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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

FRANCISCO CARRASCAL,  
Plaintiff and Appellant,

v.

DEANNA AVAKIAN et al.,  
Defendants and Respondents.

A137465

(San Mateo County  
Super. Ct. No. CIV494058)

Plaintiff Francisco Carrascal appeals the trial court's grant of summary judgment in favor of Deanna Avakian; Eugene Avakian; PNC Bank, N.A. (PNC);<sup>1</sup> Bank of America, N.A. (Bank of America); Federal National Mortgage Association (Fannie Mae); and Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively defendants), in this action arising from plaintiff's purchase of two properties in Stockton and related home-purchase and refinance loan transactions in 2006 and 2007.<sup>2</sup> On appeal, plaintiff contends the trial court erred in granting summary adjudication on all of his causes of action, including those for fraud, breach of fiduciary duty, negligence, negligent training, negligent supervision, and unfair competition. We shall affirm the judgment.

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<sup>1</sup> According to the parties, PNC is the successor by merger to National City Bank. References in this opinion to PNC may also include the former National City Bank.

<sup>2</sup> Plaintiff's lawsuit also included allegations against several other defendants, primarily related to his 2004 purchase of one of the properties. Those other defendants are not involved in the present appeal.

## PROCEDURAL BACKGROUND

Plaintiff filed his original complaint for damages in this matter on April 14, 2010. He filed his operative third amended complaint (complaint) on November 30, 2011, in which he asserted causes of action for fraud against all defendants; breach of fiduciary duty against Deanna and Eugene Avakian; negligence against the Avakians and PNC; negligent training against PNC; negligent supervision against PNC; and unfair business practices, pursuant to Business and Professions Code section 17200 et seq., against PNC, Bank of America, Fannie Mae, and Freddie Mac.

On May 25, 2012, defendants filed an amended motion for summary judgment or, in the alternative, summary adjudication of issues. On December 12, 2012, the trial court granted the motion for summary judgment and entered a judgment of dismissal.

On December 27, 2012, plaintiff filed a notice of appeal.<sup>3</sup>

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<sup>3</sup> Although plaintiff was represented by counsel in the trial court, he appears before us in propria persona.

On April 16, 2014, plaintiff filed a “Motion to Add to Record Newly Discovered Evidence and Case Law,” which defendants opposed. In an April 21, 2014 order, we took the motion under submission to be decided with the merits of the appeal. The documents in the augmentation request include, inter alia, handwritten material written by plaintiff; news and Internet articles; pages from a reporter’s transcript from a hearing on plaintiff’s motion for reconsideration of the grant of summary judgment; documents reflecting plaintiff’s attorneys’ complaints to the trial court about defendants’ compliance with discovery requests; copies of court opinions; and a report from “Corporate Mortgage Advisors,” which plaintiff describes as an expert witness, regarding its investigation of and conclusions about the loans plaintiff received. Most of these documents were not before the trial court, and therefore should not be considered in this appeal. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 [“Augmentation does not function to supplement the record with materials not before the trial court”].) In addition, neither these nor other documents included in the augmentation request are relevant to the issues raised on appeal. To the extent the appellate opinions he has included regarding loan servicing and modification are in any way pertinent to this case, we have independently considered them. For all of these reasons, we deny plaintiff’s motion to augment the record on appeal.

## FACTUAL BACKGROUND

This action against defendants concerns loan transactions related to plaintiff's January 2007 purchase of 8619 Cherbourg Way in Stockton and his May 2007 refinancing of loans secured by the residence at 2404 Segarini Way in Stockton, which plaintiff had purchased in 2004.

Plaintiff, who was born in 1957, is originally from Peru, where he completed high school. He has lived in San Mateo County for the past 14 years. He is primarily Spanish speaking and is not fluent in English. Plaintiff works as a day laborer and handyman. He has relied on odd jobs, as well as construction and landscaping work, to earn a living. His average monthly income during the time relevant to this action was \$2,000 to \$4,000 per month.

