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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DENNIS CHUNING,

Plaintiff and Appellant,

v.

AURORA LOAN SERVICES, INC. et al.,

Defendants and Respondents.

A134188

(Napa County Super Ct.  
No. 26-54500)

Plaintiff Dennis Chuning, appearing in propria persona, challenges the trial court’s rulings sustaining the demurrer by defendants Aurora Loan Services, LLC (Aurora)<sup>1</sup> and Mortgage Electronic Registration Systems, Inc. (MERS) (collectively, defendants) to plaintiff’s original complaint, sustaining defendants’ demurrer to plaintiff’s first amended complaint, and granting defendants’ motion for summary judgment. Plaintiff has waived his appellate claims because he has not sufficiently cited to the record or legal authority; furthermore, to the extent we would consider his arguments and contentions, they do not establish error. Therefore, we affirm the judgment.

**BACKGROUND**

In October 2010, plaintiff filed a complaint against defendants, as well as Quality Loan Service, Corp. (Quality), seeking declaratory relief, injunctive relief, and alleging fraud, gross negligence, and negligence against Aurora. The action involved a dispute

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<sup>1</sup> Aurora contends that plaintiff has erroneously named it as “Aurora Loan Services, Inc.”

about defendants' and Quality's rights and actions over a period of time that led to the noticing of a trustee's sale of residential real property owned by plaintiff in Napa, California (property).

Quality filed a declaration of non-monetary status. The court issued a preliminary injunction enjoining and restraining defendants and Quality from conducting a trustee's sale as noticed.

Defendants demurred to the complaint, which the trial court sustained with leave to amend as to the declaratory relief, gross negligence and negligence causes of action, and overruled the demurrer regarding the injunctive relief and fraud causes of action.

Plaintiff filed a first amended complaint, which contained the same causes of action as the original complaint, for declaratory relief, injunctive relief, fraud, negligence, and gross negligence. Plaintiff's underlying allegations in his first amended complaint were that his mother, LaWanna L. Chuning, borrowed \$150,000 from a previous lender secured by a deed of trust, with MERS, acting solely as the nominee for the lender and its successors and assigns, as the beneficiary under the security instrument. Shortly after the deed of trust was recorded, the previous lender "presumably sold or otherwise transferred its interest" in the loan and deed of trust to Aurora, which transaction was not recorded. Plaintiff's mother granted the property to plaintiff, as successor trustee of the LaWanna L. Chuning 2001 Revocable Living Trust (successor trustee). Some months later, successor trustee remised, released and forever quitclaimed the property to plaintiff, a single man.

Plaintiff further alleged that a loan assumption agreement was entered into in December 2006 between successor trustee, plaintiff, Aurora, and MERS, in which successor trustee and Lawanna Chuning were released from any and all liability then existing and thereafter incurred regarding the note and security instrument securing the debt. Plaintiff stated that he subsequently entered into two loan modification agreements, in 2006 and 2008, with Aurora as lender and MERS as mortgagee.

Plaintiff alleged that in late 2009 or early 2010 he fell in arrears in his payments to Aurora by two to three thousand dollars. He contacted Aurora and was told that he qualified for the “ ‘Obama’ making homes affordable program” (after first being told he did not qualify), that his mortgage payments would be dramatically reduced, that there was nothing else for him to do, and that the completed plan would be mailed to him. However, a few days later, he received a letter denying him program participation. Thinking this was written confirmation of the initial denial, he assumed approval of his second request was still pending.

After some time, he called Aurora and was told that the denial letter was in fact a denial reversing the approval. During this conversation, after he gave more information, he was told he qualified for a standard modification of his loan, that there was nothing else to do, and that it would take until sometime in June 2010 to complete the process. In calls he made over the next few months, he was told the package was still being processed and to be patient.

However, plaintiff alleged, a notice of default was recorded in March 2010 in the official records of Napa County. Also, a substitution of trustee was filed that purported to substitute Quality as trustee under the deed of trust for MERS, although MERS’s authority to do so, as a nominee for a previous lender who was no longer a beneficiary, was not explained. The notice of default was rescinded and another notice issued.

