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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOHN CLIFTON ELSTEAD,
Plaintiff and Appellant,
v.
JPMORGAN CHASE BANK et al.,
Defendants and Respondents.

A140069, A141247

(Alameda County
Super. Ct. No. 2002-046192)

INTRODUCTION

Plaintiff John Clifton Elstead, an attorney representing himself in this lawsuit he filed nearly fifteen years ago, appeals from a judgment entered after a bench trial rejecting his breach of contract claim against the servicer of his home mortgage, JPMorgan Chase Bank, successor to Chase Manhattan Mortgage Corp., and Chase Mortgage Services, Inc. ("Chase").

This is the second time this case has been before us. We previously affirmed a grant of summary judgment in Chase's favor on all causes of action but one, and remanded the case for further proceedings on Elstead's breach of contract claim only. (*Elstead v. JPMorgan Chase Bank* (Nov. 30, 2009, Nos. A117521, A119606) [nonpub. opn.] (*Elstead I*).) The trial court rejected that remaining cause of action at trial principally because Elstead could not prove he performed his own contractual obligations: specifically, he failed to show that he had ever paid Chase nearly $50,000 he owed under a settlement the parties reached in 1998. We now affirm the judgment

entered against Elstead on that remaining breach of contract cause of action, as well as a post-judgment order awarding $744,204.50 in legal fees to Chase for defending itself against Elstead's baseless claims over many years, all culminating with a trial that resulted in a ruling—only one aspect of which we need address here—that attorney Elstead failed to prove critical parts of his case.

BACKGROUND

The facts are taken from the trial court's statement of decision and, where appropriate, the record of trial. We state the facts in the light most favorable to the judgment.

This dispute arises from what the trial court called an "astounding" history of Chase's mishandling of Elstead's home mortgage account since taking over the servicing of that loan in 1995. We recount the history of this loan from its inception, though, as it bears on some of the problems that arose on Chase's watch.

Elstead, a plaintiff's trial attorney who has been in practice for decades, took out his home loan in October 1988 when he borrowed $429,000 from Sutter Mortgage pursuant to a 30-year, variable rate promissory note secured by a deed of trust, and an addendum agreement concerning property taxes (the parties referred to the latter as the "escrow waiver"). Elstead testified that although the deed of trust required him to include 1/12 of his annual property taxes along with his monthly payment, he and the lender agreed he wouldn't have to do that and they executed the escrow waiver addendum to memorialize their understanding that he would be responsible for paying his own property taxes. The initial loan servicer was Main Street Mortgage Company ("Main Street"), which at some point also appears to have bought the loan and took over as lender too.[1]

The First Threatened Foreclosure and Loan Reinstatement

In January 1993, roughly four years into the loan, the first of many difficulties arose. On January 4, 1993, Main Street notified Elstead he was delinquent on his

[1] The loan changed hands a number times and was serviced by several different entities along the way, although the specifics aren't entirely clear from the record.

property taxes for years 1988, 1989 and 1990 in the amount of $22,166.09 and that those taxes had been advanced on his behalf. A short time later, Main Street began sending Elstead's monthly payments back to him and, on March 3, 1993, notified him he was in default and threatened to commence foreclosure proceedings. He was delinquent by $28,967.39, including late charges and advances. Elstead claimed to be unaware Main Street had been paying his property taxes in these years, and testified he too had paid his property taxes through 1990 and that at some point the county returned his checks to him and kept Main Street's payments. He disputed the default, but in June 1993 settled with Main Street by paying $38,748.47 to get his loan reinstated and avoid foreclosure.

The Second Threatened Foreclosure and $24,832 Settlement

A year-and-a-half later, in December 1994, Elstead received another notice of default and election to sell, stating he owed $14,153.60. Elstead contacted the trustee handling the foreclosure proceedings, Title Trust Deed Service Co. ("Title Trust"), and learned this concerned property taxes that had been advanced for 1992, 1993 and 1994.

In early 1995, Elstead paid $24,832.68 to resolve this second foreclosure threat. Elstead testified he did this by sending Title Trust a check for $24,832.68 to cover the amounts due, and that the check was cashed but that unbeknownst to him the funds weren't applied to his account at the time. He testified he learned this only later, when in this litigation Chase produced a document in discovery from its loan files, created before Chase took over the loan (according to Chase), that Elstead testified he had never seen before. The document, dated February 27, 1995, is entitled "Foreclosure Tax Payment Request Form" and appears to be an internal loan servicing document generated by the "Escrow Department" concerning a "stop" that had been placed internally on the $24,832.68 for a period of time not specified.

The Third Threatened Foreclosure and 1995 Forbearance Agreement

In March 1995, a short time after this document was generated, Chase Manhattan Mortgage Corp. took over as servicer of the loan, effective April 1, 1995.[2] Shortly thereafter, on April 4, 1995, Chase notified Elstead that records it had received from Main Street showed he was in default as of February 28, 1995, and three days later Title Trust sent Elstead a notice of trustee's sale. Chase notified Elstead that $57,028.58 was owed, including $20,611 for 1991–1992 property taxes paid in March 1995, $4,121 for the first installment of 1994–1995 property taxes, and $24,954.98 for nine monthly payments from September 1, 1994, to May 1, 1995, plus various late charges and fees. Elstead testified he had made those monthly payments but they had been sent back to him. He also thought he'd already paid the 1991–1992 property taxes.

All of this eventually led to Elstead entering into a "Forbearance Agreement" on May 8, 1995, calling for him to pay Title Trust $76,210.78. The payment consisted of a $32,295.30 lump sum, followed by seven monthly payments of $6,273.64 ending in December 1995.

Elstead made all of the payments required by the Forbearance Agreement, and on December 28, 1995, Title Trust confirmed that in writing and stated the foreclosure was "rescinded."

For reasons not apparent from the trial record, though, Chase's internal records didn't reflect that Elstead had fulfilled all of his Forbearance Agreement payment obligations. On May 1, 1996, Chase noted in an internal record, "We had to pay 24,000.00 in back taxes. We set him up on a f/b agreement to pay back taxes but he did not keep." And in this litigation, Chase stated in discovery responses Elstead "did not make 7 payments of $6,273.64 as required by the [forbearance] agreement."

[2] Unless required for context, we refrain from differentiating between Chase Manhattan Mortgage Co. and its various successors named in this litigation, whom we collectively refer to as "Chase."

The Fourth Threatened Foreclosure, Culminating with Bankruptcy, Litigation and the 1998 Resolution Agreement

Elstead had not long discharged his obligations under the Forbearance Agreement when, in February 1996, Chase sent Elstead a notice of intent to foreclose again. Chase was again claiming Elstead was delinquent on his property taxes and had again been advancing property taxes and escrowing Elstead's monthly principal and interest payments to recoup its payments. Elstead disputed Chase's right to escrow the funds and objected to any prepayment of property taxes. And for the next several months he communicated with Chase and the foreclosure trustee in an effort to determine the basis for their calculations of the delinquency amounts. The matter came to a head in January 1997 when a Notice of Trustee's sale issued, and Elstead was notified that $57,617.66 was required to avoid foreclosure and reinstate the loan. He disputed this, and contended he had paid the very property taxes Chase had paid too. The trial court stated it was "baffled why this occurred and why it was not immediately discovered by the county returning one party's or the other's duplicative payments. [Elstead] testified that on each occasion the county simply either cashed or held the duplicative payments until he inquired, at which point his checks were refunded or, if not cashed, returned."

In February 1997, unable to resolve the matter, Elstead filed for bankruptcy to forestall the trustee sale. Approximately six months later, in August 1997, he filed a civil action against Chase in Alameda County Superior Court that was removed to bankruptcy court.

The parties eventually arrived at a settlement, which they memorialized in an "Amended and Restated Settlement Agreement And Release" that Elstead executed on January 23, 1998, and Chase on February 12, 1998. Below, the court and the parties referred to the settlement agreement as the "Resolution Agreement," and we will do the same.

The Resolution Agreement's intent and effect was to "wipe the slate clean" regarding all disputes before January 23, 1998. Among other terms and conditions, Chase agreed to pay Elstead $15,000 and, to the extent Chase had not already done so,

pay all outstanding property taxes for 1994–1995, including any interest and penalties. Elstead, in turn, agreed to dismiss the civil action with prejudice, pay Chase $48,563.21—a requirement that became a central issue at trial—and broadly release all claims against Chase, known and unknown, as of the agreement's date. The $48,563.21 payment, which the parties refer to as the "Supplemental Amount," was made payable beginning on March 1, 1998 in equal monthly installments on the first day of each month for 36 months, bearing 10 percent annual interest until paid in full. The obligation was made part of Elstead's secured obligation under the loan, and was not subject to any prepayment penalty. The Note and Deed of Trust remained in full force and effect except to the extent expressly modified by the Resolution Agreement.