In January 2007, plaintiff purchased the Cherbourg Way home for a purchase price of \$242,000. To fund that purchase, plaintiff obtained three loans from PNC. First, on November 9, 2006, he obtained a Home Equity Line of Credit (HELOC) with a limit of \$133,000, which was secured by the Segarini Way property. The purpose of the HELOC was to pay off an existing home equity loan in the amount of \$51,000 and to use approximately \$40,000 toward a down payment on the Cherbourg Way property. Second, on January 2, 2007, he obtained two additional loans from PNC, secured by the Cherbourg Way property: a \$193,600 adjustable rate loan with an initial interest rate of 6.5 percent, and a \$24,200 fixed rate loan with an interest rate of 8.75 percent.<sup>4</sup>

On May 3, 2007, plaintiff refinanced the loans on the Segarini Way home, to pay off a first mortgage in the amount of \$203,810 and the \$133,000 HELOC he had obtained in November 2006. To do so, he obtained two new loans: a \$316,000 adjustable rate

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<sup>4</sup> The adjustable rate loan included an "interest only" payment period and the fixed rate loan included a "Balloon Note Addendum," meaning the final payment would be larger than the previous monthly payments and would include a substantial payment of principal.

mortgage with an interest rate of 6.375 percent, and a \$39,500 fixed rate mortgage with an interest rate of 7.75 percent.<sup>5</sup>

Plaintiff purchased both properties as investments, and he spent a great deal of money and time refurbishing and maintaining the homes, with the intent to later sell them at a profit. He made all loan payments until he began to struggle to make the payments in late 2008 and 2009. Although he attempted to get assistance from various agencies, plaintiff ultimately lost both homes to foreclosure.

Deanna Avakian and Eugene Avakian were employed as loan officers for plaintiff's lender, PNC. Bank of America, Freddie Mac, and Fannie Mae each purchased one or more of the subject loans from PNC.

## DISCUSSION

### I. *Summary Judgment Rules and Standard of Review*

A motion for summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code of Civ. Proc. § 437c, subd. (c).)<sup>6</sup> A defendant moving for summary judgment has the initial burden of showing either that one or more elements of the cause of action cannot be established or that there is a complete defense. (§ 437c, subd. (p)(2).) If that initial burden is met, the burden shifts to the plaintiff to show the existence of a triable issue of fact with respect to that cause of action or defense. (*Ibid.*; see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-853.)

“ “[W]e take the facts from the record that was before the trial court when it ruled on that motion,” ’ and “ “review the trial court’s decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.” ’ ’ ’ [Citations.]” (*Hughes v. Pair* (2009) 46

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<sup>5</sup> Both loans included an “interest only” payment period.

<sup>6</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Cal.4th 1035, 1039.) “We also ‘ “ ‘liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.’ ” ’ [Citations.]” (*Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 522.)<sup>7</sup>

## II. *Fraud*

Plaintiff contends the trial court erred when it granted summary adjudication in favor of defendants on his cause of action for fraud. According to plaintiff, defendants defrauded him as to the terms of the loans he received from PNC. He bases the fraud claim on the alleged misconduct of Deanna and Eugene Avakian, and also on theories of vicarious liability against the other defendants, including the “employer-employee

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<sup>7</sup> As a preliminary matter, plaintiff raises several issues regarding alleged procedural errors on the part of the trial court. First, he asserts that he was not properly served notice of the December 4, 2012 summary judgment hearing. Plaintiff, however, cites to his motion for reconsideration, contained in the clerk’s transcript, in which he stated that he arrived in Judge Bergeron’s courtroom on the morning of December 4, and told him that he was no longer represented by counsel. He acknowledges that he was present in the courtroom on December 4, and the court’s minute order reflects that “he did not provide notice to the court, his attorney or opposing counsel of his intent to appear today as required by Local Rule 3.10 and California Rules of Court, rule 3.1308(a)(1).” Plaintiff does not show how he could have been prejudiced by this alleged failure to provide adequate notice regarding the hearing, given that he was represented by counsel who had fully responded to the summary judgment motion and who in fact remained his counsel of record on December 4.

Second, we will not address plaintiff’s three-sentence argument, unsupported by citation to the record or to legal authority, that the court improperly denied his request for a continuance of the summary judgment hearing. (See, e.g., *Associated Builders & Contractors, Inc. v. San Francisco Airports Commission* (1999) 21 Cal.4th 352, 366, fn. 2; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.) Third, plaintiff asserts that he was harmed by defendants’ misconduct during discovery. He claims that defense counsel asked him inappropriate questions during his deposition, that defendants’ responses to interrogatories were inadequate, and that he did not receive requested documents. These general complaints, made without any showing that this issue was raised and addressed in the trial court or that plaintiff suffered any prejudice from defendants’ alleged misconduct, is insufficient to warrant consideration of this issue on appeal. (*Ibid.*)

relationship” between the Avakians and PNC and the “ratification” of the fraudulent conduct by Bank of America, Freddie Mac, and Fannie Mae when they purchased one or more of the subject loans.