According to plaintiff, Aurora denied his loan modification request for his failure to submit information he was never asked to submit and, upon his further inquiries, told him his request was being renewed and expedited. However, he was later told that this renewed request would not be processed until July 22, 2010, although he also had been told the property was scheduled for sale on July 1, 2010. His repeated efforts to request help were rebuffed by Aurora, and his request to pursue other options to foreclosure not previously explored were ignored.

Plaintiff further alleged that Quality recorded a notice of trustee sale in June 2010, after which he wrote to Aurora to state that they were not in compliance with foreclosure law and had recorded an improper notice of default, and sought to postpone the sale to explore alternatives. He was then told that his request for consideration for the “ ‘Obama’ making homes affordable program” was under review and, when he complained that he was supposed to be having his request for a standard loan modification considered instead, was told there was nothing he could do.

Plaintiff further alleged that his repeated efforts to resolve the various issues with Aurora and Quality representatives were met with a lack of cooperation until late August or early September 2010, when he was told that he did not qualify for “HAMP” (a reference plaintiff apparently intends to be to the previously identified “Obama” program) and that, if he received a standard modification, his mortgage payments would go up substantially, not dramatically down as he had previously been led to believe. He was not able to find resolution, was told in mid-September that he was denied modification, and a notice of trustee sale was again filed, which contained defects.

Plaintiff sought declaratory relief regarding defendants’ rights and duties regarding a number of issues related to his allegations and questions about the loan, deed of trust, changes, substitutions, assumptions and amendments thereto, and recorded documents; an injunction against defendants’ proceeding with a trustee sale of the property; damages for Aurora’s purported fraud against him as a result of their purportedly false representations about his qualification for the “HAMP” plan and efforts to “string” him along for months until their denial of any form of modification prevented him from bringing the loan current or to explore alternative means to avoid foreclosure; and damages for Aurora’s gross negligence and negligence for its actions, particularly in their communications with him regarding “HAMP,” which were outside the traditional scope of lender or loan servicer.

Defendants demurred to this first amended complaint as well. The trial court overruled defendants' demurrer regarding declaratory relief and sustained their demurrer without leave to amend regarding the negligence and gross negligence causes of action.

Defendants answered the first three causes of action, for declaratory relief, injunctive relief, and fraud. They subsequently moved for summary judgment or, in the alternative, summary adjudication. Plaintiff opposed the motion, submitting his own declaration as his only evidence. The court granted the motion. In doing so, the court granted defendants' objections to numerous declaration statements by plaintiff, concluding the statements were hearsay. The court subsequently entered judgment in favor of defendants. Plaintiff filed a timely notice of appeal of the judgment.

### **DISCUSSION**

Plaintiff argues that the trial court made multiple errors in ruling on defendants' demurrers and motion for summary judgment. In reviewing these appellate claims, we note that plaintiff appears before us in propria persona, as he did before the trial court. While this may explain the deficiencies in his briefs, it does not excuse them. (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267 [“ ‘ “[t]he in propria persona litigant is held to the same restrictive rules of procedure as an attorney” ’ ”].)

Furthermore, it is well-settled that a “ ‘judgment or order of the lower court is *presumed correct,*’ ” and “ ‘error must be affirmatively shown.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Generally, an appellant must submit a brief that supports each issue by argument and citation to supporting facts and law. (Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).) “ ‘ “It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations.” ’ ” (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379 (*Grant-Burton*)). “ ‘[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may

treat it as waived, and pass it without consideration.’ ” (*People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*).)

These rules apply to appeals that call for de novo review, such as an appeal from summary judgment. Such a “de novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant’s responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed.” (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116 (*Lewis*).) On appeal from a summary judgment, issues not adequately briefed are deemed forfeited or abandoned. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125 (*Christoff*).)

With these procedural rules in mind, we now review plaintiff’s claims. As we will discuss, we agree with defendants that plaintiff’s presentation of his arguments is so procedurally defective as to constitute a waiver of his appellate claims.

### ***I. The Court’s Sustaining Defendants’ Demurrer With Leave to Amend***

Plaintiff challenges the trial court’s sustaining of defendants’ demurrer with leave to amend regarding the gross negligence and negligence causes of action in plaintiff’s original complaint. He challenges this ruling as “wrong” for several reasons.

