's] appraisal, [Landsafe Appraisal] performed non-duplicative services in addition to the appraisal done by a third party individual" and thus that Gibson could not establish a RESPA violation on a markup theory. Because as a matter of law Gibson could not establish a RESPA violation based on his markup theory, his cause of action for violation of Financial Code section 50505 failed, as a "violation of that section is premised on a RESPA violation." As for the section 17200 cause of action, the court determined that "[t]he 'unlawful' prong of the [unfair competition law] depends upon a showing that a defendant has violated the law, and this showing cannot be made based on Plaintiff's mark-up theory" because no RESPA violation has occurred. The court also concluded that as a matter of law Gibson could not establish a section 17200 violation based on the statute's unfair and fraudulent prongs because, under RESPA, "Congress declined to regulate mortgage settlement practices by imposing pricing restrictions. The federal legislature refused to set standards for reasonable pricing of settlement services. For this reason, federal appellate courts and this court have declined to interpret section 8(b) and Regulation X[, RESPA's implementing regulation for the settlement services form,] to require a court to inquire whether a particular settlement service is more than nominal, because to do so would involve a court in measuring the value of a service to determine if a mark-up is justified."

Regarding the itemization theory, the trial court determined that Gibson could not establish a section 17200 or Financial Code section 50505 violation. According to the court, "[a]ppraisal fees must be separately itemized at line 803 (or, now, line 804) of the [HUD-1] form. Only one line is provided on the form for disclosure of appraisal fees. With respect to Gibson's transaction, Countrywide disclosed on line 803 that [Landsafe Appraisal] received a lump sum of $555. Countrywide did not disclose the amount

[Landsafe Appraisal] paid to Rogers, the individual appraiser, or the nature of the other services performed by [Landsafe Appraisal]. [¶] . . . The HUD-1 form prescribed by the agency for this purpose [of itemizing third-party changes] provides only one line for the lender to record appraisal charges to the borrower. Thus, there is no indication on the form itself that a lender is required to break down an appraisal fee paid by the lender into component parts, if the fee paid by the lender includes several appraisal-related services. The $555 amount listed did not exceed the amount actually received by [Landsafe Appraisal] for the package of appraisal services it provided. [¶] . . . [¶] . . . [¶] . . . If the amount paid to any third party that received compensation in connection with settlement services was required to be disclosed, even though the third party did not provide services directly to the lender, the lender would have no practical means of determining when its disclosure compliance was complete. . . . " The court also concluded that the itemization theory failed as to the class, stating that, "because Defendants have shown that there was no duty to further itemize the appraisal fee paid by Countrywide, Defendants have established that the claims of the class as a whole have no merit with respect to this theory."

The trial court also determined that Gibson could not establish a violation of section 17200 or Financial Code section 50505 for the certified subclass based on the desktop review theory: "Countrywide was not required to separately disclose each element of its appraisal fee to consumers on the HUD-1. Therefore, Defendants did not act unlawfully when they failed to identify to Plaintiff the nature of the desktop appraisal that was performed with respect to his loan. Moreover, because no representation was made to Gibson concerning the nature of the appraisal service rendered, no issue is raised as to fraud based on a misrepresentation under the [unfair competition law]. [¶] Insofar as Plaintiff contends the [Landsafe Appraisal Risk Analyzer (LARA)] . . . review process[, which was performed for his loan transaction,] was worth less than a Desktop Review (2006), Plaintiff's theory of liability is nothing more than a claim that Plaintiff was overcharged for appraisal services. . . . RESPA is not a price regulation statute and does not regulate overcharges. . . . [¶] Finally, as . . . with . . . Plaintiff's mark-up theory of

recovery, based on the undisputed facts, Plaintiff cannot meet his burden under RESPA of showing that the services performed in the LARA review were nonexistent, nominal or duplicative."