Further Loan Tracking Irregularities, Culminating with the Final Threatened Foreclosure That Precipitated This Lawsuit

Thereafter, Elstead dismissed the civil action, Chase made the required $15,000 settlement payment to Elstead but, as the trial court put it, "[b]eyond that, things get murky."

Elstead testified that he paid the Supplemental Amount sometime in February 1998, but couldn't recall the exact date. He testified that he decided to pay the $48,563.21 Supplemental Amount up front at that time, in full, because he had recently received a large payment from a case he had just settled, and so he contacted Chase's attorney, Steve Cohen, and asked where he should send the check. Cohen wrote back on February 17, 1998, instructing Elstead to contact bank employee, Subodh Singh. Elstead then tried unsuccessfully to contact Singh (who turned out to be unavailable while out on medical leave), but another bank employee instructed Elstead to send a certified check. Elstead testified he thought this meant a cashier's check. And he testified he believes he paid by cashier's check but was unable to locate the check, and couldn't recall which bank he got it from. He testified he put the check in an envelope and gave it to his paralegal to mail to Chase, but wasn't sure how the paralegal sent it.

Elstead had no records corroborating his version of events. Asked if he had any bank records showing the withdrawal of $48,563.21 from his accounts, he testified "No.

The only thing in my account that showed up when I was looking for it was a check around that amount, which was paid and then released around eight or nine months later, but no, basically the answer's no." He testified his paralegal had begun embezzling from him in late 1996 or 1997 and, to cover his tracks, had altered entries in Elstead's own computerized bank records and stolen copies of checks, all of which Elstead only discovered years later (in 2006, 2007 or 2008) and prompted criminal charges. (Elstead testified he had obtained software from his bank that permitted him to print checks by computer, which the paralegal had installed for him.) Elstead didn't think his bank would have a copy of the check either, because "[t]hey don't have a copy of the records that were written out of my computer, so they weren't able to say whether they had it or not," but he also admitted that after finding out his own bank records had been destroyed, he never asked his banks for copies of records to show which account the funds had been withdrawn from.

At trial, Chase contended it had no record of receiving that payment. Its custodian of records, Albert Smith, testified that Chase had no business records referencing its receipt, including a "payment history" Chase had generated for litigation purposes from Chase's computer records, which covered the period from May 1997 to March 2006, and "servicing notes" in the loan file. The trial court ruled Smith could not testify as to whether the payment had actually been received, "because he has no way of knowing that," and "you can't ask a custodian in effect a question that says it's impossible that Chase lost it, isn't it?" and limited Smith's testimony to the substance of what Chase's records showed.

Believing he had paid the Supplemental Amount, Elstead thereafter made regular monthly payments of only principal and interest on the loan, and not an increased amount to pay down the Supplemental Amount in 36 monthly installments as the Resolution Agreement would have required had he not paid it in full.

Elstead testified that Chase never notified him before he filed suit that he had failed to pay the Supplemental Amount, and Chase introduced no contrary evidence. Later in discovery, in an interrogatory response explaining the basis for its March 9, 2002

warning that Elstead was in default in the amount of $94,570.79 which precipitated this litigation, Chase didn't mention Elstead's failure to pay the Supplemental Amount either, nor reference the $48,563.21 owed under the Resolution Agreement, merely specifying "principal and interest payments" due for various periods and $22,225.04 due for an "escrow shortage."

The trial court found that non-receipt of Elstead's Supplemental Amount did not "set off any alarms" within Chase, because internally Chase didn't look for full payment of it until March 2001, which was the end of the 36-month period. The reason was because Chase had left Elstead's account coded as "bankruptcy" (due to the Resolution Agreement's settlement of the bankruptcy), marked the account with the notation, "NO COLLECTION ACTIVITY TO BE MADE . . . NO CALLS OR LETTERS," and suspended all regular communications with Elstead.

The February 1998 Bankruptcy Remark

On February 27, 1998, a Chase employee logged an entry in the "bankruptcy monitoring system" section of Chase's computerized records for Elstead's loan: "RCVD 149,620.71 CK, NOT SURE HOW TO APPLY CALLED STEVE COHEN." Then, it stated, "Called Steve Cohen, LM, left message to verify if received notice mortgager sending this amount." Cohen was Chase's outside litigation counsel at Gray Cary Ware & Friedenrich, LLP who had negotiated the Resolution Agreement. He also handled other litigation matters for Chase too.

Chase witnesses did not know what this entry meant, Cohen was not called as a witness, and Chase was never able to discern what the entry was or locate a $149,620 check.[3] According to Chase's custodian of records Albert Smith, "[i]t appears to be an error. I have no other explanation." Smith admitted he had no firsthand knowledge of anything in Elstead's payment history, however, and hadn't talked to any Chase employees knowledgeable about the facts of Elstead's loan, and he acknowledged there was nothing later in Chase's records identifying this entry as an error. Smith also

[3] It was undisputed Elstead never sent a check of that size: Elstead admitted this and Chase's records of Elstead's payment history reflect no such payment either.

acknowledged that had Cohen, Chase's attorney, either explained in response to the inquiry what the entry was for or indicated he didn't know, one would have expected a follow-up notation in Chase's records reflecting that and yet there apparently was nothing in Chase's records to that effect. And in discovery responses, Chase said that after diligently investigating, it couldn't say how, if at all, it had finally applied the $149,622.17 referenced in this record, nor, if the $149,622.17 wasn't applied to Elstead's account, explain why not. Another Chase employee stated in a summary judgment declaration, admitted into evidence, that "[b]ased on the amount, the remark appears unrelated to this matter," and "I have been unable to locate additional information regarding the system mark."

According to Elstead's testimony, the February 28, 1997 entry expressing uncertainty about "how to apply" $149,620.71 was evidence Chase had received his check for the Supplemental Amount, because the figure closely correlated with the sum of three settlements he had made on this loan, none of which were accurately accounted for in Chase's internal records. Specifically, Elstead explained in his testimony that $149,620.71 is nearly the sum of the amount of the Supplemental Payment he tried to mail to Chase, the $24,832.68 he paid Main Street in 1994 for 1994–1995 taxes but that he later discovered Main Street had placed on hold, and the $76,210.98 he paid Chase under the Forbearance Agreement but which was inaccurately described in Chase's internal records and discovery responses as not fully paid.

In early 1999, Elstead contacted Chase to try to get monthly statements sent to him, which led to "a flurry of internal communications" within Chase that led to one of its employees discovering that Chase was again improperly escrowing for property taxes internally. The trial court found this error was eventually reversed.

A number of controversies arose, at the heart of which once again were property taxes. Again, the parties paid duplicative property taxes, and Chase was subsequently refunded its payments (including for penalties). But in the meantime, in September 2001, Chase began returning Elstead's monthly checks and it eventually resumed foreclosure efforts.

On March 9, 2002, Chase sent Elstead an "Acceleration Warning," notifying him he was in default under the loan for having failed to pay the required monthly installments and late charges and that $94,570.79 was presently due for "principal, interest, escrow, late charges, and fees," and warning him the entire balance would become due if the default were not cured in 30 days. Over the next ten days, Elstead wrote multiple letters asking for an explanation, and insisting he had made all of his required payments. The parties have not cited any evidence that Chase responded.

Chase's records were in considerable disarray. By the time this dispute ended up in court, Chase had used four different software systems to track Elstead's loan since taking over as servicer in 1995. And at various junctures, Chase internal records reflected the loan file couldn't be located. The trial court pondered whether "[r]ather than a 'too big to fail' problem, one must wonder if there is a 'too big to function' issue."

This Litigation

On April 4, 2002, less than a month after Chase's acceleration warning, Elstead brought suit against Chase (specifically, JPMorgan Chase Bank, Chase Manhattan Mortgage Corp., and Chase Mortgage Services, Inc.). His original pleading, styled a verified complaint for "injunctive relief and damages," alleged ten causes of action arising from Chase's mishandling of his loan. Paragraph 25 specifically alleged he would be irreparably injured unless Chase were restrained and enjoined from instituting the threatened foreclosure proceedings, because Elstead couldn't pay the $94,570.79 Chase demanded and foreclosure proceedings would cloud his title and ultimately result in the loss of his home. Thereafter, on May 8, 2002, the trial court preliminarily enjoined Chase from initiating foreclosure proceedings during the pendency of the case.

