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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RUBY STROUD,

Plaintiff and Appellant,

v.

BANK OF AMERICA, N.A., et al.,

Defendants and Respondents.

B234453

(Los Angeles County  
Super. Ct. No. BC425676)

APPEAL from judgments of the Superior Court of Los Angeles County,  
John Shepard Wiley, Jr., Judge. Affirmed.

Ruby Stroud, in pro. per., and Robert Ware for Plaintiff and Appellant.

Carroll, Burdick & McDonough, Vicki L. Freimann and Nathaniel K. Fisher  
for Defendant and Respondent Bank of America, N.A.

Patrick Carey for Defendant and Respondent California Credit Union.

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Plaintiff and appellant Ruby Stroud (Stroud) appeals judgments in favor of defendants and respondents Bank of America, N.A. (Bank) and California Credit Union (Credit Union) following the grant of defense motions for summary judgment.

Stroud sued two financial institutions alleging they mishandled her accounts and failed to properly account for her funds.

On the record presented, we perceive no error in the grant of summary judgment in favor of the Bank and the Credit Union. The judgments are affirmed.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *1. Pleadings.*

Stroud commenced this action in 2009 and filed the operative second amended complaint against the Bank and Credit Union in August 2010. Stroud pled causes of action for breach of contract and common counts for money had and received, and sought damages as well as an accounting and the imposition of constructive trusts against both defendants.

##### *a. The Bank matter.*

With respect to the Bank, Stroud alleged:

She maintained deposit accounts with the Bank since 1987. In December 2006, she made a series of deposits into her checking account: two checks for \$10,000, one for \$1,000 and one for \$11,480. During this time period, the Bank offered Stroud a \$50,000 equity line of credit, which she accepted.

Also, sometime in 2006 or 2007, Stroud wrote two checks from her regular checking account, each in the amount of \$500, to an Alaska Airlines VISA account, a revolving credit account issued by the Bank. Both checks cleared but one was returned for insufficient funds and VISA did not credit the account. The Bank charged Stroud a fee even though she had sufficient funds on deposit. She stopped payment on the second check and wrote another check for \$1,000 to the VISA account to cover both \$500 checks.

Stroud subsequently discovered that someone had opened an account at the Bank without her knowledge and that \$600.01 was deposited into it. Stroud inquired but did not understand why it was opened.

In April 2007, Stroud lost her purse and closed all her accounts at the Bank. She found her purse and tried to reopen her accounts but the Bank told her it was too late. The Bank then raised the “mysterious” new account with \$600.01 and told Stroud it was overdrawn and referred it to collections.

The Bank also informed Stroud that her equity line, which should have had a balance of \$27,500, had been spent. Whenever Stroud drew on her equity line, she directly deposited the funds into her regular checking account. Therefore, any draws on the equity line would have appeared as deposits into her checking account. However, Stroud was unable to trace the remainder of her equity line.

b. *The Credit Union matter.*

Stroud maintained deposit accounts at the Credit Union. In November 2005, she refinanced her home and deposited a total of \$20,000 into her accounts at the Credit Union; \$15,000 went into share certificates and \$5,000 went into a savings account. In 2006, Stroud withdrew the \$5,000 from the savings account and \$5,000 from her share certificates in order to make home repairs, and deposited said \$10,000 into her checking account at the Bank.

In November 2006, the Credit Union offered Stroud a \$10,000 loan with a 48-month repayment schedule. She accepted the loan and deposited the funds into her savings account at the Credit Union. She made two draws on the loan – one for \$500 and another for \$400. The Credit Union told Stroud she owed \$995 in interest on the loan, which she paid. In December 2006, the Credit Union transferred \$10,000 from Stroud’s savings account to itself, ostensibly to repay the loan it had made to Stroud one month earlier.

c. *The “confluence of both bank matters.”*

Stroud further pled, with respect to the “confluence” of the two matters, that she was unable to reconcile her accounts with the Bank and the Credit Union. In November and December 2006, she made two \$10,000 deposits to her checking account at the Bank: one with funds from a personal check and another with funds withdrawn from the Credit Union. However, the Bank only credited her for one of those deposits. She also was unable to determine the facts relating to the mysterious new account at the Bank in which \$600.01 was deposited, and which account allegedly was overdrawn and placed into collection. There also were other accounts at the Bank which Stroud “cannot seem to locate or trace,” and the Bank had not adequately responded to her inquiries. For example, more than half of her \$50,000 equity line “seems to have disappeared, and customer service has been unhelpful in determining its status.” Further, the Credit Union, without proper notice, withdrew \$10,000 from her savings account to repay itself the \$10,000 loan it had extended to Stroud one month earlier, although said loan was for a term of 48 months.