The trial court, however, denied defendants' summary judgment motion as to the class members. According to the court, "[d]efendants attempt to defeat Plaintiff's claims based on a mark-up theory by showing that the functions performed by [Landsafe Appraisal] were not non-existent, nominal or duplicative. Defendants do not attempt to offer facts concerning the processing of *all* class members' appraisals by [Landsafe Appraisal], nor do they argue that the functions performed in connection with Plaintiff's own appraisal were performed in connection with every class member's appraisal. Therefore, as to Plaintiff's mark-up theory of recovery, Defendants have not met their initial burden of making a prima facie showing of the nonexistence of any genuine issue of material fact as to all class members." The court later noted that, "after class certification and notice, Defendants filed essentially the same motion for summary judgment that they had withdrawn prior to class certification. That is, Defendants offered evidence specific to the individual Plaintiff's (Mr. Gibson's) transaction rather than evidence of facts common to all class members' transactions." As a result, although the itemization and desktop review theories failed as to class members, the remaining markup theory precluded summary resolution of both the section 17200 and Financial Code section 50505 causes of action because a trial court cannot grant partial summary adjudication of a cause of action.

After making its summary judgment rulings and entering judgment, the trial court decertified the class and subclass and dismissed the class members' claims without prejudice. The court concluded, "With respect to the class, class claims cannot be pursued without a class representative. [Citation.] Insofar as some class members may have viable claims, the claims of Mr. Gibson [as to the markup theory] were not representative of their circumstances. The interpretation of RESPA adopted by this court makes clear that common issues of fact do not predominate as to Plaintiff's claims based on additional sums charged by [Landsafe Appraisal] over and above the cost of a third-

party appraisal. The appraisal process for each class member would have to be examined to determine what (if any) services [Landsafe Appraisal] itself performed and whether those services were duplicative or . . . properly could be characterized as merely nominal. . . . [¶] Plaintiff Gibson's claims based on the requirements of the HUD-1 disclosure and [the desktop review theory] are based on facts that are common to the remainder of the class. However, Plaintiff's counsel would need to request the substitution of another class representative in order to pursue those claims on a classwide basis. Plaintiff's counsel understandably has indicated that they do not plan to ask to substitute a class representative in order to pursue these claims because this court's analysis in ruling on Defendant[s'] motion for summary judgment as to Mr. Gibson rejects these theories of recovery on grounds applicable to the class as a whole. [Citation.] Thus, lacking a class representative, the class also must be decertified as to these theories of recovery as well. [¶] Plaintiff can appeal from a denial of class certification or from an order decertifying a class. . . . If this court's grant of summary judgment in favor of Defendants on Gibson's claims is reversed on one or more grounds, the implications of that reversal may (or may not) make it appropriate to reinstate class certification on appeal from this order decertifying the class. Judicial economy does not favor holding this case in a status by which the claims of the only class representative are on appeal and the unrepresented class is held in an undefined limbo status."

Gibson timely appealed from the judgment and the order decertifying the class. Defendants timely appealed from the judgment.[4]

---

[4] Gibson moved to strike the cross-appellants' reply brief on the ground that defendants improperly used the brief to address arguments made in Gibson's reply brief on his appeal, rather than confine the brief to issues on the cross-appeal. We agree with Gibson that portions of the cross-appellants' reply brief improperly relate to issues on the appeal not the cross-appeal. Although we decline to strike the entire brief as Gibson requested, we strike those portions of the brief that are not limited to the cross-appeal (specifically, section I(C)(1) beginning on page 8 through section II concluding on page 16 and section III(A) on page 17). (See *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 268 ["'a cross-appellant may not use its *cross-appellant's* reply brief to answer points raised in the *appellant's* reply brief'"].)

DISCUSSION

1. *The Trial Court Did Not Err in Granting Summary Judgment Against Gibson*

a. *Standard of review*

A trial court must grant a summary judgment motion when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We independently review the trial court's decision, "considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

b. *The markup theory*

"Enacted in 1974, RESPA regulates the market for real estate 'settlement services,' a term defined by statute to include 'any service provided in connection with a real estate settlement,' such as 'title searches, . . . title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, . . . services rendered by a real estate agent or broker, the origination of a federally related mortgage loan . . ., and the handling of the processing, and closing or settlement.' [Citation.]" (*Freeman v. Quicken Loans, Inc.* (2012) 132 S.Ct. 2034, 2037-2038, fn. omitted (*Freeman*).) Under RESPA, "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." (12 U.S.C. § 2607(b) (RESPA section 8(b)).) Gibson contends that the $555 he paid for an appraisal, as part of the refinance of his loan, violates RESPA and constitutes an

unlawful, unfair and fraudulent business practice under section 17200 because the actual appraiser's fee was less than $555 and defendants therefore unlawfully marked up the fee by charging him $555. The trial court concluded that, based on the services that were performed in connection with the appraisal for Gibson's loan transaction, there was no markup in violation of RESPA. We agree.