After Chase was preliminarily enjoined, Elstead filed a verified first amended complaint, which became the operative pleading at trial, dropping all references to injunctive relief and praying only for damages on various grounds. He alleged a single cause of action for breach of contract and ten additional causes of action sounding principally in tort.

Elstead's contract claim was far-ranging. In it, Elstead alleged breaches of the Note, Deed of Trust, Escrow Waiver, Forbearance Agreement and the Resolution Agreement. His basic premises were allegations Chase had wrongly "refused to accept and apply [his] monthly payments to principal and interest," "created unwarranted defaults under the Note," "erroneously calculated the amount [Elstead] agreed to pay under the Resolution Agreement and has added that erroneous amount to supposed arrearages under the Note" and "declared that [Elstead] is in default under the Note and has threated, and continues to threaten, to institute foreclosure proceedings." Elstead sought damages in an unspecified amount and an award of attorney fees.

As noted, the trial court subsequently granted summary judgment for Chase on all causes of action, and in our prior opinion this court largely affirmed that ruling, reversing the grant of summary judgment only with respect to a portion of Elstead's breach of contract claim. (*Elstead I, supra*, Nos. A117521, A119606.) We concluded the trial court had erroneously ruled that the alleged breaches of the note, deed of trust, escrow waiver and Resolution Agreement were time-barred, but affirmed the trial court's ruling on summary judgment that Elstead's breach of contract claim under the Forbearance Agreement was time-barred. (*Ibid*.)

On remand, a five-day bench trial ensued on Elstead's claim for breach of the Resolution Agreement, note, and deed of trust. Only two witnesses testified: Elstead, in his own case, and Chase's custodian of records, Albert Smith, who testified in Chase's case-in-chief. In addition, Elstead designated portions of the deposition of Chase employee Deborah Baker. The trial was extremely document intensive, with nearly 160 exhibits comprising almost five hundred pages.

During a colloquy near the end of Elstead's direct examination, the trial court made comments indicating the court believed Elstead had made a prima facie showing that he had paid the Supplemental Amount. The following day, during Chase's case-in-chief (which was proceeding somewhat out of order), the court reiterated that Elstead had already made a prima facie case (based on Elstead's live testimony, and designated portions of the Baker deposition) and said it would deny any motion for nonsuit because

"there's a question of fact." The court later denied Elstead's motion for a directed verdict at the close of the case, however, ruling that the evidence was in conflict in light of the fact that Chase's business records didn't reflect receipt of the Supplemental Amount.

On the last day of trial, renewing a motion that had been denied years earlier, Elstead moved to amend the complaint with causes of action for fraudulent concealment, conversion and violation of the Consumer Legal Remedies Act, based on 19 payments he made to Chase between August 2000 and February 2002 that Chase cashed but didn't apply to his loan.

The Trial Court's Rulings

At the conclusion of trial, the trial court rejected Elstead's breach of contract claim in a detailed, 26-page statement of decision. The principal basis for its ruling was that Elstead failed to meet his burden of proving that he paid the $48,563.21 Supplemental Amount. It also made subsidiary findings concerning the property tax issues which "have been a mess from Day 1," but concluded the parties' differences over the tax issues "in the end . . . do not matter." In addition, the court found Elstead had failed to prove any damages, which was an independent basis for rejecting his breach of contract claim. And the court denied Elstead's motion to amend the complaint to add four new causes of action, and in the alternative granted the motion but ruled that Elstead had failed to prove those claims.

The court subsequently entered judgment against Elstead, and this timely appeal followed.

After judgment was entered, Chase moved for an award of approximately $1.33 million in attorney fees. On January 17, 2014, the court entered an order granting the motion in part, awarding Chase $744,204.50 pursuant to an attorney fee provision of the Resolution Agreement. Elstead timely appealed from the January 17, 2014 order.[4] On our motion, we consolidated the two appeals for purposes of argument and decision.

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[4] The trial court directed the preparation of an amended judgment incorporating the fee award, but none appears in the record. Neither party raises any issue or error regarding that omission, which appears to be an oversight and is of no jurisdictional

DISCUSSION

Our consideration of these appeals has been greatly hampered by Elstead's deficient briefing. His discussion of the facts in his opening brief on appeal from the judgment is a largely one-sided, argumentative presentation of the evidence that disregards much, if not all, evidence that does not favor his position, which is improper. (See *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531; *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1659.) Indeed, the duty to fairly summarize the facts " 'grows with the complexity of the record' " (*Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 50), and the record here, while not extraordinarily lengthy, is sizeable and factually complex. In addition, in many places Elstead's briefing on the merits fails to include appropriate record citations which violates California Rule of Court 8.204(a)(1)(C). Elstead also cites and extensively relies on dozens of trial exhibits but did not take steps to ensure they were properly transmitted to this court after having designated them for inclusion in the clerk's transcript; upon discovering their omission from the record after the close of briefing, we procured them on our own motion (ultimately from the parties) which was not our burden to do. The opening brief relies on authority that was depublished more than nine years before the opening brief was filed (*Anolik v. EMC Mortgage Corp.* (Apr. 29, 2005, No. C044201), and hence may not be cited. (See Cal. Rules of Court, rules 8.1105(e), 8.1115(a).) One of his legal arguments rests solely on that non-citable opinion,[5] and two other legal arguments rely almost exclusively on it.[6] Moreover, much of Elstead's opening brief reads like a full-scale assault on the credibility of witnesses. This fundamentally misconceives our appellate role: " ' " 'Conflicts and even testimony which is subject to justifiable suspicion do not

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significance. (See *Whiteside v. Tenet Healthcare Corp.* (2002) 101 Cal.App.4th 693, 706 ["An order awarding attorney fees is separately appealable as an order after judgment"].)

[5] Specifically, that is point B of the opening brief, page 22, captioned "The March 2002 Notice Of Default Does Not Contain a Correct Statement of Default And Is Invalid."

[6] We refer here to pages 23 and 51 of the opening brief.

justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' " ' " (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 750.) Finally, many of his arguments are jumbled and incomprehensible, consisting of isolated attacks on portions of the trial court's ruling, and/or snippets of the evidence captioned under vague, uninformative headings (including, "The Statement of Decision is Based on Speculative Inferences and Unsupported by Substantial Evidence: The Inferences Are Based on Nonexistent Facts and Dispelled as a Matter of Law," "Mr. Elstead was Credible and Chase was Not," and "All Inferences are Based on Nonexistent Facts"); the best we can do—reluctantly, for of course we needn't do so at all—is to construe pages 27 to 40 of his opening brief on appeal from the judgment as a challenge to the trial court's ruling that he failed to meet his burden to prove that he paid the Supplemental Amount, and disregard all points made in those pages (and in his even more disorganized reply brief) that do not appear to have anything to do with that question.

To be clear, ordinarily we would be inclined to deem Elstead's appeal from the judgment forfeited in one or more ways, or to summarily affirm it, because of all of these deficiencies. However, we elected to direct supplemental briefing on a limited number of issues, and now address Elstead's two appeals within the constraints posed by his inadequate briefs.

I.

The March 9, 2002 Notice From Chase

Elstead challenges the judgment, first, on the ground that "[t]he March 2002 notice of default does not contain a correct statement of default and is invalid," relying upon depublished authority applying Civil Code section 2924, which is part of a comprehensive statutory scheme governing nonjudicial foreclosure sales pursuant to a power of sale contained in a deed of trust. (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813–814.) We reject this contention. The trial court rejected Elstead's *claim for contract damages*. It did so because, among other reasons, he failed to perform his own contractual obligations under the loan documents. The validity (or non-validity)

of the March 9, 2002 notice was immaterial to the court's decision, and Elstead does not contend otherwise. Whether Chase could proceed with foreclosure in these circumstances on the basis of the March 9, 2002 notice is an irrelevant, hypothetical question neither implicated by the trial court's decision nor embraced by the scope of Elstead's amended complaint. Furthermore, the sole authority Elstead cites has been depublished and may not be cited. (See Cal. Rules of Court, rules 8.1105(e), 8.1115(a).)