Plaintiff alleged in his fraud cause of action in the complaint that the Avakians falsely told him that they had secured for him purchase and refinance mortgage loans that provided low fixed rate interest terms, knowingly concealed the fact that they had included false information about his employment status and monthly income on his loan applications, and falsified other related documents. Plaintiff further alleged that the Avakians made the false statements with the intent to induce him to rely on them, so that they would receive their fees and commissions. He also alleged that he reasonably relied on these misrepresentations and omissions, without which he would not have entered into the relevant loan transactions.

The trial court granted summary adjudication on plaintiff’s fraud cause of action, finding that all of the claims were time-barred.

With respect to the three loans plaintiff obtained to purchase the Cherbourg Way property, we agree with the trial court that plaintiff’s fraud causes of action are time-barred. The statute of limitations applicable to the fraud cause of action is three years. (§ 338, subd. (d).) The evidence in the record shows that plaintiff obtained these three loans on November 9, 2006 (the HELOC), and January 2, 2007 (the adjustable and fixed rate loans). The evidence also shows that the terms of each of these loans were disclosed to plaintiff before or at the time each loan originated and plaintiff acknowledges that he made monthly payments on all of the loans for one to two years. Plaintiff did not file his original complaint in this matter until April 14, 2010, by which time the three-year limitations period for filing an action based on defendants’ alleged fraud related to the Cherbourg Way purchase loans had already passed. (See § 338, subd. (d).)

Nor can plaintiff claim that the statute of limitations was tolled because he was not aware of the allegedly fraudulent loan terms at the time he signed the closing documents, given that these documents set forth the terms of each loan. He also had constructive knowledge of the loan terms when he made the monthly payments. (See § 338,

subdivision (d) [cause of action for fraud “is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake”].) Under the discovery rule, “ ‘the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . [Citation.] A plaintiff need not be aware of the specific “facts” necessary to establish the claim . . . . So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.’ [Citation.]” (*Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 715.) “This policy of charging plaintiffs with presumptive knowledge of the wrongful cause of an injury is consistent with our general policy encouraging plaintiffs to pursue their claims diligently. [Citation.]” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808 (*Fox*) [under delayed discovery rule, plaintiff must show, inter alia, “ ‘the inability to have made earlier discovery despite reasonable diligence’ ”].)

Here, plaintiff clearly had reason to suspect the alleged fraud in the terms of the loans related to the purchase of the Cherbourg Way property at the time he signed the loan documents, which contained all of the relevant terms, as well as when he made monthly payments on the loans. (See *Fox, supra*, 35 Cal.4th at p. 808; *Sahadi v. Scheaffer, supra*, 155 Cal.App.4th at p. 715.) Because a reasonably prudent person would have become aware of the Avakians’ alleged wrongdoing upon signing and receiving copies of the loan documents and upon making the regular loan payments, plaintiff is charged with knowledge of the contents of the documents provided to him. (See *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921.) The trial court, therefore, properly granted summary adjudication on plaintiff’s fraud cause of action as it related to the loans plaintiff obtained for the Cherbourg Way property, based on the statute of limitations.

The court, however, erred when it found that plaintiff’s fraud claims related to the Segarini Way refinance loans were also barred by the three-year statute of limitations for fraud. (See § 338, subd. (d).) The record reflects that plaintiff obtained those loans on May 3, 2007, less than three years before he filed this lawsuit, in April 14, 2010. We

must therefore determine whether plaintiff has raised a triable issue of material fact regarding whether the defendants committed fraud related to the issuance of these later loans.