We need not review plaintiff’s arguments, or their defects, because, as defendants point out, it has long been the rule that an order sustaining demurrer *with* leave to amend is not appealable when a party elects to file an amended complaint. Plaintiff, by filing his first amended complaint, waived any right to challenge on appeal the trial court’s order sustaining with leave to amend the demurrer regarding his negligence and gross negligence causes of action. (*Gaglione v. Coolidge* (1955) 134 Cal.App.2d 518, 521 [by filing a third amended complaint, plaintiff “waived any error” in the court’s order

sustaining a demurrer to the second amended complaint]; *Sheehy v. Roman Catholic Archbishop of San Francisco* (1942) 49 Cal.App.2d 537, 540.)

## **II. *The Court's Sustaining Defendants' Demurrer Without Leave to Amend***

Plaintiff argues that the first amended complaint addressed any shortcomings the court thought existed in the original complaint. Plaintiff's entire argument is as follows: "For the same reasons that the Complaint should not have been required to be amended coupled with the changes as to the Fourth and Fifth Causes of Action made in the First Amended Complaint the Fourth and Fifth Causes of Action the Demurrer to the First Amended Complaint should not have been Sustained."

This is a conclusory argument without sufficient citations to the record or legal authority. Therefore, we disregard it. (*Grant-Burton, supra*, 99 Cal.App.4th at p. 1379; *Stanley, supra*, 10 Cal.4th at p. 793.)

## **III. *Summary Judgment***

Plaintiff makes several arguments why the trial court erred in granting defendants' motion for summary judgment, which we now review.

### **A. *Legal Standards***

A trial court properly grants summary judgment if the record establishes no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A party moving for summary judgment "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*)). "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*, fn. omitted.) "A defendant bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. [Citation.]" (*Ibid.*)

Generally, “the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]” (*Aguilar, supra*, 25 Cal.4th at pp. 850–851.) Although the burden of production shifts, the moving party always bears the burden of persuasion. (*Id.* at p. 850.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Ibid.*)

The standard of review for an order granting or denying summary judgment is de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) We view the evidence in the light most favorable to plaintiffs as the parties opposing summary judgment, strictly scrutinizing defendants’ evidence in order to resolve any evidentiary doubts or ambiguities in plaintiffs’ favor. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.) However, as we have discussed, “review is limited to issues which have been adequately raised and briefed.” (*Lewis, supra*, 93 Cal.App.4th at p. 116.) On appeal from a summary judgment, issues not adequately briefed are deemed forfeited or abandoned. (*Christoff, supra*, 134 Cal.App.4th at p. 125.)

### **B. The Court’s Order Granting Summary Judgment**

Plaintiff first argues that the court erred in ruling that defendants “have presented undisputed evidence showing that plaintiff assumed a loan under a promissory note and deed of trust, with himself identified as the borrower and Aurora identified as the lender, that Aurora is the current holder of the note and deed of trust on the property, and that plaintiff has failed to pay on the note as promised.” Plaintiff fails to establish error.

According to plaintiff, the trial court's statement "severely oversimplified the transactions involved in the present case." Plaintiff contends that Aurora "has not provided any proof of how they came to be the alleged holder of the note and deed of trust" regarding the property, including any evidence showing the chain of custody from the original lender to Aurora; instead, plaintiff complains, Aurora relies on a declaration statement that it " 'is the current holder of the original note.' " Plaintiff then refers to unidentified "court decisions" and the "numerous times" when the issue was raised in the current case without identifying where in the record this has occurred. Based on this unsubstantiated argument, plaintiff concludes that Aurora "has never provided any evidence that they actually hold" the original note. Plaintiff further argues, again without citation to any supporting legal authority, that to require plaintiff "to prove the negative would be fundamentally unfair. To prove that something does not exist is an impossibility."

Plaintiff then argues that even if Aurora were in possession of the original note, "that does not resolve the question of whether they possess a note and deed of trust that is currently valid or if the loan between plaintiff, Dennis Chuning, is secured by a valid note and deed of trust." Plaintiff then asserts that he and the original borrower, LaWanna Chuning, "were released 'from any and all liability, now existing or hereinafter incurred, on or under the Note and Security Instrument securing such debt.' " The only record citation plaintiff makes in support of this argument is to his own briefing below, which merely repeats his contention without citing evidence.