The facts are undisputed that Landsafe Appraisal charged $555 for the appraisal services related to Gibson's loan and that Countrywide charged Gibson $555 as noted on his settlement services form. Thus, Countrywide did not mark up the fee for the appraisal services.

The facts also are undisputed that Rogers, the appraiser, charged Landsafe Appraisal $240 for the initial appraisal and $100 for an additional inspection. As a result, Gibson's markup theory is premised on the difference of $215 between the $555 he paid for the appraisal, as identified on his settlement services form, and the $340 paid to Rogers.

Under *Freeman*, RESPA section 8(b) "covers only transactions in which a provider shares a part of a settlement-service charge with one or more other persons who did nothing to earn that part." (*Freeman*, *supra*, 132 S.Ct. at p. 2039.) The United States Supreme Court decided *Freeman* only last year when briefing in this appeal was nearly complete. Gibson's markup claim appears to lack validity in light of *Freeman* because he did not present any facts to controvert that neither Countrywide nor Landsafe Appraisal shared a part of the charge for the appraisal with another person who did nothing to earn it.

In any case, as *Freeman* makes clear, the person accepting the charge must do "nothing" to earn it. (*Freeman*, *supra*, 132 S.Ct. at p. 2039.) "The language of Section 8(b) prohibits only the practice of giving or accepting money where no service whatsoever is performed in exchange for that money . . . . By negative implication, Section 8(b) cannot be read to prohibit charging fees, excessive or otherwise, when those fees are for services that were actually performed." (*Martinez v. Wells Fargo Home Mortg., Inc.* (9th Cir. 2010) 598 F.3d 549, 553-554.) In other words, under RESPA

section 8(b), Gibson can prove an improper markup only if the additional $215 was for services that were not "actually performed" by Landsafe Appraisal. Based on the undisputed facts, Gibson cannot make that showing. The undisputed facts demonstrate that Landsafe Appraisal did not do "nothing" in connection with Gibson's loan transaction over and above the $340 charged by Rogers. (*Freeman*, at p. 2039.)

Of the $215 Gibson paid beyond Rogers's $340 fee, $75 was for a desktop review that Countrywide ordered as a result of Gibson's credit rating. The LARA desktop review performed by Landsafe Appraisal included an employee's work in researching sales comparison and sales history information and a staff appraiser's review and analysis of the data and preparation of a report. The staff appraiser identified two issues concerning the appraisal of Gibson's property as it related to the loan transaction: (1) based on Rogers's observation that the bedroom windows of Gibson's home had security bars, the staff appraiser noted the bars presented "health and safety issues" and recommended that Countrywide's underwriter require confirmation that safety latches be installed on the bars; and (2) the staff appraiser flagged an adjustment by Rogers to the value of Gibson's property based on the conversion of his garage to an unpermitted spa and weight room as potentially overstated. These issues were handled as Gibson's loan was processed. Landsafe Appraisal, therefore, actually performed services for the $75 it charged for the LARA desktop review.

The remaining $140 charged by Landsafe Appraisal also was for services actually performed. Although Rogers charged Landsafe Appraisal $240 for the initial appraisal, Landsafe Appraisal charged Countrywide $350; and, although Rogers charged Landsafe Appraisal $100 for the return trip to the property, Landsafe Appraisal charged Countrywide $130. Gibson contends the $110 and the $30 charged by Landsafe Appraisal constitute illegal markups, but the undisputed evidence shows that Landsafe Appraisal actually performed services for those fees. Those services included assigning Rogers to perform the initial appraisal; acting as a liaison between Countrywide and Rogers regarding the appraisal; communicating with Countrywide regarding the issues identified in the LARA desktop review; scheduling Rogers to reinspect the property

based on those issues and arranging for his completion of a satisfaction certificate; and reviewing Rogers's certification and report and submitting it to Countrywide. All of these services contributed to the closing of Gibson's loan transaction.

