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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

MARGARITA RODRIGUEZ, Plaintiff and Appellant, v. BANCO POPULAR NORTH AMERICA, Defendant and Respondent.	B280489 (Los Angeles County Super. Ct. No. BC598450)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Michael M. Johnson, Judge. Reversed and remanded with directions.

Law Offices of Chandler Parker, Chandler A. Parker, for Plaintiff and Appellant.

Frandzel Robins Bloom & Csato, Craig A. Welin and Hal D. Goldflam, for Defendant and Respondent.

Twenty-two months after her home was made uninhabitable by fire damage, octogenarian Margarita Rodriguez (plaintiff) sued her lender, defendant Banco Popular North America (BPNA, the bank), on a variety of legal theories stemming from BPNA's failure to disburse any of the insurance proceeds covering the fire loss. Defendant filed a demurrer based on federal preemption and the sufficiency of the allegations. It also filed a verified cross-complaint in interpleader, depositing with the court the insurance proceeds it had been holding, minus the amount it retained to retire the mortgage. Plaintiff in turn demurred to the interpleader cross-complaint, contending interpleader was not appropriate because BPNA was independently liable to her for damages based in part on the delay in disbursing the insurance proceeds.

The trial court sustained BPNA's demurrer to plaintiff's first amended complaint without leave to amend, overruled plaintiff's demurrer to the interpleader cross-complaint, discharged BPNA from all liability and obligation, and awarded BPNA a total of $68,265 in attorney fees. The fees were awarded both for prosecuting the interpleader action (Code Civ. Proc., 386.6) and successfully defending against the complaint (Civ. Code, § 1717.) The trial court ordered the entire attorney fees award paid from the $138,259.95 in interpleaded insurance proceeds deposited with the clerk. We reverse the judgment, including the award of attorney fees and costs, and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

The parties do not dispute the facts in this case.[1] Plaintiff and Maria Luis Castano purchased a home in Los Angeles in 1990, obtaining a $100,000 loan from Quaker City Federal Savings and Loan Association (Quaker). The borrowers signed a promissory note and the lender recorded a deed of trust against the property. Castano transferred the property to plaintiff in 1999.

BPNA acquired Quaker in early 2000. Quaker was a federally chartered lender; BPNA was organized under the laws of New York. The record suggests the Castano-to-Rodriguez grant deed was recorded, but it appears undisputed that neither Castano nor Rodriguez ever took any steps to remove Castano from the deed of trust or promissory note.

Fire destroyed the home in December 2013. Two insurance policies covered the loss. In May 2014, one insurer issued a check for $83,755, payable to plaintiff and BPNA. In October 2014, the second insurer issued a check in the amount of $80,316, also payable to plaintiff and BPNA. Pursuant to the bank's instructions, plaintiff endorsed the checks and sent them to BPNA. Although less than $40,000 remained due on the mortgage, BPNA exercised the option under the rider to the deed of trust that permitted it to retain control over repairs to the

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[1] The trial court sustained BPNA's demurrer to the first amended complaint without leave to amend, and we accept all well-pleaded allegations as being true. As noted, BPNA's cross-complaint was verified.

property.[2] BPNA advised it would release insurance proceeds based on the reconstruction progress and would conduct an inspection once 50 percent of the work was completed.

Reconstruction began. Repairs reached the 50 percent completion mark, but PBPNA never conducted any inspections and never issued any progress payments to Rodriguez's contractor.

On October 24, 2014, however, BPNA tendered a check for $43,579.54, payable jointly to plaintiff and Castano.[3] Castano's whereabouts had been unknown for some time, and plaintiff could not negotiate the check. Plaintiff returned the uncashed check to BPNA. Two months later, on December 22, 2014, BPNA tendered a check payable to plaintiff and Castano in the sum of $84,621.15. Plaintiff could not negotiate this check, either; and she returned it to the bank. In January 2015, BPNA advised plaintiff her loan would need to be refinanced before it would release any insurance proceeds. BPNA "also represented [it] would take care of removing Ms. Castano from the Note."

Nothing happened after that, however. According to plaintiff, BPNA ignored her requests to come to a resolution.