Elstead repackages the same point, next, as a challenge to the trial court's refusal to exclude all evidence of his failure to pay the Supplemental Amount. Specifically, he contends the trial court erred in denying his motion *in limine* requesting the exclusion of that evidence on the ground the March 2002 notice was invalid under Civil Code section 2924. Here again Elstead misconceives his own cause of action. "The standard elements of a claim for breach of contract are: '(1) the contract, (2) *plaintiff's performance or excuse for nonperformance*, (3) defendant's breach, and (4) damage to plaintiff therefrom.' " (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1178 (*Wall Street Network, Ltd.*), italics added.) So, evidence that Elstead didn't perform his own obligations was relevant, and there was no abuse of discretion in its admission. Again, the hypothetical question whether Chase could properly exercise a power of sale on the basis of the March 9, 2002 notice, or instead whether that remedy would be procedurally improper, has no bearing on this damages claim. Unlike the only published authority Elstead does cite, this wasn't a claim to restrain a nonjudicial foreclosure sale. (See *Ung v. Koehler* (2005) 135 Cal.App.4th 186, 190.) Elstead cites no authority for the proposition that a defective notice of mortgage default (assuming for the sake of argument this was one[7]) is a complete defense to an action seeking damages for breach of contract. Perhaps in recognition of this fact, Elstead dropped this argument entirely from his reply brief.

[7] The parties disagree as to whether the March 9, 2002 notice even constitutes a notice of default, much less whether it was a valid one. We express no opinion on either subject, as the question is irrelevant.

II.

The Trial Court Properly Ruled That Elstead Failed to Prove a Breach of the Loan Documents.

A. Elstead Was Required to Prove He Paid the Supplemental Amount or That His Timely Payment Was Excused.

Elstead argues, next, that his failure to pay the Supplemental Amount is not a defense to this breach of contract claim, because "[p]ayment of the supplemental amount is not a condition precedent to Chase's obligations under the Resolution Agreement," however at oral argument he could not recall making the argument and stated that is not his position.[8] We disagree with the argument put forward in his brief. Elstead in fact conceded during the rebuttal portion of his oral argument he *did* have the burden to prove that he paid the Supplemental Amount.

This concession was appropriate. As noted above, a plaintiff's "performance or excuse for nonperformance" is one of the "standard elements" of a claim for breach of contract. (*Wall Street Network, Ltd.*, *supra,* 164 Cal.App.4th at p. 1178.) Put another way, "A defendant's duty is discharged by failure of consideration regardless of his or her lack of knowledge of it, and even though the defendant has also been guilty of a breach. The reason is that the plaintiff, having failed to perform on his or her part, suffers no legal injury by the defendant's breach." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 817, p. 908.) In particular, "[t]he trustor-mortgagor or the person who alleges that a debt has been paid has the burden of proving payment." (5 Miller & Starr, Cal. Real Estate (4th ed. December 2016 update), Deeds of Trust and Mortgages, § 13:85; see also 1 Witkin, *supra*, Contracts, § 848, p. 935 ["The plaintiff must be free from substantial default in order to avail himself or herself of the remedies for the defendant's breach. Hence, the plaintiff must plead and prove performance or tender on

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[8] Chase is merely the servicer of Elstead's loan, and is not a party to either the Note, Deed of Trust, or Escrow Waiver. However, Chase has not questioned Elstead's ability to sue it for breach of those underlying loan agreements. We assume for purposes here, as the parties and the trial court apparently did, that the fact Chase is not a party to those instruments is no obstacle to Elstead's claim that Chase breached them.

his or her part or an excuse for performance"].) Thus, " '[u]nder basic contract principles, when one party to a contract feels that the other contracting party has breached its agreement, the non-breaching party may either stop performance and assume the contract is avoided, *or continue its performance and sue for damages*. Under no circumstances may the non-breaching party stop performance *and* continue to take advantage of the contract's benefits.' " (*Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 443, italics added; accord, *Beutel v. Wells Fargo Bank, N.A.* (N.D. Cal. Oct. 20, 2011, No. 11-CV-04357-LHK) 2011 WL 5025118, at *3 [homeowner who believed lender's loan servicing practices breached their agreement could have terminated the contract, but "was not allowed to stop making [mortgage] payments while continuing to take advantage of the contract's benefits by remaining in possession of the home"] [applying California law].)

Elstead cites a handful of cases in which a plaintiff's failure to perform its own contractual obligations was held not to defeat a claim the other party breached the contract, but none involve contracts or circumstances remotely similar to those at issue here. They involved situations in which the plaintiff's duty to perform was subject to an unfulfilled condition precedent, which is not true of Elstead's obligation to pay the Supplemental Amount (see *Rubin v. Fuchs* (1969) 1 Cal.3d 50, 54); or where the plaintiff's breach was essentially de minimis[9] (see *Redpath v. Evening Express Co.* (1906) 4 Cal.App. 361, 367–368; *Verdier v. Verdier* (1955) 133 Cal.App.2d 325, 335 [breach not "so serious"]); or where the parties' contractual obligations were determined to be independent duties, not mutually dependent, based in part upon either timing (see *Kaupke v. Lemore Canal & Irrigation Co.* (1937) 20 Cal.App.2d 554, 559 [duties under agreements allocating water rights between irrigation districts " 'are to be performed at different times' "]; *Federal Deposit Insurance Corp. v. Air Florida Systems, Inc.* (9th Cir.

[9] Here, the trial court ruled Elstead had failed to carry his burden of proving that he " 'did all, or substantially all, of the *significant* things that the [Resolution Agreement] required [him] to do.' " (Italics added.) Elstead did not argue below, and does not argue now, that his breach was in any sense immaterial.

1987) 822 F.2d 833, 841 [construing stock purchase agreement]) or simply the nature of the obligations involved (see *Verdier*, at p. 335 [construing marital separation agreement]). But when the parties' contractual obligations are not independent, the plaintiff's failure to perform his own material contractual duties precludes suit for breach of contract. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 276–280; see also, e.g., *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.* (1914) 168 Cal. 140, 143 ["A party cannot recover damages for the breach of an entire contract if he himself has failed, without lawful cause, to perform the covenants, upon compliance with which the obligations of the defendant were dependent"]; *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.* (1909) 156 Cal. 776, 779–780 [under contract for sale of oil, "the obligation to furnish and the obligation to take all oil needed . . . are necessarily reciprocal. Each goes to the essence of the agreement"]; *Wiz Technology, Inc. v. Coopers & Lybrand LLP* (2003) 106 Cal.App.4th 1, 11–13 [plaintiff breached "a critical requirement" of the contract]; *Pry Corp. of America v. Leach* (1960) 177 Cal.App.2d 632, 638–640 [licensee's failure to make payments under their contract "was a material failure of consideration which discharged [cross-defendants'] duty"].)

Here, Elstead was required to pay down his loan according to its terms, and (under Elstead's theory) Chase was contractually required to properly apply his payments in a certain manner upon receipt. Their obligations were not independent. Simply put, it's impossible to construe Chase's obligations to track and properly account for Elstead's payments as anything *but* related to Elstead's performance of his own obligations under the terms of the loan documents. Furthermore, we are not free to decide this question in the first instance, as Elstead would apparently have us do. When the trial court relies on parol evidence to construe a contract, its determination that a promise is not an independent covenant is a question of fact that must be upheld if based upon substantial evidence. (*Brown v. Grimes*, *supra*, 192 Cal.App.4th at p. 279.) Elstead just ignores this, and proceeds as if we may interpret this contract anew.

The trial court's implied finding that Chase's duty to properly account for Elstead's payments was dependent on Elstead's own duty to pay is supported by

substantial evidence. It is evident from the very nature of these contracts, not to mention the troubled history of this loan and the circumstances that led to the Resolution Agreement's execution, that the parties' respective contractual obligations were not independent. The lender most certainly would not have been willing to agree to apply Elstead's payments in a particular manner (nor Chase, when carrying out those duties as the lender's servicing agent) unless it could be assured Elstead *would pay*. (Cf. *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.*, *supra*, 156 Cal. at p. 780.) Elstead advances no meaningful argument to the contrary.