Gibson does not dispute that Landsafe Appraisal performed these services. Rather, based on declarations he submitted in opposition to summary judgment, he contends the services were inferior, useless or not necessary. The question under RESPA, however, is not the value of the services, but whether they were performed. (*Busby v. JRHBW Realty, Inc.* (11th Cir. 2008) 513 F.3d 1314, 1324 [under RESPA § 8(b) "a simple binary determination of 'any services' or 'no services' is all that need be done"].) It is undisputed that Landsafe Appraisal performed services. As the trial court summarized, Landsafe Appraisal "performed substantial scheduling, monitoring and administrative functions with respect to the completion of Rogers'[s] appraisal; [Landsafe Appraisal's] check on and further exploration of Rogers'[s] work (through the LARA desktop review) identified conditions that were important to Countrywide's underwriting determination with respect to the loan; and [Landsafe Appraisal] carried through in a timely manner the organization required to complete the certification needed by Countrywide. These are the type of appraisal management functions that HUD contemplates as appropriate to ensure the quality of work done by an individual appraiser." According to HUD, "appraisal service providers, cooperatives and similar entities may provide a host of services that expedite and improve the quality of the appraisal. Consequently, the Department will allow the mortgagor to pay a fee for the appraisal which may encompass fees for services performed by an appraisal management firm as well as fees for the appraisal itself." (HUD Mortgage Letter 97-46, http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14644.txt.) That is precisely what occurred with Gibson's loan—Gibson paid a fee for the appraisal and reinspection by Rogers as well as $215 for services performed by Landsafe Appraisal as

an appraisal management firm. As a result, no RESPA violation exists based on the $555 Gibson paid in connection with the appraisal for his loan transaction.[5]

Gibson maintains that, even if he cannot establish the $555 charge is unlawful under RESPA, it nevertheless violates section 17200 because it was unfair and fraudulent. The charge, however, was not unfair or fraudulent because no dispute exists that Landsafe Appraisal performed services contemplated by HUD for appraisal management firms in addition to the work of Rogers and that Countrywide paid Landsafe Appraisal the $555 that it charged Gibson for the appraisal services. (See *Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 496-497 [§ 17200 cause of action based on alleged violation of Gov. Code, § 8211, setting the amount a notary can charge per signature, failed as a matter of law because notary fee in connection with loan refinance transaction included services other than merely taking the signature, such as traveling to the signing location, presenting multiple documents for signature, showing where to sign on the document and answering questions].) Moreover, to the extent Gibson suggests that we should value the services performed by Landsafe Appraisal in

---

[5] In the trial court, and in the appellate briefing, much of the parties' argument on the markup theory focused on the question whether Landsafe Appraisal actually performed services. Gibson argued the services could be considered actually performed only if they were actual, necessary and distinct. Defendants argued actually performed meant simply more than no, nominal or duplicative services. The trial court concluded the standard was no, nominal or duplicative. *Freeman* supports this conclusion by stating that for a RESPA violation to occur the person accepting the charge must do "nothing" to earn it. (*Freeman, supra*, 132 S.Ct. at p. 2039.) Regulation X, the implementing regulation of HUD for RESPA, also provides that a "charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section." (24 C.F.R. § 3500.14(c).) Gibson does not dispute that Landsafe Appraisal performed the services it says it did. Thus, Landsafe Appraisal performed some services. Those services were not duplicative of other fees. And, although Gibson claims the services were nominal, he, as the trial court concluded, did not raise a triable issue of fact by presenting evidence that all of the services were no more than nominal and, indeed, makes more of a quality or valuation-type argument, which is not governed by RESPA. (*Friedman v. Market Street Mortg. Corp.* (11th Cir. 2008) 520 F.3d 1289, 1296 [RESPA section "8(b) does not govern excessive fees because it is not a price control provision"].)

analyzing his section 17200 cause of action, such valuation would conflict with RESPA, which, as noted, is not a price control provision and does not govern the question of excessive fees. (*Friedman v. Market Street Mortg. Corp.*, *supra*, 520 F.3d at p. 1296.)