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[2] BPNA had the option "in its sole and absolute discretion" to use the insurance proceeds to retire the mortgage or to require borrower to use them "to pay the costs and expenses of necessary repairs or restoration of the Property to a condition satisfactory to Lender."

[3] The record does not reflect why the bank tendered only a portion of the amount of the check. A reasonable inference is that BPNA retained a sum sufficient to retire the loan, although it did not do so at that time.

Plaintiff continued to make all the monthly mortgage payments, even though her home remained uninhabitable; the bank continued to collect interest on the loan.

Finally, on October 27, 2015, plaintiff initiated this action against BPNA. On March 23, 2016, BPNA used $27,643.74 of the insurance proceeds to retire the promissory note. On March 30, 2016, BPNA filed both a demurrer to plaintiff's complaint and a verified cross-complaint in interpleader, depositing with the clerk of the superior court the balance of the insurance proceeds plus accrued interest in the sum of $136,427.26. One week later, on April 5, 2016, the bank filed a "Substitution of Trustee and Notice of Full Reconveyance."

BPNA's demurrer asserted that all of plaintiff's causes of action were preempted by federal law. The trial court agreed, but gave plaintiff one opportunity to amend. Plaintiff's first amended complaint alleged breach of contract, breach of the covenant of good faith and fair dealing, financial elder abuse, money had and received, and negligence. In addition to damages, plaintiff sought declaratory and injunctive relief. This time, the trial court sustained BPNA's demurrer without leave to amend. Although the cross-complaint was pending, the trial court entered judgment in BPNA's favor on the first amended complaint.

BPNA named both plaintiff and Castano as defendants in the interpleader action. Plaintiff filed a demurrer, asserting BPNA was not a "disinterested stakeholder" because it had incurred independent liability to her based on an unreasonable delay in disbursing the insurance proceeds. The trial court

overruled the demurrer, and plaintiff filed a verified answer. Castano defaulted.

BPNA then sought an order of discharge as well as attorney fees for prosecuting the interpleader action (Code Civ. Proc., § 386.6) and as the prevailing party on the complaint (Civ. Code, § 1717). BPNA requested $91,020 in attorney fees. The trial court granted attorney fees in the total amount of $68,265 and costs of $1,715.80. The trial court did not allocate fees between the interpleader and BPNA's successful defense of the complaint, but ordered that BPNA collect the total sum from the interpleaded funds. Agreeing in part with plaintiff's argument that the attorney fees were unreasonably high, the trial court nevertheless observed, "[t]he size of the fee request is largely due to the aggressive litigation of this case by [plaintiff]. In a case which could have been resolved through a cooperative interpleader, [plaintiff] challenged BPNA's interpleader cross-complaint by demurrer and resisted BPNA's well-founded demurrers to her complaint and amended complaint. On the other hand, the invoices show that BPNA used three attorneys in the action, resulting in some duplication."

The judgment in BPNA's favor was filed November 30, 2016. Plaintiff's timely notice of appeal followed on January 30, 2017.

I. BPNA's Motion to Partially Dismiss Appeal

Plaintiff challenges on appeal the trial court's sustaining without leave to amend BPNA's demurrer to the first amended complaint, the overruling of its demurrer to BPNA's interpleader

cross-complaint, BPNA's discharge in interpleader, and the attorney fees awarded pursuant to Civil Code section 1717. BPNA has moved to partially dismiss the appeal. BPNA asserts plaintiff's challenge to the dismissal of the first amended complaint is untimely and her trial court stipulation for discharge of the interpleader cross-complaint forecloses her appeal on that score. Plaintiff opposes the motion to dismiss. We deny the motion to dismiss.

The trial court sustained BPNA's demurrer to plaintiff's first amended complaint on August 24, 2016. The bank immediately presented the trial court with a proposed "Judgment of Dismissal of First Amended Complaint"; and it was signed and filed the same day as the hearing. BPNA's cross-complaint was still pending, however. The premature judgment violated the one final judgment rule; it was neither final nor appealable.[4] (*Kurwa v. Kislinger* (2017) 4 Cal.5th 109, 114.)