Elstead cites no authority holding that a borrower's obligation to pay what he owes under a loan is independent of any contractual duty to properly apply payments, track the loan and refrain from assessing late charges, fees and other penalties. Absent some excuse (which we discuss, *post*), we simply do not see how a borrower may recover contract damages for alleged errors in the proper servicing of his loan without also proving the borrower has substantially complied with the contract by making all (or substantially all) payments required of him—or, put another way, that he is not in *substantial* default. Simply put, a borrower who materially fails to perform his own mortgage obligations cannot sue his loan servicer for breach of contract. In our independent research, we have found many federal decisions applying California law that have expressly so held. (See *Rose v. J.P. Morgan Chase, N.A.* (E.D. Cal. Feb. 11, 2014, Civ. No. 2:12-225 WBS CMK) 2014 WL 546584, at p. *6 [granting summary judgment for loan servicer, because "[f]ailure to make payments on the terms required by a mortgage loan constitutes non-performance and ordinarily bars a plaintiff from prevailing on a breach of contract claim based on that loan"]; see also, e.g., *Friedman v. U.S. Bank National Assn.* (C.D. Cal. Nov. 14, 2016, No. 2:16-CV-02265-CAS-FFM) 2016 WL 6745149, at pp. *5–*6 [dismissing with prejudice breach of contract claim by borrower who admittedly failed to make required tax and insurance payments]; *Barber v. Citimortgage, Inc.* (C.D. Cal. Sept. 19, 2014, No. EDCV 13-1188 JGB (OPx)) 2014 WL 12561627, at pp. *5–*6 [granting summary judgment for loan servicer where borrower failed to pay her property taxes for nearly two years and thus "did not perform as required

under the Deed"]; *Wise v. Wells Fargo Bank, N.A.* (C.D. Cal. 2012) 850 F.Supp.2d 1047, 1055–1056 [borrower who defaulted on loan failed to state a claim for breach of contract as a matter of law against loan servicer for allegedly misapplying payments, "[b]ecause [borrower] failed to perform under the contract"].)

In short, there was no legal error by the trial court on this point.

C. Elstead's Evidence Did Not Compel a Finding as a Matter of Law That He Paid the Supplemental Amount.

Next, we address that portion of Elstead's brief that, as said, we will construe as a challenge to the sufficiency of the evidence concerning his non-payment of the Supplemental Amount.

The standard of review presents a formidable barrier. As we have already noted, the trial court ruled that Elstead did not meet his burden of proving he paid the Supplemental Amount. When a plaintiff fails to carry its burden of proof below and then challenges the sufficiency of the evidence on appeal, the issue is not whether substantial evidence supports the judgment. (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465.) Rather, " 'where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes *whether the evidence compels a finding in favor of the appellant as a matter of law*.' " (*Id.* at p. 466, italics added.) The appellant's evidence must be " '(1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." ' " (*Ibid.*) It is "almost impossible" for a losing plaintiff to make such a showing and win on appeal, because "unless the trial court makes specific findings of fact in favor of the losing plaintiff, we presume the trial court found plaintiff's evidence lacks sufficient weight and credibility to carry the burden of proof." (*Bookout v. State ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1486.)

We start, first, with what Elstead did prove: that he intended to and thought he had paid the Supplemental Amount. Specifically, the trial court found that "[h]aving been fighting with Chase for so many years . . . it is inconceivable that, once the

Resolution Agreement was signed, [Elstead] would have both blown off the opportunity to bring his account current with a lump sum payment and also failed to at least try to [make] the regular 36 supplemental payments." It also found Elstead's "testimony that he elected and performed under the first of these two options was credible," and that "it is clear to this court that [Elstead] *believes* he made that payment." So these amount to factual findings that Elstead at least tried to pay the Supplemental Amount in February 2002. But Elstead's evidence didn't compel a finding Chase actually *received* a check. It might just as easily have been lost in the mail, or stolen.[10]

The trial court said it "initially entertained the possibility of finding [Elstead] sent the payment but for some reason *Chase* lost it and never negotiated the check," but rejected that position for several reasons. First, the court declined to find the check was received because Elstead didn't have personal knowledge that it was sent. The court also ruled that Elstead's failure to produce bank records showing "a withdrawal or payment consistent with his recollection" supported an inference that his bank records "do not reflect any payment of the Supplemental Amount." Alternatively, the trial court ruled that Elstead's failure to introduce his bank records at least to show "he had the cash available at the time to support such a payment or to corroborate his recollection that at or about that time he received a large settlement that allowed him to pay the Supplemental Amount in a lump sum in that timeframe," justified an adverse inference that Elstead *didn't* write such a check and/or have the funds available at the time to make that payment. We have no reason to second-guess these adverse inferences. (See Evid. Code, § 412.) Elstead challenges them only on the ground that it was Chase, not he, who subpoenaed the bank records; but we fail to see why that matters, and Elstead has cited no legal authority suggesting it was improper to draw an inference against him in these

[10] To prove that he paid by check, Elstead was required to prove that Chase actually received his check not just that he mailed it. (See *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439–440.) And we do not understand Elstead to contend otherwise.

circumstances. *They were his bank records*. Surely, if those records could corroborate his version of events he had the power to produce them.

Given the complete absence of any documentary evidence corroborating Elstead's version of events, we cannot say Elstead's evidence *compelled* the trial court to find that Chase ever received his check. That alone is dispositive.

The trial court also harbored grave doubts based upon Elstead's reliance on an embezzling paralegal, both to handle Elstead's finances and purportedly mail the check in question, and we refrain from summarizing those findings. Elstead quibbles with some of the trial court's findings on this subject, including even whether the embezzling paralegal and the paralegal to whom he gave the check were one and the same, but to us they are both amply supported by this record and amply justified. As the trial court put it, Elstead "was not in the habit of paying much attention to his own personal financial affairs," and "the court has a problem crediting a party's recollection of these kinds of details at issue here when apparently Plaintiff paid so little attention to his finances that an embezzler could have been stealing from him for over eleven years without Plaintiff noticing the resulting discrepancies." The trial court was entitled to make this credibility determination. We therefore have no trouble affirming the court's ruling that "looking at just Plaintiff's testimony and the evidence corroborating his recollection (or the lack thereof), the court cannot find that he carried his burden of proof regarding the payment of the Supplemental Amount."

None of Elstead's arguments dictate a contrary conclusion. He expends considerable effort attacking Chase's evidence (in particular, attacking witness Smith and the accuracy of the so-called "Payment History" document), and in effect re-arguing the weight of much of the evidence, but none of that bears on the sufficiency of his *own* evidence. He also argues the loan balance, reflected in Chase records, would not have declined had the Supplemental Amount not been paid in full in February 1998; but the trial court found Chase had "astounding[ly]" mishandled this loan and at trial observed that Chase's loan-tracking was "miserable," and so we infer nothing of any consequence

from a declining loan balance. And we certainly cannot say as a matter of law what Chase's records reflect.

Elstead also points to the inscrutable $149,620.71 notation in Chase's business records in February 1998. The trial court reasoned it would be "rank speculation" to conclude this notation had anything to do with Elstead's loan, and concluded that "as best as anyone can tell the uncertainty as to that check was probably eventually sorted out and the amount applied to some other Chase dispute Cohen was handling." We asked for supplemental briefing about this notation and the court's finding, and conclude the notation does not compel a finding as a matter of law that Chase ever received a check for the Supplemental Amount that Elstead claims was sent. Without elaboration, Elstead briefly reprises the theory he advanced below in his trial testimony that the notation actually represents three separate payments on his account: his payment of $76,210.98 under the Forbearance Agreement, $24,832.68 for back taxes he paid in 1995 and the $48,563.21 Supplemental Amount. But as the trial court found, the sum of those three figures doesn't exactly total $149,620.71. Furthermore, those other payments had been made years earlier than February 1998 when this notation was recorded.[11] Although Chase was apparently never able to figure out definitively what this entry meant, this isolated notation, standing alone, is not " 'of such a character and weight' " as to compel a finding that Chase actually received a check from Elstead for $48,563.21. (See *Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc., supra,* 196 Cal.App.4th at p. 466.)

Nor is Elstead's trial testimony that "[t]he only thing in my account that showed up when I was looking for it was a check around that amount, which was paid and then released about eight or nine months later, " another subject upon which we requested supplemental briefing. Elstead argues this is evidence his check was "cashed but not applied to the loan" but does not explain why, whereas Chase contends "[i]f [Elstead's]

[11] Elstead paid the taxes in 1995 and finished paying under the Forbearance Agreement in December 1995.

statement was accepted as true, then there would be documents to support his claim." Chase has the better of this argument. Elstead's vague testimony does not compel reversal, for we think the trial court properly could—and impliedly did—reject it. And as Chase argues, it does not undermine the adverse inference the trial court properly drew against Elstead for failing to produce any corroborating bank records.