The elements of fraud include: (1) a misrepresentation; (2) knowledge of falsity; (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damages. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) “ ‘Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff’s reliance is reasonable is a question of fact.’ [Citations.] ‘However, whether a party’s reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts.’ [Citation.]” (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) “The reasonableness of the plaintiff’s reliance is judged by reference to the plaintiff’s knowledge and experience. [Citation.]” (*OCM Principal Opportunities Fund v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864.) Where a claim of fraud is based on concealment rather than an affirmative misrepresentation, the plaintiff must also demonstrate a fiduciary relationship with the defendant, or that the defendant alone had knowledge of material facts that were not accessible to the plaintiff. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 482 (*Magpali*); accord, *Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1199.)

Here, defendants point out that the documents given to and signed by plaintiff at the time the loans closed explicitly stated the terms of those loans. Therefore, according to defendants, as a matter of law, plaintiff could not have reasonably relied on any alleged prior oral misrepresentations by the Avakians regarding the terms of the loans.

As a general rule, “one who assents to a contract is bound by its provisions and cannot complain of unfamiliarity with the language of the instrument.” (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710; accord, *Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal.App.4th 866, 872.) Nevertheless, we gather from the record in this case that plaintiff is a laborer and handyman for whom English is a second language. He is not a sophisticated and experienced real estate

investor who could necessarily have been expected to understand all of the loan terms set forth in the voluminous closing documents, and he arguably could have been misled into relying on a lender's false representations. (See *OCM Principal Opportunities Fund v. CIBC World Markets Corp.*, *supra*, 157 Cal.App.4th at p. 864 [reasonableness of plaintiff's reliance is judged by reference to his or her knowledge and experience]; compare *Fox*, *supra*, 35 Cal.4th at p. 808 [in context of delayed discovery for purposes of tolling statute of limitations, plaintiffs are charged "with presumptive knowledge of the wrongful cause of an injury," which "is consistent with our general policy encouraging plaintiffs to pursue their claims diligently"].)

We cannot say, however, that a genuine issue of material fact exists as to whether plaintiff relied on false statements by the Avakians regarding the terms of his refinance loans for the Segarini Way property, and whether such reliance was reasonable. That is because plaintiff has failed to point to any evidence in the record—and we have been unable to find any ourselves—indicating that the Avakians did in fact orally misrepresent the terms of the two refinance loans they secured for him. In these circumstances, the signed loan documents provide the only evidence regarding plaintiff's knowledge and understanding of the loan terms. Because those documents contained all of the actual loan terms and because the evidence shows that those terms were disclosed to plaintiff and agreed to by him at or before the time of origination, we conclude that summary adjudication was properly granted on the fraudulent misrepresentation claim.<sup>8</sup> (See

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<sup>8</sup> Plaintiff asserts that the trial court improperly applied the parol evidence rule to exclude evidence that would have shown that defendants "induced him to sign these fraudulent mortgage papers knowing that [plaintiff] was not qualified to afford the mortgages." He does not provide a citation to any document in the record reflecting a ruling by the trial court regarding parol evidence. In support of this argument, plaintiff does cite to almost 60 pages of excerpts from his deposition in the clerk's transcript. However, he again fails to point to any particular evidence in the record—regardless of whether the trial court was willing to consider it—that supports his claim that the Avakians misrepresented the loan terms. Thus, even assuming the court failed to consider these portions of plaintiff's deposition, these documents provide no evidence of fraud that would support plaintiff's claim. (Compare *Edwards v. Centex Real Estate*

*Rosenfeld v. JP Morgan Chase Bank, N.A.* (N.D. Cal. 2010) 732 F.Supp.2d 952, 973-974 [where evidence showed only that loan documents containing loan’s terms were disclosed to buyer, buyer’s cause of action for fraudulent misrepresentation and concealment could not succeed].)<sup>9</sup>

As to plaintiff’s claim that defendants included false information regarding his employment status and monthly income on the loan applications and falsified other related documents,<sup>10</sup> to the extent he is alleging fraudulent concealment, his claim fails because he cannot demonstrate a fiduciary relationship with the Avakians or PNC. (See *Magpali, supra*, 48 Cal.App.4th at p. 482.) First, PNC, as plaintiff’s direct lender, did not owe him a fiduciary duty. (See *Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 466 (*Oaks*) [“[A]bsent special circumstances . . . a loan transaction is at arm’s length and there is no fiduciary relationship”].) Second, as we shall discuss in more detail in part II., *post*, the evidence shows that the Avakians acted as loan officers for PNC, not as mortgage brokers for plaintiff. Therefore, they owed him no fiduciary duty. (See *Smith v. Home Loan Funding, Inc.* (2011) 192 Cal.App.4th 1331, 1335 (*Smith*).)