Thus, plaintiff provides almost two pages of argument with virtually no citations to the record and none to any legal authority that supports his legal assertions. Therefore, we again disregard his arguments. (*Grant-Burton, supra*, 99 Cal.App.4th at p. 1379; *Stanley, supra*, 10 Cal.4th at p. 793; *Lewis, supra*, 93 Cal.App.4th at p. 116; *Christoff, supra*, 134 Cal.App.4th at p. 125.)

Even if we were to consider his arguments, plaintiff fails to explain why the evidence submitted by defendants in support of their motion was insufficient, including that plaintiff entered into loan modification agreements identifying Aurora as the lender.

***C. The Court's Summary Judgment Ruling Regarding Injunctive Relief***

Plaintiff next argues that he was not required to prove his ability to tender the amounts owed on the loan and, therefore, the trial court erred in finding he did not raise a disputed issue of fact on the issue regarding his injunctive relief cause of action. Plaintiff argues the question of whether he needed to prove his ability to tender was “previously adjudicated” in the court’s ruling on defendants’ demurrer to the original complaint. Plaintiff’s argument is unpersuasive here as well.

In the demurrer ruling, the court stated regarding plaintiff’s first cause of action, for declaratory relief: “Defendants also contend that plaintiff’s claim for declaratory relief must fail because he has not alleged a tender of the amount owed. In this instance, the court agrees with plaintiff that the distinction between the cases relied on by defendants, where the foreclosure sale was already held and plaintiff was seeking to set aside the sale, and the instant case, where the sale has not yet occurred, is a material distinction. Plaintiff has alleged that defendants conduct throughout the course of the relevant dealings was so egregious as to be fraudulent, and argues that to require a tender would be inequitable. He further contends that his claims against defendants offset the amounts that would allegedly be tendered. Defendants do not dispute that a tender may be required where requiring one would be inequitable, they merely argue, whether, under these facts, there is inequity. The court concludes that plaintiff’s allegations are sufficient to demonstrate the existence of an inequity, which is inadequate to overcome the demurrer on this ground.”

The court’s order granting summary judgment stated regarding plaintiff’s second cause of action, for injunctive relief: “Defendants seek to adjudicate plaintiff’s claim for injunctive relief on the ground that plaintiff has not tendered the amount of indebtedness

and is financially unable to do so. Despite arguments to the contrary, plaintiff has presented no admissible evidence in support of his claim that if called on to do so he could tender the amount owed.”

Plaintiff argues that since the issue of tender was adjudicated, defendants’ only option was to appeal the demurrer ruling. He further argues that, even if the trial court could have considered the issue again on summary judgment, defendants’ contentions should have been rejected for the same reasons asserted by the court in its demurrer ruling. Plaintiff also contends that he “would have been able” to provide tender because the property value exceeded the amount of the loan in question, providing him with “many options” to obtain the funds to tender, and that these options were not pursued because the options available through Aurora, if they had proceeded to a proper conclusion, were more advantageous to him.

There are numerous problems with plaintiff’s arguments. First and foremost, however, we are again faced with arguments that are not supported by citations to the record or legal authority. Once more, we disregard them because of this insufficient presentation. (*Grant-Burton, supra*, 99 Cal.App.4th at p. 1379; *Stanley, supra*, 10 Cal.4th at p. 793; *Lewis, supra*, 93 Cal.App.4th at p. 116; *Christoff, supra*, 134 Cal.App.4th at p. 125.)

Even if we were to consider these arguments, plaintiff does not establish that the trial court’s demurrer ruling, which merely found he was not foreclosed from proceeding with his declaratory relief cause of action based on his allegations, foreclosed its review of defendants’ summary judgment motion arguments and related evidence on the tender issue. We do not explore this issue further because, in any event, the trial court also stated an independent ground for its summary judgment ruling on plaintiff’s injunctive relief cause of action. The court found that “[a]dditionally, and more fundamentally, injunctive relief is not appropriate here, because the instant motion reveals that plaintiff

has no viable claim against defendants, and therefore has no legal basis for seeking an injunction.”