In sum, Elstead did not prove as a matter of law he paid the Supplemental Amount. We cannot and will not re-weigh any of the evidence, nor pass on any witness's credibility. Given the gaping holes in Elstead's proof, and his remarkable theory, self-defeating on its face, that he paid by means of a check placed in the hands of an admitted thief, we find no error.

D. Elstead Has Waived the Theory That His Performance Was Excused.

In his opening brief, Elstead briefly asserted as a defense that performance of his obligation to pay the Supplemental Amount was excused. (See Civ. Code, § 1511) In light of a rather substantial record, not detailed here, of failed efforts by Elstead to ascertain the basis of Chase's position that he was again in default and Chase's non-responsiveness, we requested supplemental briefing on this question. Indeed, it appears to be undisputed that Chase never told Elstead before this litigation commenced that it thought Elstead hadn't paid the Supplemental Amount.[12]

Having considered the parties' supplemental briefing, we conclude the issue has been waived. "The rule is well understood that a recovery on proof of excuse for

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[12] We conclude this independently from the record. We asked for supplemental briefing as to when Elstead learned Chase thought he hadn't paid the Supplemental Amount, but neither party's response was illuminating. Elstead's was incomprehensible. And Chase's obfuscated: Chase wrote only that Elstead "should have been on inquiry notice" in September 2001 "that he was in default under the loan," when Chase returned a payment as being insufficient to cure a default.

At oral argument, Elstead maintained he didn't find out Chase was claiming he didn't satisfy the Resolution Agreement until trial, and specifically not until Chase filed its written closing argument. But, as Chase's counsel pointed out, Chase specifically addressed Elstead's failure to pay the Supplemental Amount in a declaration it filed in support of a 2005 summary judgment motion, many years before trial in 2013.

nonperformance cannot be had on an allegation of full performance." (*Kirk v. Culley* (1927) 202 Cal. 501, 506; accord, *Durrell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1367; *Nelson v. Specialty Records, Inc.* (1970) 11 Cal.App.3d 126, 138; *Rivadell, Inc. v. Razo* (1963) 215 Cal.App.2d 614, 621.) Here, Elstead's verified amended complaint alleges he fully performed and does not allege his performance was excused. And he testified at trial he had performed, too. The trial court's statement of decision does not address this theory either, which as best we can tell was first raised, tangentially, in Elstead's post-trial reply brief. We will not overturn a judgment on the basis of a theory Chase was not put on notice it would have to defend at trial.[13] In addition to violating the rules governing the pleading requirements for a contract cause of action, these circumstances violate the well-settled principle " 'that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.' " (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874.) Furthermore, in his supplemental reply brief Elstead disavows reliance on an excuse theory, telling us he "is not alleging excuse for his nonperformance but for Chase's."

In light of our disposition, it is unnecessary to address the question of damages.

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[13] Elstead argues the allegations of his complaint "put Chase on notice long before trial that repeated failure to respond to his inquiries as the basis of the alleged 2002 default was at issue," and we agree. But he never sought to amend his complaint at trial to allege excuse as a theory, and so the trial court never had a chance to exercise its discretion to decide whether allowing it at that late stage would be prejudicial to Chase, nor consider any terms upon which such an amendment might be granted (such as permitting Chase a continuance if need be). (See *Nelson v. Specialty Records, Inc.*, *supra*, 11 Cal.App.3d at pp. 138–141 [affirming denial of motion to amend complaint at trial to allege excuse where complaint alleged only full performance, even though plaintiff notified defendant of the excuse theory before filing suit and also in discovery responses].)

III.

The Trial Court Did Not Abuse Its Discretion in Rejecting Elstead's New, Proposed Amended Causes of Action.

Finally, Elstead argues the trial court should have granted him leave to amend his complaint to conform to proof at trial with three additional causes of action: fraudulent concealment, conversion and violation of the Consumer Legal Remedies Act.[14] The trial court did permit the amendment but rejected those claims on their merits. Elstead has not carried his burden to show any error.

In evaluating Elstead's contentions, we start with the fundamental principle that " '[a] judgment or order of the lower court is *presumed correct* . . . and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) One aspect of an appellant's burden is to furnish, and appropriately discuss, pertinent legal authority. We are not required to address arguments that the appellant has not supported with *applicable* legal authority. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 980–981.) Moreover, "an appellant is required to not only cite to valid legal authority, but also explain how it applies in his case," because it also is not our duty "to attempt to resurrect an appellant's case or comb through the record" for evidence that might support the appellant's theory. (*Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1, 10.) Simply put, merely citing or discussing general propositions of law does not meet an appellant's burden of demonstrating error; an appellant must explain how those legal principles apply

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[14] The motion was made orally on the last day of trial, followed by a written opposition and reply. Elstead also challenges an earlier ruling denying a motion to amend the complaint he made in January 2011, but fails to explain how that earlier ruling prejudiced him given that, at trial, the court *granted* him leave to amend the complaint but rejected these new causes of action on their merits. Indeed, Elstead concedes the trial court's earlier ruling was "essentially the same" as the ruling denying the motion to amend he made at trial, and he characterizes the pre-trial motion itself as "identical" to the motion he made at trial. Thus, we focus only on the ruling made at trial that, on the merits, he didn't prove these claims.

to the facts of his case. (See *id.* at p. 11; *Kim*, at p. 979 [appellate court may disregard points where "the relevance of the cited authority is not discussed or points are argued in conclusionary form"].)

Fraudulent Concealment. Elstead's appellate argument concerning this cause of action is nearly impossible to follow. As we understand it, Elstead contends he sought to hold Chase liable on a tort theory of fraudulent concealment based solely on 19 monthly payments made between August 1, 2000, and February 1, 2002, that he contends "were not passed on to the lender and applied to the loan," and "had he learned sooner they were not, he would not have waited until April 2002 to file suit."[15] Elstead provides no record cites for his factual assertion that these payments were never passed on to the lender, however, and it is not our job to unravel this factual theory ourselves. In addition, he argues that two of the payments were returned to him, and so on that theory he undisputedly *knew* those two payments were not applied to his loan. In other words, that fact was not concealed from him.

Elstead's argument also fails for an even more fundamental reason, however. He devotes most of his attention to arguing that a cause of action for fraudulent concealment is not limited to fiduciary relationships, but he does not show affirmatively that he proved this cause of action as a matter of law. He does not even address all of its elements, confining his appellate argument (as best we can tell) to describing the facts allegedly concealed from him. " '[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not

[15] In his reply brief, Elstead argues the cause of action also is based upon Chase's failure to tell him that it was returning his monthly payments and initiating foreclosure proceedings due to his failure to pay the Supplemental Amount. This point is forfeited because it is made improperly for the first time in the reply brief. (See *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 63, fn. 27.) In any event, it fails for the same reason as the other theory discussed in the text.

have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' " (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 748; accord, *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868.) Among other things, Elstead has not argued on appeal, much less demonstrated, that he proved as a matter of law the element of detrimental reliance, or that the facts allegedly concealed were material; and even his own authority makes clear that both of these elements ordinarily present issues of fact.[16] (See *Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 292–293; *People v. Hedgecock* (1990) 51 Cal.3d 395, 408 ["in civil fraud actions in which the plaintiff must show a misrepresentation as to a material fact the jury determines what is material"].) Nor has Elstead argued, much less demonstrated as a matter of law, that Chase's actions—even if deceitful—were willful. (See *Blickman Turkus*, at p. 869; Civ. Code, §§ 1709 ["One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers"], 1710 [defining deceit]). "It is not enough that the misstatement (or concealment) actually harmed the plaintiff; it must have been made by the defendant with the intent to *induce action* (or inaction) by the plaintiff."[17] (*Blickman Turkus*, at p. 869.)

In short, having failed to brief most of the elements of a fraudulent concealment cause of action, Elstead has not met his burden on appeal to demonstrate that he proved this claim as a matter of law.

Conversion. Elstead's appellate argument concerning his cause of action for conversion is no more intelligible. His brief attacks isolated snippets of the trial court's

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[16] With regard to reliance, the only thing Elstead argues he would have done differently had he known the true facts is that he would have filed suit sooner. That is bootstrapping. We do not think a delay in filing suit is the kind of inaction this tort was meant to redress. In any event, he cites no authority supporting this theory.