Nor can plaintiff show that the Avakians or PNC had knowledge of material facts that were not accessible to him. (See *Magpali, supra*, 48 Cal.App.4th at p. 482.) As with the loan documents themselves, the record reflects that the allegedly concealed loan applications were disclosed to plaintiff, signed by him, and submitted to PNC. Each of the loan applications contained, *inter alia*, the following language immediately above

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*Corp.* (1997) 53 Cal.App.4th 15, 42 [trial court improperly granted defendant’s in limine motion excluding all evidence of defendant’s oral or written misrepresentations].)

<sup>9</sup> Moreover, even assuming, as plaintiff argues, that he did not read the loan documents that set forth the terms of his loans before signing them, this does not support a finding of fraud, given the lack of evidence that defendants misrepresented the terms of the loan. (See, e.g., See *Rosenfeld v. JP Morgan Chase Bank, N.A. supra*, 732 F.Supp.2d at pp. 973-974.)

<sup>10</sup> The loan applications stated that plaintiff was self-employed, with a company name of “Francisco Carrascal Construction,” and that his monthly income was \$7,900.

plaintiff's signature: "Each of the undersigned [borrowers] specifically represents to Lender . . . and agrees and acknowledges that: (1) the information provided in this application is true and correct as of the date set forth opposite my signature[;] . . . (4) all statements made in this application are made for the purpose of obtaining a residential mortgage loan; . . . (7) the Lender . . . may continuously rely on the information contained in the application, and I am obligated to amend and/or supplement the information provided in this application if any of the material facts that I have represented herein should change prior to closing of the Loan; . . . [and] (10) neither Lender nor its agents, . . . successors or assigns has made any representation or warranty, express or implied, to me regarding this property or the condition or value of the property . . . ." Thus, the loan applications constituted the plaintiff's representations to PNC. They were not PNC's representations to plaintiff, on which he could rely, that he could afford the loans. (See *Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 436 (*Perlas*).

*Perlas, supra*, 187 Cal.App.4th 429 is instructive on this point. There, the borrowers similarly alleged that they had relied on the lender's determination that they qualified for a loan based on an inflated income, fabricated by the lender's employee. The borrowers further alleged that the lender knew or should have known that the borrowers could not make the required payments based on the income information actually provided to the lender. (*Id.* at p. 434.) In holding that the plaintiffs could not amend their complaint to state a claim for fraudulent misrepresentation or fraudulent concealment, Division Five of this District stated: "Appellants appear to conflate loan qualification and loan affordability. In effect, appellants argue that they were entitled to rely upon [the lender's] determination that they *qualified* for the loans in order to decide if they could *afford* the loans. Appellants cite no authority for this proposition, and it ignores the lender-borrower relationship. . . . A lender is under no duty 'to determine the borrowers ability to repay the loan. . . . The lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the lender's protection, not the borrower's.' [Citations.]" (*Id.* at p. 436.)

Here, as in *Perlas*, plaintiff cannot demonstrate that defendants committed fraud by allegedly inflating his income on loan documents to qualify him for loans he could not afford. Accordingly, the trial court properly granted summary adjudication on plaintiff's fraud cause of action as it related to the loans plaintiff obtained for the Segarini Way property.<sup>11</sup>

### **III. Breach of Fiduciary Duty**

Plaintiff contends the trial court erred when it granted summary adjudication in favor of Deanna and Eugene Avakian on his cause of action for breach of fiduciary duty.

In this cause of action in the complaint, plaintiff alleged that he had a fiduciary relationship with the Avakians as his mortgage brokers, and that they breached their fiduciary duty to him by falsifying documents and failing to disclose information related to, inter alia, the terms of the loans, his employment status and income, and his ability to repay the loans.

The trial court granted summary adjudication on plaintiff's breach of fiduciary duty cause of action after finding that plaintiff did not raise a triable issue of material fact showing that the Avakians were mortgage brokers, rather than loan officers, for PNC.

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1599.) A mortgage broker has a fiduciary duty toward a borrower, while a direct lender has no such duty. (*Smith, supra*, 192 Cal.App.4th at p. 1335.) "Financial Code section 50003, subdivision (m), defines a mortgage 'Lender' as 'a person [who] . . . directly makes residential mortgage loans, and . . . makes the credit decision in the loan transactions.' The relationship between a lending institution and a borrower is not fiduciary in nature.