Plaintiff argues the court erred by relying on this independent ground as well because he “has put forth reasons to find that there is a viable claim. If the court finds at this time that there is a viable claim on any count than the imposition of Injunctive Relief would be appropriate and plaintiff requests that said Injunctive Relief be provided by the court.” We are again faced with a conclusory argument that is not supported by citations to the record or legal authority. Once more, we disregard it because of this insufficient presentation. (*Grant-Burton, supra*, 99 Cal.App.4th at p. 1379; *Stanley, supra*, 10 Cal.4th at p. 793; *Lewis, supra*, 93 Cal.App.4th at p. 116; *Christoff, supra*, 134 Cal.App.4th at p. 125.)

#### ***D. The Court’s Summary Judgment Ruling Regarding Fraud***

Plaintiff next argues that he has laid out in significant detail the wrongful, fraudulent actions of Aurora in the declaration he submitted in opposition to defendants’ motion for summary judgment. This argument is also unpersuasive for multiple reasons.

First, plaintiff presents his arguments with virtually no citations to the record to establish that he properly disputed facts raised by defendants below, and with only conclusory citations to legal authority regarding the law of fraud without explaining its application to the present case. Once more we disregard his arguments because of this insufficient presentation. (*Grant-Burton, supra*, 99 Cal.App.4th at p. 1379; *Stanley, supra*, 10 Cal.4th at p. 793; *Lewis, supra*, 93 Cal.App.4th at p. 116; *Christoff, supra*, 134 Cal.App.4th at p. 125.)

Second, we note that the trial court cited as a basis for its ruling that, while plaintiff submitted a declaration below regarding his version of events (the only evidence he submitted), he did not cite to it to the extent he challenged defendants’ statement of undisputed facts. Code of Civil Procedure section 437c, subdivision (b)(3), provides that “[t]he opposition papers shall include a separate statement that responds to each of the

material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion." (Code Civ. Proc., § 437c, subd. (b)(3); *Lewis, supra*, 93 Cal.App.4th at p. 116 ["[w]ithout a separate statement of undisputed facts with references to supporting evidence in the form of affidavits or declarations, it is impossible for the plaintiff to demonstrate the existence of disputed facts".]) Plaintiff does not explain why the trial court abused its discretion in so ruling.

Third, as defendants point out, the trial court sustained defendants' objection to 12 of the 46 paragraphs in plaintiff's declaration as containing inadmissible hearsay. Plaintiff does not challenge the trial court's rulings on these objections. Instead, he argues, again without citation to the record or legal authority, that he "could testify, as he did in his Declaration of the events that transpired between himself and Aurora. What he was told by Aurora as they pertain to the processing of his loan modification and related activities would not violate the hearsay rules. . . . Plaintiff's testimony would go to show merely what was represented to him by Aurora not to whether or not the statements by Aurora were true." This argument, even if intended as a challenge to the trial court's hearsay rulings, is devoid of citations to the record or legal authority and, therefore, we disregard it. (*Grant-Burton, supra*, 99 Cal.App.4th at p. 1379; *Stanley, supra*, 10 Cal.4th at p. 793; *Lewis, supra*, 93 Cal.App.4th at p. 116; *Christoff, supra*, 134 Cal.App.4th at p. 125.) Given the trial court's sustaining of defendants' objections, plaintiff, even if we were to consider the remainder of his declaration, fails to establish how he has raised any triable issues of material fact regarding his fraud claim.

In his reply brief, plaintiff, relying on California Rules of Court, rule 8.204(e), asserts that, should we find that his opening brief is procedural defective, “[a]ny lack of compliance appears to be minor and it is requested that the court disregard any noncompliance and in the alternative order the brief returned for correction and refilling.” We decline to do so. We do not find plaintiff’s lack of compliance to be minor, and our review of his reply brief, as well as his papers below in opposition to defendants’ motion for summary judgment, do not give us reason to think he will be able to effectively cure the defects in his arguments.

**DISPOSITION**

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

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Lambden, J.

We concur:

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Haerle, Acting P.J.

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Richman, J.