Our decision in *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457 (*McKell*) is not to the contrary. In that case, we concluded that the borrowers had stated a section 17200 cause of action against their lender. (*Id*. at p. 1488.) The borrowers alleged that the lender "did not disclose to borrowers that in many cases it was performing no underwriting services, it was charging them significantly more than the cost of those services and it was retaining the difference." (*Id*. at p. 1466.) In addition, according to the borrowers, the lender "charges borrowers more for the third party vendor services than the vendors charge, without performing any additional services, and retains the difference, unbeknownst to the borrowers." (*Ibid*.) Moreover, the borrowers alleged, the lender "pays a flat fee to wire money to another bank or title company . . . [but] charges borrowers fees for this service well above its costs, without performing any additional services and without disclosing the markup to borrowers." (*Id*. at p. 1467.) Those allegations, we determined, survived a demurrer under the unlawful, unfair and fraudulent prongs of section 17200 because they provided a factual basis that the lender was charging the borrowers more than its pass-through costs without performing additional services. (*Id*. at pp. 1471-1476.) Here, in contrast, Gibson cannot survive summary judgment on his section 17200 cause of action when the evidence is undisputed that Countrywide charged Gibson only the $555 it paid Landsafe Appraisal for the appraisal services and that Landsafe Appraisal actually performed services in connection with the appraisal in addition to Rogers's work. Moreover, in *McKell*, we specifically recognized that RESPA "prohibits a '"settlement service provider" from "mark[ing]-up the cost of another provider's services without providing additional settlement services."' [Citation.]" (*Id*. at p. 1478.) Although in *McKell* the allegations stated a claim that the lender had marked up the cost of settlement services without

providing additional settlement services, the evidence here on summary judgment demonstrates that no such markup occurred. *McKell*, therefore, does not assist Gibson.[6]

c. *The itemization theory*

Gibson claimed that defendants violated RESPA by listing $555 as the appraisal fee on line 803 (now line 804), which is titled "Appraisal Fee," of the HUD-1 settlement services form. According to Gibson, RESPA required that Countrywide specify the amount paid to the actual appraiser on line 803, list separately in the blank lines on the form the amounts for the LARA desktop review and other services performed by Landsafe Appraisal and identify all persons or entities receiving part of the total $555 appraisal fee. Explaining this itemization theory on appeal, Gibson states that "the applicable HUD regulations under RESPA require that only the fee for the appraisal itself be listed on line 803 (now line 804) of the HUD-1, and additional charges for appraisal management or other services must be itemized on the blank lines of the HUD-1 for 'Additional Settlement Services.'" The trial court concluded that Gibson could not establish a RESPA violation based on the itemization theory. We agree.

As to itemization of settlement services, RESPA requires only that the uniform settlement statement, the HUD-1 form, "conspicuously and clearly itemize all charges imposed upon the borrower . . . ." (12 U.S.C. § 2603(a).) As the Ninth Circuit has determined, "the language of [RESPA] is clear that the HUD-1 Settlement Statement requires only a list of '*charges imposed upon the borrower*.' [Citation.] This clearly means that [the lender] must list the amounts it is charging [the borrowers] for its settlement services, not that it must list the costs it incurred in providing those services. . . . It is beyond dispute that there is a difference between what a business 'charges' its customers for a service or product, and what that service or product 'costs'

---

[6] In *McKell*, *supra*, 142 Cal.App.4th at pp. 1475-1480, we adopted the proposition from *Kruse v. Wells Fargo Home Mortg., Inc.* (2d Cir. 2004) 383 F.3d 49 that a RESPA violation may occur even when there is not one person who gives and at least one person who accepts a settlement service fee other than for services actually performed. We recognize that the United States Supreme Court in *Freeman*, *supra*, 132 S.Ct. at pp. 2039-2044, rejected that proposition. That rejection does not benefit Gibson.

the business. That difference is called 'profit,' and it is the motive for businesses to sell services or products. . . . Because [under the plain language of the statute,] there is no requirement for [the lender] to disclose actual costs on the HUD-1 Settlement Statement, [its] conduct in not doing so cannot be 'fraudulent' . . . ." (*Martinez v. Wells Fargo Home Mortg., Inc.*, *supra*, 598 F.3d at pp. 557-558.) Here, it is undisputed that Countrywide, as the lender, charged Gibson, as the borrower, $555 for the appraisal fee and listed that amount on the HUD-1 form. Thus, under RESPA, no further itemization was required. In addition, because Countrywide charged Gibson only the $555 it paid to Landsafe Appraisal for the appraisal fee, such practice could not have been unfair or fraudulent.