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<sup>11</sup> Plaintiff appears to blame the Avakians and PNC generally for encouraging him to refinance his loans and for failing to warn him that doing so was a bad idea in light of his income and the fragile economy. While we sympathize with plaintiff's situation, these facts simply do not support a cause of action for fraud against these defendants. (See *Perlas, supra*, 187 Cal.App.4th at p. 436.)

[Citation.]” (*Smith*, at p. 1335.) A mortgage broker, on the other hand, is “ ‘a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others: [¶] . . . [¶] (d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.’ The mortgage broker acts as the borrower’s agent. [Citation.]” (*Ibid.*, quoting Bus. & Prof. Code, § 10131.)

Here, the evidence in the record demonstrates that the Avakians were not plaintiff’s mortgage brokers. They were employed by PNC as loan officers and were acting on behalf of PNC when they obtained direct loans from PNC for plaintiff. Plaintiff has submitted no evidence suggesting that the Avakians represented themselves as mortgage brokers, or that they either agreed to or did “shop” the loan among any other lenders.<sup>12</sup> (Compare *Smith, supra*, 192 Cal.App.4th at pp. 1335-1336 [where lender and loan officer acknowledged placing some loans with other lenders, and loan officer told borrower he had shopped loan with other lenders, evidence supported finding that loan officer acted as mortgage broker].)

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<sup>12</sup> In its order granting summary adjudication on this cause of action, the court specifically rejected plaintiff’s claim that the insertion of the Avakians’ names under “Name of Broker” and “Broker Representative” on the California Department of Real Estate’s loan disclosure form constituted the Avakians’ “ ‘identifying’ themselves as brokers. The alleged statement [by Deanna Avakian] that the rate was ‘the best she could have gotten on the market’ . . . describes the rate; it is not a promise to shop plaintiff’s loan to various lenders in the future. Defendant Avakian’s statement that she had brokered other loans in the past is not evidence what she acted a broker [*sic*] for plaintiff’s loan.”

We have found no documents in the record related to the trial court’s findings on this point. Nevertheless, we agree that any statement by the Avakians about shopping loans in the past and the presence of their names under “broker” designations on preprinted state real estate forms would not suffice to raise a triable issue of fact regarding their status as mortgage brokers.

Because plaintiff has not raised a triable issue of material fact as to whether the Avakians acted as his mortgage brokers, he cannot show that they owed him a fiduciary duty. The trial court therefore properly granted summary adjudication on plaintiff's cause of action for breach of fiduciary duty.

#### **IV. Negligence**

Plaintiff contends the trial court erred when it granted summary adjudication in favor of the Avakians and PNC on his cause of action for negligence.

Plaintiff alleged in his negligence cause of action that the Avakians, as his mortgage brokers, "acted negligently in failing to properly consider, investigate or evaluate plaintiff's loan application and/or ability to repay the loans." Plaintiff further alleged that "[t]hese defendants and PNC acted negligently in underwriting and originating the loans."

The trial court granted summary adjudication on plaintiff's negligence cause of action, explaining: "Defendants' moving argument (lender owes no duty of care to borrower) is misplaced, because the complaint does not allege that defendants breached a lender's duty of care. Rather, it alleges that the Avakian Defendants breached their duties as mortgage brokers. [Citation.] . . . [T]he motion is granted because, as set forth above, the undisputed facts are that defendants were not acting as mortgage brokers, and plaintiff fails to raise any triable issue of fact. Therefore, plaintiff's claim that defendants breached a mortgage broker's duty of care has no merit."

"To state a cause of action for negligence, a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries. [Citation.] Whether a duty of care exists is a question of law to be determined on a case-by-case basis. [Citation.] [¶] We start by identifying the allegedly negligent conduct by [defendants] because our analysis is limited to "the specific action the plaintiff claims the particular [defendant] had a duty to undertake in the particular case." ' [Citation.]" (*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 944.)

A panel of this Division recently noted that, “ ‘as a general rule, a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.’ [Citations.]” (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 898 (*Jolley*); quoting *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096; see also *Oaks, supra*, 145 Cal.App.4th at p. 466 [“[A]bsent special circumstances . . . a loan transaction is at arm’s length and there is no fiduciary relationship”].)