Nor are we persuaded that plaintiff waived the right to appeal the order discharging BPNA from the interpleader. Plaintiff's decision not to oppose BPNA's motion for discharge came only after the trial court overruled her demurrer to the interpleader cross-complaint. Plaintiff's demurrer was based on BPNA's having incurred an independent liability to her as a

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[4] Neither Appendix includes a copy of a notice of entry of this judgment. BPNA attaches a copy to the motion to dismiss, but does not ask that we take judicial notice of it. Even if the August 24, 2016 judgment were appealable, without a notice of entry of judgment in the record, the notice of appeal filed January 30, 2017—within 180 days of the judgment—would have been timely. (Cal. Rules of Court, rule 8.104(a)(1)(C).)

result of the alleged wrongful and inordinate delay in distributing the insurance proceeds. As our Supreme Court recognized in 1944, "'Interpleader will not lie if the stakeholder has incurred some personal obligation to either of the claimants, independent of the title or the right to possession, because such claimant would in that event have a claim against him which could not be settled in a litigation with the other claimant.'" (*Hancock Oil Co. v. Hopkins* (1944) 24 Cal.2d 497, 505 (*Hancock Oil*).) Plaintiff appropriately raised the issue in the trial court, but lost. This was sufficient to preserve the issue for appeal.

II. Federal Preemption Does Not Apply

The Home Owners' Loan Act of 1933 ("HOLA"),[5] enacted in response to unprecedented bank failures during the Great Depression, created "a nationwide system of federal savings and loan associations to be centrally regulated according to nationwide 'best practices.'" (*Silvas v. E*Trade Mortg. Corp.* (9th Cir. 2008) 514 F.3d 1001, 1004 (*Silvas*).) The Office of Thrift Supervision (OTS), as successor to the Federal Home Loan Bank Board, was created in 1989 to administer HOLA. (*Akopyan v. Wells Fargo Home Mortgage, Inc.* (2013) 215 Cal.App.4th 120, 138.) OTS was given, and has exercised, "broad authority to issue regulations governing thrifts." (*Silvas, supra,* 514 F.3d at p. 1005.)

Specifically, OTS has promulgated regulations that preempt state laws insofar as the operations of federally

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[5] HOLA is codified in title 12 of the United States Code (12 U.S.C. § 1461 et seq.).

chartered lending institutions are concerned.[6] (12 C.F.R. § 560.2 (part 560.2).) Part 560.2(b) lists "various examples of the types of 'requirements' that are within the field of exclusive regulation . . . [while part 560.2(c) specifies] the types of laws that are outside that field." (*Gibson v. World Savings & Loan Assn*. (2002) 103 Cal.App.4th 1291, 1298 (*Gibson*).)

In very general terms, state laws that purport to provide a state remedy for, or "impose requirements" on, the categories of operations identified in part 560.2(b) are preempted. (*Silvas, supra,* 514 F.3d at p. 1005.) Part 560.2(c), however, makes it clear "that state laws of general applicability only incidentally affecting federal savings associations are not preempted." (*Silvas, supra,* 514 F.3d at p. 1006; see also *Gibson, supra,* 103 Cal.App.4th at p. 1300 [federal preemption typically does not

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[6] BPNA is not a federally chartered bank. Nevertheless, because plaintiff's loan originated with a federally chartered lender, BPNA contends it is entitled to HOLA's protections so long as the loan is outstanding. (*Stewart v. Wells Fargo Bank, N.A.* (C.D. Cal., Dec. 1, 2014) 2014 U.S. Dist. LEXIS 166692, *10-*11).) Plaintiff suggests this may not be the case, and posits that a finding of preemption may turn on whether the conduct occurred while the lender was a HOLA-covered institution. (See, e.g., *Griffin v. Green Tree Servicing, LLC* (C.D. Cal. 2015) 166 F.Supp.3d 1030, 1043, and the cases cited therein ["other courts have suggested that HOLA preemption should be limited to claims based on conduct that took place while the entity holding the loan was covered by HOLA"].)