Gibson contends that Countrywide's listing of the total $555 appraisal fee, without itemizing the individual components, violates Regulation X, which includes HUD's regulation of disclosures on the settlement services form. We disagree.

Regulation X provides that "[t]he settlement agent must separately itemize each third party charge paid by the borrower and seller" and that the amount stated "for any itemized service cannot exceed the amount actually received by the settlement service provider for that itemized service . . . ." (24 C.F.R. § 3500.8(b)(1).) The instructions for completing the form state, "This form is to be used as a statement of actual charges . . . paid by the borrower . . . . [¶] . . . [¶] . . . For each separately identified settlement service in connection with the transaction, the name of the person ultimately receiving the payment must be shown together with the total amount paid to such person." (24 C.F.R. § 3500, Appendix A.) "Line 804 [line 803 at the time of Gibson's loan transaction] is used to record the appraisal fee." (*Ibid*.) Countrywide disclosed on the appropriate line the actual charges it paid to Landsafe Appraisal for the appraisal services required to complete Gibson's loan transaction. Although Gibson claims the requirement to show "the name of the person ultimately receiving the payment" (*ibid*.) means that each person who performed a task related to the loan transaction for a fee, including the appraiser himself, must be separately listed on the HUD-1 form, such is not a fair reading of Regulation X. The name requirement is connected to "each separately identified

settlement service." (*Ibid*.) The settlement service here was the appraisal service performed by Landsafe Appraisal, and Countrywide identified Landsafe Appraisal and the $555 fee paid to it on line 803 of the HUD-1 form. The appraisal fee paid to Rogers was only part of that settlement service. Regulation X does not require a breakdown of the settlement service performed. Indeed, as discussed, HUD contemplates use of an appraisal management firm, which may perform services beyond the actual appraisal. As a result, Countrywide's listing of $555 for the appraisal fee—the fee charged by the lender to the borrower for the settlement service and the actual amount paid by the lender to the appraisal management firm—complies with Regulation X.[7]

---

[7] Gibson argues, based on numerous declarations submitted in the summary judgment proceedings detailing the relationship between Landsafe Appraisal and Countrywide, that Countrywide was an alter ego of Landsafe Appraisal and that Landsafe Appraisal therefore was not a third-party provider. The purported alter ego relationship, according to Gibson, precluded summary judgment against him because, at a minimum, triable issues of material fact exist as to whether Countrywide is Landsafe Appraisal's alter ego. But the alter ego allegations in the operative complaint related not to liability but to the remedies of punitive damages and injunctive relief sought by Gibson and the putative class and subclass in the event of liability. Gibson thus did not plead an alter ego theory as a basis to establish Countrywide's liability for the purported markup and lack of itemization. As the trial court noted, "the alter ego allegations are not linked to specific actions alleged to have been taken by the Defendants; the [operative] Complaint does not allege that actions taken by [Landsafe Appraisal] should be attributed to Countrywide on the basis of an alter ego theory." Defendants, therefore, were not required to defeat an alter ego theory to obtain summary judgment. (*Couch v. San Juan Unified School Dist.* (1995) 33 Cal.App.4th 1491, 1499 ["pleadings . . . delimit the scope of the issues on summary judgment"].) In any case, even if Gibson had pleaded the alter ego theory as a basis for liability, it at the most could hold Countrywide accountable for any wrongdoing by Landsafe Appraisal. (*Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1358-1359 ["claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief"; "alter ego defendant has no separate primary liability to the plaintiff . . . [because] plaintiff's claim against the alter ego defendant is identical with that claimed by plaintiff against the already-named defendant"].) Thus, in light of the absence of any wrongdoing by Landsafe Appraisal, the alter ego doctrine did not preclude summary judgment against Gibson.

d. *The desktop review theory*

In opposition to summary judgment, Gibson claimed that he could pursue section 17200 and Financial Code section 50505 causes of action against defendants, individually and on behalf of the subclass, based on the appraisal review of the collateral for his loan transaction. Although Countrywide, due to Gibson's credit rating, ordered a Desktop Review (2006) for Gibson's loan transaction, Landsafe Appraisal performed a LARA desktop review, which is its customized desktop review product. According to Gibson, the LARA desktop review was inferior to the requested Desktop Review (2006), and he should have been charged only $70 and not $75, which is the cost of the Desktop Review (2006). Gibson also maintained defendants should have disclosed to him that he received a LARA desktop review rather than the requested Desktop Review (2006).