On appeal, plaintiff’s argument focuses only on the Avakians’ alleged role as his mortgage brokers, as when he states: “Deanna and Eugene Avakian and vicarious, as PNC, as their employer, [*sic*] all owed [plaintiff] a duty to act as reasonably prudent agents and mortgage loan brokers. . . .” As discussed in part II., *ante*, plaintiff has not raised a triable issue of material fact regarding whether the Avakians acted as mortgage brokers, and he therefore has not shown they owed him a duty of care for purposes of proving negligence. (See *Smith, supra*, 192 Cal.App.4th at p. 1335; see also *Jolley, supra*, 213 Cal.App.4th at p. 898.) Moreover, plaintiff has not raised any facts suggesting that PNC directly breached any duty of care in funding his loans or that its role “ ‘exceed[ed] its conventional role as a mere lender of money.’ ” (*Jolley*, at p. 898.) Hence, even assuming his cause of action included a direct negligence claim against PNC, that claim must likewise fail. (Compare *id.* at p. 900 [finding, in a very different context, that plaintiff borrower’s “ability to protect his own interests in the [construction] loan modification process was practically nil. [The lender] held all the cards”].)

Because plaintiff did not raise a triable issue of material fact as to the direct negligence claim against the Avakians or the vicarious claim against PNC, we conclude the trial court properly granted summary adjudication on plaintiff’s negligence cause of action.

#### ***V. Negligent Training and Negligent Supervision***

Plaintiff contends the trial court erred when it granted summary adjudication in favor of PNC on his causes of action for negligent training and negligent supervision.

In those causes of action, plaintiff alleged that PNC breached its duty to him by failing to adequately train and supervise its employees, including the Avakians, to comply with all applicable state and federal laws, rules, and regulations and by allowing them to operate without such adequate training and supervision. Specifically, plaintiff alleged that PNC breached its duties by permitting the Avakians to, inter alia, fail to provide plaintiff with Spanish translations of documents, falsify loan applications, and represent above market rate adjustable loan products as low fixed rate loan products.

The trial court granted summary adjudication on plaintiff's negligent training and negligent supervision causes of action, explaining: "As a matter of law, a lender owes no general duty of care. [Citation.] Plaintiff offers no opposing argument to the motion as it pertains to [these two] causes of action."

On appeal, plaintiff argues only that because the Avakians owed him a fiduciary duty, PNC likewise owed him "an equal duty of reasonable care to train and supervise its employees to perform that duty." As we have already explained, the evidence shows that the Avakians were loan officers, not mortgage brokers, and they therefore did not have a fiduciary relationship with plaintiff. (See *Smith, supra*, 192 Cal.App.4th at p. 1335.) Nor has plaintiff argued or raised any facts suggesting that PNC acted outside of its role as a lender of money and breached a duty of care in its supervision or training of the Avakians. (See *Jolley, supra*, 213 Cal.App.4th at p. 898.)

Consequently, we conclude the trial court properly granted summary adjudication on plaintiff's negligent training and negligent supervision causes of action.<sup>13</sup>

## **VI. Unfair Competition**

Plaintiff contends the trial court erred when it granted summary adjudication in favor of PNC, Bank of America, Fannie Mae, and Freddie Mac on his cause of action for

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<sup>13</sup> Defendants also argued for summary adjudication on the negligence, negligent training, and negligent supervision causes of action on the ground that these claims were time barred. (See § 339, subd. (1).) The trial court did not address this claim and, in light of our conclusion that summary adjudication was properly granted on other grounds, we need not address it here.

unfair business practices, pursuant to the unfair competition law (UCL). (Bus. & Prof. Code, § 17200 et seq.)