The parties have not cited any federal appellate decision resolving the issue. Without expressing an opinion on this subject, we will analyze the preemption issue based on the loan's origination, not the date of BPNA's alleged conduct.

apply to preempt "[t]he states' historic police powers [which] include the regulation of consumer protection in general and of the banking and insurance industries in particular"] and *Wells v. Chevy Chase Bank, F.S.B.* (2003) 377 Md. 197, 214 ["those state laws that only incidentally affect lending operations or that are consistent with section (a)'s purpose of 'giving federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation'" are exempt from preemption].) Part 560.2(c) expressly exempts from preemption contract and commercial law, real property law, tort law and laws that "[further a vital state interest] to the extent that they only incidentally affect the lending operations of Federal savings associations." (*Ibid.*)

OTS's regulations, where they apply, have the force of federal law and "preempt state law just as fully as federal statutes." (*Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 612.) California courts have also recognized, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. . . . The question, therefore, is whether the scope of the express preemption extends to the claims at issue here." (*Gibson, supra,* 103 Cal.App.4th at p. 1301.) Our determination of the preemptive effect of the applicable federal statutes and regulations is de novo, without according deference to the trial court's conclusions. (*Id.* at p. 1297; *Hood v. Santa Barbara Bank & Trust* (2006) 143 Cal.App.4th 526, 535-536.)

Reviewing the issue de novo, we conclude all of plaintiff's causes of actions in the first amended complaint (breach of

contract, breach of the covenant of good faith and fair dealing, financial elder abuse, money had and received, negligence, declaratory relief) fall outside the scope of federal preemption. Plaintiff sought damages under these contract and tort theories based on BPNA's failure to promptly and reasonably disburse the insurance proceeds, as per the terms of the written agreements it entered into with plaintiff. Nothing in part 560.2(b) suggests a bank's handling of fire insurance proceeds either is preempted or even incidentally affects its lending operations. The insurance proceeds were not part of an impound account in plaintiff's name, nor did they concern "[d]isbursements and repayments" from the mortgage account. (Part 560.2(b)(6), (b)(11).)

This conclusion is in accord with long line of California authority finding no federal preemption when a plaintiff sues in state court for a state consumer remedy. (See, e.g., *Siegel v. American Savings & Loan Assn.* (1989) 210 Cal.App.3d 953, 956 [HOLA did not preempt causes of action for "civil conspiracy, bad faith denial of the contract, unfair competition, breach of contract, fraud, breach of agency duty, and . . . constructive trust and an accounting"]; *People ex rel. Sepulveda v. Highland Fed. Savings & Loan* (1993) 14 Cal.App.4th 1692, 1708 [HOLA did not preempt plaintiff's claims for unfair business practices, fraud, and RICO violations]; *Fenning v. Glenfed, Inc.* (1995) 40 Cal.App.4th 1285, 1298 [HOLA did not preempt causes of action for "deceptive advertising practices, intentionally or negligently made material misrepresentations and omissions"]; (*Gibson, supra*, 103 Cal.App.4th at p. 1299 [HOLA does not preempt claims under California's unfair competition law (UCL), Bus. &

Prof. Code, § 17200]; *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1488 [UCL and breach of contract causes of action not preempted]; *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 231 [Civil Code section 2923.5, requiring a lender to provide the borrower with notice before declaring a home loan to be in default is not preempted by HOLA]; *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1021, 1026 [HOLA did not preempt plaintiffs' claim for breach of contract which were "a matter of ordinary contract law and [had] no effect on [the bank's] lending activities"].)

In a variety of situations, federal courts as well have acknowledged the exemption of state causes of action from federal preemption. In *Davis v. Chase Bank U.S.A., N.A.* (C.D. Cal. 2009) 650 F.Supp.2d 1073, the federal district court concluded the plaintiff's contract-related claims were not preempted because they did "not seek to force [the bank] to set its contracts in a certain way, but rather merely to *adhere* to the contracts it does create. A breach of contract claim that concerns lending terms is perhaps closer to preemption than one centered on a contract for employment or maintenance, but the Court does not consider such a claim to fall within the fundamental purposes of the broad national banking preemption." (*Id.* at p. 1086.)