[17] Elstead acknowledged this below; in his "Closing Argument" brief to the trial court, he contended this cause of action requires proof of " 'intent to induce action.' " (Italics added.)

ruling without explaining what his theory was on this claim below, or how the trial court ruled, much less why he is now entitled to a judgment in his favor on this cause of action. We could deem the argument forfeited for that reason alone, because we are "not required to make an independent, unassisted study of the record in search of error." (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 139.) Rather, as already noted, we are entitled to the assistance of a coherent appellate brief that contains "a legal argument with citation of authorities on the points made." (*Ibid.*)

From what little we can glean, it appears Elstead complains of payments allegedly made that Chase neither "pass[ed] . . . on to the lender or appl[ied] . . . to the loan." Below, Elstead conceded in his oral argument to the trial court that if the evidence merely showed Chase had taken his monthly payments and charged it to his account in a way Elstead believed was *improper*, no cause of action for conversion would lie ("If that was the state of the evidence, I would agree with you"). His theory, rather, was that Chase "didn't do anything with [the 19 payments] except cash them and put them in their own pocket. . . . They did not apply them in any form or fashion to my loan . . . . [¶] They just took the money, end of discussion . . . ." He appears to reprise that argument on appeal, contending "Chase is no different than a thief who intercepted those monthly payments and applied them for its own use instead of passing them onto the lender and applying them to the loan."

The argument borders on frivolous. Elstead fails to cite any evidence, much less undisputed evidence, that Chase took Elstead's payments "for its own use." What is more, he ignores the trial court's factual finding, explained at length in paragraph 31 of the Statement of Decision, that "[a]ll of the monthly payments [were] accounted for in some manner" by Chase and "credited in some fashion," even though there was a dispute "as to whether they were properly applied." The trial court went through this in painstaking, careful detail.

Elstead also ignores the reason the trial court rejected his conversion claim: because he did not prove ownership of these funds. Specifically, the trial court found that Elstead "made monthly payments to the bank to satisfy a debt he owed. *His intent was*

not to maintain some interest in such payments but to pay off an obligation. He retained no property right in such moneys once paid." (Italics added.) Although Elstead quibbles with the trial court's word choice (pointing out Chase was the loan servicer not a "bank," and asserting the payments weren't "made"), he fundamentally does not address the trial court's *legal* ruling that Elstead no longer had any property right in the funds he sent to Chase—a legal ruling that is premised, moreover, on a *factual* finding about Elstead's intentions. By failing to supply us with any authority or reasoned argument that the trial court erred in either regard, he has waived any error in the trial court's ruling. (See *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303.)

It was incumbent on Elstead to address this point. "The gist of the right of recovery in an action for conversion is derived from ownership with the right of possession, or from actual possession at the time of the alleged tortious act." (*Kronsberg v. Milton J. Wershow Co.* (1965) 238 Cal.App.2d 170, 174–175; see also *Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1452 ["Proof of conversion requires a showing of ownership or right to possession of the property at the time of the conversion, the defendant's conversion by a wrongful act or disposition of property rights, and resulting damages"].) Elstead had *parted* with his money, having tendered it as payment to the lender by sending it to the lender's agent, Chase.[18] Elstead has cited no authority suggesting the funds still belonged to him once he tendered his payments to Chase, or alternatively that he had right to possess them. In particular, he cites no authority for the proposition that mere accounting miscalculations by a lender's agent constitutes

[18] See, e.g., *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 233–234 (seller that retained buyer's deposit when sale failed to close not liable for conversion because title to funds transferred to seller "such that [plaintiff] cannot establish ownership"); *Avidor v. Sutter's Place, Inc., supra*, 212 Cal.App.4th at pp. 1452–1453 (rejecting conversion claim premised on consensual, agreed-upon tip-pooling arrangement between plaintiff and his employer, because plaintiff "did not have ownership or possessory rights" in the money he contributed); *Kronsberg*, *supra*, 238 Cal.App.2d at pp. 174–175 (auctioneer not liable to seller for conversion in failing to pay over sale proceeds, where seller had conveyed title to auctioneer and no longer owned the property or was entitled to its possession).

conversion of the borrower's property. The few conversion cases Elstead cites are distinguishable, because in each of them the plaintiff (unlike Elstead) either owned and/or had a possessory interest in the property converted; *and* the defendant (unlike Chase) misused the plaintiff's property in some way, either by appropriating the property for itself, losing and/or destroying it, or wrongfully withholding it from the plaintiff.[19]

In short, he has not demonstrated any error.

Consumer Legal Remedies Act. Finally, Elstead challenges the trial court's rejection of his claim under the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), which prohibits certain methods of competition, acts or practices that are "undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer . . . ." (*Id.*, § 1770, subd. (a).) Its purpose is to curb deceptive sales practices in consumer transactions. (See *Berry v. American Exp. Publishing, Inc.* (2007) 147 Cal.App.4th 224, 230.) In rejecting this cause of action, the trial court ruled both that the CLRA does not apply to the servicing of home mortgage payments (see Civ. Code, § 1761, subd. (b)) and also that Chase didn't engage in any deceptive conduct prohibited by the CLRA.

Elstead's argument on this issue, as we understand it, consists of two propositions. First, he contends mortgage loans *are* covered by the CLRA and the trial court erred in concluding otherwise by relying on the Supreme Court's decision in *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56 which Elstead argues is distinguishable (an

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[19] See *Hollywood Motion Picture Equipment Co. v. Furer* (1940) 16 Cal.2d 184 (defendant hired by plaintiff to manufacture equipment based on plaintiff's proprietary designs allegedly appropriated the designs for itself to manufacture and sell competing products); *Messerall v. Fulwider* (1988) 199 Cal.App.3d 1324 (shop that repaired boat brought to it by boat's buyer refused to release boat upon demand to seller who was boat's registered owner and had a contractual right to repossess it); *Reynolds v. Lerman* (1956) 138 Cal.App.2d 586, 596 (sheriff liable for conversion to owner of property seized under writ of attachment for wrongfully selling the property at auction; although plaintiff "did not have the right of immediate possession at the time of the sheriff's tortious sale . . . he was the owner and we hold that in a case such as this, where the sale divests the owner's title entirely, right of immediate possession is not essential to his recovery for conversion").

argument elaborated upon at greater length in his reply brief). Second, he maintains that Chase engaged in practices prohibited by the CLRA "with respect to the '19 monthly payments' it did not pass on to the lender after August 2000 and apply to the loan." (Italics omitted.) Instead, Elstead argues, Chase "concealed" from him its "failure to apply those monthly payments to the loan until June 2005 when it first filed for summary judgment," including by sending him "monthly statements after August 2000 indicating that monthly payments were being applied to the loan."

Elstead has shown no error in the trial court's ruling that Chase's actions did not meet the definition of an unlawful practice under the CLRA. His argument on this issue is supported by *no* record citations, and practically no legal argument, authority or analysis other than quoting the statute's text. We deem this point forfeited, and affirm the trial court's rejection of his CLRA cause of action on that basis alone.[20]

In light of Elstead's failure to demonstrate on appeal he proved Chase engaged in any conduct proscribed by the CLRA, it is unnecessary to decide whether the CLRA even applies to Chase, as the servicer of Elstead's mortgage. Here again, though, we note Elstead has failed to show the trial court erred in concluding the CLRA is inapplicable. In *Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, our colleagues in the Second District thoroughly examined the relevant statutory framework, and held that a mortgage loan is neither a good nor a service covered by the CLRA, regardless of whether ancillary services are provided in connection with the loan. (See *Alborzian*, at

[20] Were the point not waived, we also would reject Elstead's theory on its face just as the trial court did. Elstead asserts Chase violated the statutory prohibition against "[u]sing deceptive representations or designations of geographic origin in connection with goods or services" (Civ. Code, § 1770, subd. (a)(4)), when "geographic origin" has not the slightest thing to do with this dispute. He asserts Chase violated the CLRA's prohibition on "[r]epresenting that goods or services have . . . benefits . . . they do not have" (Civ. Code, § 1770, subd. (a)(5)), when Chase made no representations to him about any "benefits" of this loan; it simply accepted his monthly payments and (in his view) misapplied them. Finally, he asserts Chase violated the CLRA's prohibition on "[r]epresenting that a transaction confers or involves rights . . . that it does not have or involve" (Civ. Code, § 1770, subd. (a)(14)) when, again, the only thing Chase did was accept Elstead's monthly payments and in Elstead's view fail to properly apply them.