On appeal, Gibson does not seek reversal of the summary judgment based on the purported inferiority of the LARA desktop review or the alleged $5 difference in cost between the LARA desktop review and the Desktop Review (2006). In any case, the inferiority or price differential arguments would not benefit him. Given no dispute exists that Landsafe Appraisal performed a LARA desktop review, Gibson's arguments amount to no more than claims that defendants overcharged him for the product he received through his loan transaction. A claim of overcharge cannot establish a RESPA violation: "Section 8(b) [of RESPA] cannot be read to prohibit charging fees, excessive or otherwise, when those fees are for services that were actually performed." (*Martinez v. Wells Fargo Home Mortg., Inc.*, *supra*, 598 F.3d at pp. 553-554.) Moreover, the undisputed evidence demonstrates that, at the time of Gibson's loan transaction, the cost of both a LARA desktop review and Desktop Review (2006) was $75.

Relying on defendants' failure to disclose to him that he received a LARA desktop review rather than the requested Desktop Review (2006) as a basis to establish liability under the desktop review theory also does not assist Gibson. As discussed, RESPA did not require Countrywide to itemize the various appraisal services performed in connection with Gibson's loan transaction, but only to list the fee it, as the lender, was charging him, as the borrower, for the appraisal. Failing to inform Gibson that the

appraisal services consisted of a LARA desktop review, rather than a Desktop Review (2006), thus is not a RESPA violation. Nor could the failure be unlawful, unfair or fraudulent when the type of service performed did not adversely affect Gibson's loan transaction or cause him to pay additional, yet unnecessary, fees. Indeed, as to Gibson's loan transaction, the undisputed evidence demonstrates that the LARA desktop review identified certain issues and prompted their resolution so that the appraisal process could be completed and Countrywide could fund the loan. Consequently, Gibson's desktop review theory did not preclude summary judgment against him.[8]

---

[8] As to all three of his liability theories—the markup, itemization and desktop review theories—Gibson contends that the trial court erred by summarily resolving the section 17200 cause of action against him because defendants in their moving papers failed to argue that he could not prove their conduct was unfair or fraudulent, two of the three prongs of the unfair competition law. We agree with the trial court that the procedural posture of the case and the evidence presented permitted summary resolution of the section 17200 cause of action. "[T]he trial court has the inherent power to grant summary judgment on a ground not explicitly tendered by the moving party when the parties' separate statements of material facts and the evidence in support thereof demonstrate the absence of a triable issue of material fact put in issue by the pleadings and negate the opponent's claim as a matter of law. [Citations.]" (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 70.) The court may exercise this inherent power if it provides the party opposing the motion with "an opportunity to respond to the ground of law identified by the court and . . . to show there is a triable issue of fact material to said ground of law." (*Ibid*.) The court here gave Gibson that opportunity. Yet, he did not demonstrate a triable issue of material fact that the $555 fee listed on the HUD-1 form was unfair or fraudulent, given that the fee properly identified the amount charged by Countrywide, the lender, to Gibson, the borrower, for the appraisal and that Landsafe Appraisal performed services pertinent to Gibson's loan transaction, including the required appraisal review. (See *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 721 [defendant's conduct in light of statutory interpretation was not unfair under § 17200]; *Martinez v. Wells Fargo Home Mortg., Inc., supra,* 598 F.3d at pp. 557-558 [defendant's conduct in light of statutory interpretation was not fraudulent under federal statute prohibiting false statements in HUD matters].)

2. *The Trial Court Did Not Err By Denying Summary Judgment as to Class Members*

The trial court concluded that defendants' summary judgment motion filed after class certification presented essentially the same argument and evidence on the markup theory as the summary judgment motion they had filed and withdrawn before class certification. According to the court, defendants thus were not entitled to summary judgment against the class because they had not shifted the burden by demonstrating that the services provided by Landsafe Appraisal to the class, as opposed to Gibson individually, eliminated the possibility of a RESPA violation. As noted, the court determined that "[d]efendants do not attempt to offer facts concerning the processing of *all* class members' appraisals by [Landsafe Appraisal], nor do they argue that the functions performed in connection with Plaintiff's own appraisal were performed in connection with every class member's appraisal. Therefore, as to Plaintiff's mark-up theory of recovery, Defendants have not met their initial burden of making a prima facie showing of the nonexistence of any genuine issue of material fact as to all class members."