In his unfair competition cause of action, plaintiff alleged that PNC, Bank of America, Fannie Mae, and Freddie Mac violated the UCL by engaging in the practices described in his other causes of action. He also alleged UCL violations based on PNC's employing an unlicensed Spanish-speaking salesperson to solicit, negotiate, and close home loans in Spanish with him, and then not providing him with Spanish language copies of his loan documentation and disclosures as required by Civil Code section 1632; falsely inflating his income on the loan applications and falsely inflating the value of the property that served as security for the loans; falsifying HUD-1 statements to hide the nature and amount of fees and charges or to obligate him to mortgage terms to which he never agreed; failing to provide him with copies of appraisal reports or loan applications submitted on his behalf; and failing to verify his employment status, income, and assets. In discovery, plaintiff apparently focused on Financial Code section 4973, not Civil Code section 1632, as the basis for his UCL claim. Specifically, plaintiff stated that he had evidence to prove fraud based on documents showing "he did not qualify for the loans generated by PNC . . . which were knowingly and willfully made by PNC without any regard for plaintiff's ability to repay in violation of [Financial Code section] 4973."

The trial court granted summary adjudication on plaintiff's UCL cause of action, explaining: "It is undisputed that neither Financial Code section 4973 nor Civil Code section 1632 applies to this case. [Citation.] Plaintiff cites no authority holding that common law torts of fraud, negligence, and breach of fiduciary duty as alleged in the complaint constitute 'unlawful' acts within the meaning of Business & Professions Code section 17200. Further, as set forth above, the claims for fraud, negligence, and breach of fiduciary duty have no merit; they cannot be a basis for unfair business practices."

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising," as well as any act specifically prohibited under Business and Professions Code section 17500 et seq. (Bus. & Prof. Code, § 17200; see also Bus. & Prof. Code, § 17500 [concerning false or misleading

advertising].) “The statute is meant to forbid not only anti-competitive practices but also “ “ “the right of the *public* to protections from fraud and deceit.” ’ ’ ’ [Citation.]” (*Jolley, supra*, 213 Cal.App.4th at p. 907.)

In the present case, as already discussed, *ante*, plaintiff failed to raise a triable issue of material fact regarding whether defendants are liable for fraud, breach of fiduciary duty, negligence, negligent training, or negligent supervision. Therefore, even assuming these causes of action can form the basis of a UCL claim, such a claim would fail.

In addition, with respect to Financial Code section 4973, which prohibits certain “acts and limitations for covered loans,” neither of the Segarini Way loans was a “covered loan.” As explained in Financial Code section 4970, subdivision (b):

“ ‘Covered loan’ means a consumer loan in which the original principal balance of the loan does not exceed the most current conforming loan limit for a single-family first mortgage loan established by the Federal National Mortgage Association in the case of a mortgage or deed of trust, and where one of the following conditions are met:

“(1) For a mortgage or deed of trust, the annual percentage rate at consummation of the transaction will exceed by more than eight percentage points the yield on Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor.

“(2) The total points and fees payable by the consumer at or before closing for a mortgage or deed of trust will exceed 6 percent of the total loan amount.”

Here, the annual percentage rate for each of the two loans in question was 7.415 percent for the adjustable rate loan and 7.926 percent for the fixed rate loan. Hence, the annual percentage rate for either loan could not have exceeded the applicable Treasury yield by more than eight percent. (See Fin. Code, § 4970, subd. (b)(1).) Furthermore, the total points and fees for these loans were significantly below six percent of the loan amounts. (See Fin. Code, § 4970, subd. (b)(2).) In short, plaintiff’s loans simply do not qualify as “covered loans” pursuant to section 4973.

Likewise, to the extent plaintiff's claim is still based on the provisions of Civil Code section 1632, he cannot show a violation of that section, which provides that, in certain transactions, the documents that are utilized must be translated from English into the customer's primary language. Section 1632 provides in relevant part: "Any person engaged in a trade or business *who negotiates primarily in Spanish*, . . . orally or in writing, in the course of entering into [certain types of transactions], shall deliver to the other party to the contract or agreement and prior to the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated . . . ." (Civ. Code, § 1632, subd. (b), italics added.)

In the present case, as he acknowledged in his deposition, plaintiff interacted with the Avakians solely in English. Accordingly, the protections of Civil Code section 1632 are inapplicable.

For all of these reasons, the trial court properly granted summary adjudication on plaintiff's UCL cause of action.

In conclusion, because plaintiff did not satisfy his burden of raising a triable issue of material fact as to any of his causes of action, the trial court properly granted summary judgment in favor of all defendants. (See § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 850-853.)

#### **DISPOSITION**

The judgment is affirmed. The parties shall bear their own costs on appeal.

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Kline, P.J.

We concur:

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Richman, J.

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Stewart, J.