Molosky v. Wash. Mut., Inc. (6th Cir. 2011) 664 F.3d 109 (Molosky) is similar. There, the Sixth Circuit recognized some state law breach of contract claims could be inconsistent with the purpose of HOLA and, accordingly, preempted. One example would be where "state contract law interposes unstated or implied terms into a contract." (*Id.* at p 115.) But in the case

then before it, the appellate court held the mortgagor's breach of contract action could proceed because "hold[ing] [the lender] to the terms of its contract with the [plaintiffs] is consistent with the purposes of the OTS's regulation." (*Ibid.*)

In *Dixon v. Wells Fargo Bank, N.A.* (D. Mass. 2011) 798 F.Supp.2d 336, the federal district court denied the bank's motion to dismiss and ruled the plaintiffs' cause of action for specific performance of the lender's promise to engage in loan modification discussions was not preempted by HOLA: "The facts as alleged in the complaint are sufficient to invoke the doctrine of promissory estoppel, and this common-law claim, as applied, is not preempted by federal law." (*Id.* at p. 360.)

For the same reasons, there is no federal preemption here. Although the first fire insurance check, which was received within five months after the fire, was more than enough to retire plaintiff's mortgage, BPNA elected instead to exercise its contractual right to require the proceeds to be used to reconstruct the home. But plaintiff contends BPNA failed to timely follow through with its obligations in that regard, falsely told her she would have to refinance her loan before it could be paid off, and failed to interplead the funds until she initiated her lawsuit. All the while, plaintiff made her monthly mortgage payments even though her home was uninhabitable.

In the trial court, BPNA bore the burden to demonstrate plaintiff's claims were preempted. (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1475.) There and also on appeal, BPNA cited federal decisions holding the plaintiffs' claims were preempted and simply concluded, without any

discussion, that plaintiff's claims here were also preempted because her allegations "triggered" sections (b)(2), (b)(4), (b)(6), (b)(7), (b)(10), and (b)(11) of part 560.2. The facts in the decisions cited by BPNA, however, are readily distinguishable from those in this case. And each of those decisions engaged in an analysis explaining why the particular state law claims, when applied to the particular facts, were preempted.

For example, in *Vargas v. Wells Fargo Bank, N.A.* (C.D. Cal., Aug. 17, 2015) 2015 U.S. Dist. LEXIS 113283, *18, the elderly plaintiff (whose lawsuit included a cause of action for financial elder abuse) "essentially allege[d] [the bank] should have advised her that the loan was not in her best interest, which would be a requirement on lenders pertaining to loan origination, disclosure, and the circumstances under which the loan may be called due." By contrast, plaintiff's essential allegations here are that BPNA failed to live up to its contractual obligations and engaged in tortious conduct toward her. (See, e.g., *Molosky, supra,* 664 F.3d at p. 115.)

The federal district court in *Cosio v. Simental* (C.D. Cal., Jan. 27, 2009) 2009 U.S. Dist. LEXIS 8385 first noted that California's financial elder abuse and negligence laws "on their face, do not appear to pertain to the lending practices of federal savings associations." (*Id.* at p. *13.) This analysis, in the abstract, would have led to the conclusion that the plaintiff's state law claims were not preempted. However, when the federal court "analyzed [these laws] in relation to the particular circumstances of this case, it becomes much more apparent that, as applied, they impose requirements on [the bank] that are

already imposed on it by HOLA. Consequently, they are preempted." (*Ibid*.)

Silvas, supra, 514 F.3d 1001 did not preface its discussion with an "on their face" analysis of California's unfair competition and advertising laws. Instead, the Ninth Circuit determined these laws "as applied" to the plaintiffs' allegations were preempted. (*Id*. at pp. 1006-1008.)

Because our review comes after the trial court sustained BPNA's demurrer to the first amended complaint without leave to amend, we accept as true plaintiff's factual allegations. The California laws upon which plaintiff relies, as applied to the facts she pleaded, demonstrate none of her causes of action is preempted by HOLA.

III. BPNA's Demurrer to the Contract Causes of Action in Plaintiff's First Amended Complaint Should Have Been Overruled

In addition to preemption, but without any analysis, the trial court also sustained the demurrer to each cause of action on "all other grounds asserted by BPNA." Plaintiff sued BPNA for breach of contract, breach of the covenant of good faith and fair dealing, money had and received, financial elder abuse, negligence and declaratory relief. On appeal, plaintiff challenges only the ruling as to the contract causes of action. We agree the demurrer should have been overruled as to the breach of contract and breach of the covenant of good faith and fair dealing causes of action.