Defendants on appeal contend that, although the trial court properly granted summary judgment against Gibson, it erred by denying summary judgment as to class members. Defendants assert that they "brought their [m]otion for [s]ummary [j]udgment against the class as a whole based on evidence of services that would be and were performed for every class member and on the same evidence that Gibson submitted in seeking summary adjudication on behalf of the class."

Although defendants had the right to withdraw their initial summary judgment motion and postpone a merits determination until after class certification (see *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1087), they could not obtain summary judgment against the class without satisfying summary judgment standards as to the class. Yet, the evidence to which they refer on appeal to maintain that the trial court should have summarily resolved the case against the class and subclass pertains to Gibson's loan transaction, detailing the services performed in connection with the

appraisal of his home, and would not necessarily be pertinent to class members. For example, the evidence demonstrates that issues arose during the appraisal process for Gibson's loan transaction because of security bars installed on a room at his house and an unpermitted garage conversion. Based on those issues, Landsafe Appraisal performed certain services to assist with processing the loan transaction. Such services, however, would not always accompany a loan transaction. Perhaps in other cases no services would have been performed, or the services would have been duplicative or nominal. The services performed for Gibson's loan transaction thus did not entitle defendants to summary resolution of the markup theory against class members. Defendants also listed a variety of services that Landsafe Appraisal may provide in a typical appraisal. Such list, however, did not meet defendants' burden on summary judgment to demonstrate as a matter of law that no RESPA violation occurred as to class members based on the markup theory. (*Kirby v. Sega of America, Inc.* (2006) 144 Cal.App.4th 47, 54 ["defendant moving for summary judgment satisfies its burden of showing a claim lacks merit if the defendant can show one or more elements of a cause of action cannot be established because the plaintiff does not possess and cannot reasonably obtain the evidence necessary to establish the claim, or a complete defense to that cause of action exists"].) The court thus did not err by denying summary judgment as to the class and subclass.[9]

---

[9] As noted, the trial court concluded that defendants had demonstrated that the itemization and desktop review theories failed as a matter of law as to the class and subclass. Nevertheless, because defendants did not establish the markup theory failed as a matter of law as to class members, defendants were not entitled to summary resolution against the class on either the section 17200 or Financial Code section 50505 causes of action. (Code Civ. Proc., § 437c, subd. (f)(1); *People v. Schlimbach* (2011) 193 Cal.App.4th 1132, 1141 ["Summary adjudication motions are restricted to an entire cause of action, an affirmative defense, a claim for punitive damages, or an issue of duty"].) The court determined, "Defendants have not demonstrated that Plaintiff's mark-up theory has no merit as to class members other than Plaintiff Gibson. Because summary adjudication only may be granted as to an entire cause of action, and because the mark-up theory of recovery remains viable as to other class members, Defendants'

3. *The Trial Court Did Not Err By Decertifying the Class*

As discussed, after granting summary judgment, the trial court decertified the class and subclass. Gibson contends that "[t]he decertification order should be reversed because it was based solely on the erroneous summary judgment order." Because the court did not err in granting summary judgment, Gibson has presented no grounds to reverse the decertification order.

Defendants suggest that the trial court should have decertified the class as to the itemization theory and subclass as to the desktop review theory, not just as to the markup theory. The court did decertify the class as to all theories. Defendants contend that, along with decertification, the court should have dismissed the action with prejudice as to class members. The court, however, determined that defendants were not entitled to summary judgment against class members, a determination with which we agree, and defendants offer no basis other than the court's purported error in denying summary judgment with respect to the class to warrant a dismissal of the action with prejudice as to class members.

DISPOSITION

The judgment and decertification order are affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J. CHANEY, J.

Motion for Summary Judgment and in the Alternative for Summary Adjudication must be denied as to the class." Defendants do not dispute this determination.