pp. 39–40; Civ. Code, § 1761, subds. (a) & (b) [defining "goods" and "services"].) *Alborzian*'s analysis was based in part on the Supreme Court's decision in *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, which held the CLRA does not apply to life insurance. It is unnecessary to examine the analysis of either decision at any length here. We note only that the Supreme Court in *Fairbanks* characterized loans as "intangible goods" not covered by the CLRA either, and rejected the bootstrapping argument that customer services provided in connection with intangible goods, such as "services related to the maintenance, value, . . . or repayment of the intangible item," would trigger CLRA coverage. (See *Fairbanks*, at p. 65.) Concluding the reasoning of *Fairbanks* "applies with equal force to lenders," *Alborzian* affirmed the dismissal of a homeowner's CLRA claim alleged against one of its mortgage lenders *and* a debt collection agent of the lender. (See *Alborzian*, at pp. 40, 41; see also *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1488 [CLRA held inapplicable to mortgage lender that allegedly charged improper costs and fees in connection with loan's issuance]). Post-*Fairbanks*, the weight of federal authority supports the trial court's ruling too. (See, e.g., *Jamison v. Bank of America, N.A.* (E.D. Cal., July 6, 2016, No. 2:16-cv-00422-KJM-AC) 2016 WL 3653456, at *7–*8 and authorities cited [CLRA held inapplicable to servicer of mortgage loan]; *Mazonas v. Nationstar Mortgage LLC* (N.D. Cal., May 4, 2016, No. 16-CV-00660-RS) 2016 WL 2344196, at *1 [same].) The only case Elstead cites to the contrary, *Hernandez v. Hilltop Financial Mortgage Inc.* (N.D. Cal. 2007) 622 F.Supp.2d 842, 849, which held the CLRA does apply to mortgage loans, pre-dates both *Alborzian* and the Supreme Court's decision in *Fairbanks*, and were we to reach the issue we would decline to follow it.

IV.

The Attorney Fees Award Must Be Affirmed.

Finally, after litigating against Chase for more than 11 years and getting nowhere, Elstead challenges the trial court's January 14, 2014 award of $744,204.50 in attorney fees to Chase on a number of grounds.

The award was a significant reduction from Chase's $1.3 million dollar request , and we are unable to review it because we do not have an adequate record. All we have before us is the order granting Chase's fee request in part. Although copies of Chase's opening papers and supporting declarations are included in the record of the merits appeal and we could take judicial notice of those materials (see, e.g., *People v. Kisling* (2014) 223 Cal.App.4th 544, 546, fn. 2), Elstead's opposition to the fee motion and Chase's reply papers are not included in either record as far as we can tell. The record also does not include a transcript of the hearing that took place on December 6, 2013, where the matter was argued and taken under submission. "It is the burden of the party challenging the fee award on appeal to provide an adequate record to assess error." (*Maria P. v. Riles* (1997) 43 Cal.3d 1281, 1295 (*Maria P.*).) This record is inadequate, and we presume the ruling is correct. (See *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564; *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46; see also *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 ["The judgment must be affirmed because the record provided by defendant is inadequate to conclude the trial court abused its discretion in determining the fee was reasonable. As the party challenging a fee award, defendant has an affirmative obligation to provide an adequate record so that we may assess whether the trial court abused its discretion"]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 711 ["Without a transcript of the hearing . . . , we have no idea what grounds were actually advanced or what arguments were made in the trial court," even though clerk's transcript contains written motion papers and opposition].)

Given these problems, we address only briefly the difficulties in Elstead's arguments that are apparent even on their face. For example, Elstead argues he wasn't trying to enforce the Resolution Agreement, but that argument is disingenuous, and

directly contradicted (among other ways) by paragraph 46 of his complaint ("Chase failed and refused, and continues to fail and refuse, to adhere to and perform the acts agreed to under the Resolution Agreement"); his own trial testimony[21]; and page 4 of his opening brief on the merits ("He filed a first Amended Complaint in August 2005, alleging contractual causes of action for breach of the underlying loan documents and Resolution Agreement . . .").

Elstead also contends the fee provision of the Resolution Agreement does not apply because Chase Manhattan Mortgage Corp., the defendant he sued, is not a signatory to that contract (the only counter-party being Chase Manhattan Bank), thereby attempting to draw distinctions between the various Chase entities involved in the case. But the argument is squarely foreclosed by controlling Supreme Court authority that has been a basic tenet of California law for nearly 40 years. *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, a seminal decision interpreting Civil Code section 1717, established that a prevailing defendant who has been sued on a contract containing a fee clause by a party to the contract, who would themselves have been entitled recover fees under the contract had that plaintiff won, may recover its attorney fees even though the prevailing defendant is not actually a party to the contract. (*Reynolds Metals Co.*, at pp. 128–129.) This reciprocity rule has been a longstanding bedrock of California law. In addition, Elstead's opening brief ignores the trial court's finding that he stipulated below "that the sole remaining defendant is the successor in interest to all the other Chase entities in this case."[22] Moreover, the Resolution Agreement is expressly made for the

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[21] "Q: I just want to clarify, Mr. Elstead. The breach of contract claim that you have against my client—you're alleging breach of the resolution agreement, correct? [¶] A: That's correct."

[22] In his reply brief, Elstead attempts to parse the record and argue the trial court misunderstood his comments, but having failed to challenge the finding of a stipulation in his opening brief Elstead has waived this contention. (See *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc., supra*, 226 Cal.App.4th at p. 63, fn. 27.) It would be unfair to Chase who had no opportunity to respond. Furthermore, we would reject the argument had it not been waived. In the colloquy, quoted in Chase's respondent's brief, Elstead expressly said on the record that "I essentially agree." While his comments are at

benefit of all "agents" of Chase Manhattan Bank (which a loan servicing agent self-evidently is) *and* all "successors and assigns"; Elstead ignores these provisions (pointed out in Chase's respondent's brief) and therefore has not met his burden to show any error in the trial court's ruling.

We also reject Elstead's various challenges to the amount of this fee award, including his contentions that fees were not properly apportioned and that some fees were sought on irrelevant issues. As said, the lack of an adequate record, and in particular a hearing transcript, makes it impossible for us to review these contentions. (See *Maria P. v. Riles*, *supra*, 43 Cal.3d at pp. 1295–1296; *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 633.) The record also does not show Elstead *asked* the trial court to apportion legal fees on any ground.

Finally, Elstead argues the award must be reversed because Chase waived its right to claim fees because it failed to check a box in its cost memorandum indicating it would be claiming attorney fees. We do not need to decide whether there was any procedural error in this regard because Elstead fails to explain how he was prejudiced. A timely, noticed motion for attorney fees was filed, supported by documentation, opposed, and then ruled upon and so he cannot suggest this somehow deprived him of a chance meaningfully to contest the question of attorney fees. The purported procedural error, if any, was trivial and we do not reverse judgments on that basis. (See Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; see also, e.g., *Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 781 [alleged error in challenging claimed costs by moving to strike cost memorandum

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best ambiguous, we agree with the trial court's conclusion, whether reviewed de novo or more deferentially, that Elstead *himself* agreed the present defendant was the successor in interest to all "Chase" entities involved in the case, and was not just stipulating (as he now contends) to the fact that *Chase's counsel* had that understanding. (See *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 156 ["We . . . employ a de novo standard of review regarding the interpretation of contracts and stipulations between the parties where there was no conflicting extrinsic evidence presented at trial"]; *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632–633 [oral stipulation subject to conflicting inferences reviewed for substantial evidence].)

instead of moving to tax costs]; *Parker v. City of Los Angeles* (1974) 44 Cal.App.3d 556, 565–566 [cost bill filed prematurely].)

We are not unmindful of the size of this fee award, which Elstead has been given the option of adding to his secured indebtedness under the loan. But the award was significantly reduced from what had been sought, and we are equally mindful of what the trial court said when rendering it: "The court has also considered the fact that Plaintiff pursued a classic 'shotgun' litigation strategy, alleging every conceivable theory of recovery, and vigorously contested every issue throughout the entire case. While the bank's conduct contributed to the exceptional expense of this case, Plaintiff also bears a substantial measure of responsibility and should expect as a result that his adversary would incur substantial fees." Regrettably, the court's observations regarding Elstead's persistent, and ultimately wasteful, "shotgun" approach are equally apt to these appeals.

DISPOSITION

The judgment and the post-judgment award of attorney fees are affirmed. Costs on appeal are awarded to respondents.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.