The gravamen of plaintiff's allegations was that BPNA breached its obligations to her after it received the insurance checks and unreasonably delayed in resolving the reimbursement issue. The complaint, fairly read, concedes BPNA had the discretion to require plaintiff to use the insurance proceeds to rebuild her home rather than simply pay off the loan, but alleges the bank unnecessarily and unreasonably delayed in resolving that issue, failed to timely make progress payments, falsely insisted refinancing was necessary in order to disburse plaintiff's share of the insurance proceeds, and required her to file suit before it interpleaded the money. Plaintiff's first amended complaint did not seek to impose any state-based requirements on BPNA's operations; it only sought to hold BPNA to its contractual obligations.

The deed of trust established a contractual relationship subject to the implied covenant of good faith and fair dealing. (*Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1409; *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 76 ["'The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith"'].) Additionally, the rider to the deed of trust expressly provided that time was of the essence in the performance of its provisions.

The first amended complaint alleged sufficient facts to withstand demurrer as to the breach of contract and breach of the covenant of good faith and fair dealing causes of action.

IV. Interpleader Cross-Complaint Should Not Have Been Dismissed

As appropriate as interpleader is under circumstances similar to these—i.e., where a lender is holding money and one of two borrowers on the note cannot be located—so long as plaintiff's first amended complaint is pending, the cross-complaint in interpleader cannot be decided in BPNA's favor.[7] (*Hancock Oil, supra,* 24 Cal.2d at p. 505.) Thus, that aspect of the judgment must also be reversed.

V. Guidance for the Parties on Remand

The award of attorney fees and costs falls with the reversal. We provide the following as guidance to the trial court and counsel. (See *Estate of Hilton* (1996) 44 Cal.App.4th 890, 918.)

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[7] Castano's transfer of her interest in the real property did not, by itself, extinguish her obligation under the note and deed of trust. But the first insurance check, issued in May 2014, five months after the fire, was in a sum more than sufficient to pay off the mortgage. Had BPNA simply retired the note at that time (as it was entitled to do under the terms of the rider to the deed of trust) and interpleaded the balance of the insurance proceeds, it is doubtful there would have been any basis for asserting independent liability against the bank. The bank for whatever reason, however, eshewed that practical and money-saving option and instead required plaintiff to apply the insurance funds to rebuilding the home (BPNA's counsel observed at oral argument that the bank had the right to collect interest on the note through its maturity). But then BPNA did not follow through with progress payments to the contractor. BPNA may be liable to plaintiff for any contract damages that flow from these decisions and any failure to timely implement them.

A successful interpleading party is statutorily entitled to attorney fees from the interpleaded funds. (Code Civ. Proc., § 386.6, subd. (a); *Southern California Gas Co. v. Flannery* (2014) 232 Cal.App.4th 477, 488.) BPNA has not cited, nor have we found, any authority that permits recourse to interpleaded funds to satisfy an award of attorney fees pursuant to Civil Code section 1717, however.

More to the point, if BPNA prevails on remand to plaintiff's complaint, it may not rely on paragraph 7 of the deed of trust or the attorney fees provision in the parties' note to obtain attorney fees as the prevailing party under Civil Code section 1717. [8]

Paragraph 7 of the deed of trust authorizes the lender to incur reasonable attorney fees "to protect the value of the Property and Lender's rights in the Property" only "[if] Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property." If attorney fees are incurred under either of those scenarios, the lender's sole remedy is to add the attorney fees to the borrower's loan. Neither of those situations was present here, and the deed of trust did not confer on the prevailing party in this action any contractual right to attorney fees under Civil Code section 1717.

There was an attorney fees provision in the parties' note, but plaintiff did not sue to enforce rights under the note; she sued

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[8] Plaintiff requested attorney fees in the first amended complaint pursuant to Welfare and Institutions Code section 15657.5 based on her allegations of elder financial abuse.

to enforce her contractual rights to disbursement of insurance proceeds.

DISPOSITION

The judgment is reversed. On remand, the trial court is directed to overrule BPNA's demurrer to the breach of contract and breach of the covenant of good faith and fair dealing causes of action and vacate BPNA's discharge in interpleader. Plaintiff is awarded her costs.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, 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.