2. *Motions for summary judgment.*

Both the Bank and the Credit Union filed motions for summary judgment.<sup>1</sup>

In moving for summary judgment, the Bank asserted that notwithstanding Stroud’s claims of “unaccounted for” deposits and withdrawals, the Bank’s records reflected that all funds withdrawn from her equity line were deposited into her checking account and subsequently spent by Stroud. Likewise, Stroud’s claim the Bank failed to credit various checks she deposited into her checking account was without factual support, in that all deposits were duly credited to Stroud’s checking account.

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<sup>1</sup> The Credit Union’s papers were not designated by Stroud and were not included in the record on appeal. (See Discussion, section 2, *infra*.) Therefore, we do not address that aspect of the proceedings.

In support, the Bank filed voluminous declarations and exhibits, as well as a separate state of undisputed facts, consisting of 120 facts. The Bank's papers set forth the following undisputed material facts and supporting evidence, which showed the following:

On December 12, 2006, Stroud opened an Equity Maximizer Account, which was a home equity line of credit (HELOC), with a credit limit of \$50,000, secured by a deed of trust. Between May 31, 2007 and May 15, 2008, Stroud took 17 advances or withdrawals in various amounts from the HELOC. Each time Stroud made a withdrawal from the HELOC, the funds were deposited into Stroud's checking account at the Bank. Stroud then spent the funds in her checking account. The 17 HELOC advances (and the 17 corresponding deposits into the checking account) totaled \$51,080.26. On May 21, 2009, Stroud paid off the HELOC. The Bank then issued and recorded a reconveyance of the deed of trust.<sup>2</sup>

As for Stroud's claim the Bank failed properly to credit her deposits, the Bank's papers showed Stroud deposited only one \$10,000 check into her checking account during November and December of 2006, not two such checks, as claimed by Stroud. Further, Stroud had no evidence to support her claim the Bank had not duly credited her deposits.

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<sup>2</sup> Stroud's checking account statements showed the following deposits into her checking account: \$5,000 on May 31, 2007; \$5,000 on July 16, 2007; \$1,000 on August 17, 2007; \$10,000 on August 28, 2007; \$5,000 on September 12, 2007; \$5,000 on September 28, 2007; \$5,000 on October 12, 2007; \$10,000 on November 6, 2007; \$1,000 on November 14, 2007; \$1,000 on November 27, 2007; \$500 on December 7, 2007; \$1,000 on December 13, 2007; \$300 on March 4, 2008; \$500 on March 12, 2008; \$300 on March 25, 2008; \$258.05 on April 17, 2008; and \$222.21 on May 16, 2008.

These 17 deposits, totaling \$51,080.26, are identical to the 17 advances Stroud took from the HELOC, to wit: \$5,000 on May 31, 2007; \$5,000 on July 16, 2007; \$1,000 on August 17, 2007; \$10,000 on August 28, 2007; \$5,000 on September 12, 2007; \$5,000 on September 28, 2007; \$5,000 on October 12, 2007; \$10,000 on November 6, 2007; \$1,000 on November 14, 2007; \$1,000 on November 27, 2007; \$500 on December 7, 2007; \$1,000 on December 13, 2007; \$300 on March 4, 2008; \$500 on March 12, 2008; \$300 on March 25, 2008; \$258.05 on April 17, 2008; and \$222.21 on May 16, 2008.

3. *Opposition papers.*

Stroud's opposition papers were untimely and not in proper form. On May 17, 2011, *three days* before the hearing on the motion for summary judgment, Stroud filed an opposing separate statement in response to the Bank's separate statement of undisputed material facts.<sup>3</sup> The May 17, 2011 filing by Stroud was incorrectly captioned "Bank of America, N.A.'s Separate Statement of Undisputed Facts in Support of Notice of Motion and Motion for Summary Judgment." Stroud's responsive separate statement was simply a photocopy of the Bank's 49-page moving separate statement, on which she made handwritten interlineations lacking evidentiary support.

For example, in response to the Bank's assertion that each time a withdrawal was made from the HELOC, the funds were deposited into Stroud's checking account, Stroud simply responded "No they were not." Further, even though Stroud had repaid the HELOC in full, she now asserted without evidentiary support that "All advance[s] withdrawn were unauthorized."

4. *Bank's objection to Stroud's untimely opposition.*

On May 19, 2011, the Bank filed a written objection to Stroud's untimely opposition papers, asserting the papers were served late and should not be considered by the court. Further, the delay was extremely prejudicial to the Bank, which did not receive a copy of Stroud's papers until near the close of business on May 18, 2011, and therefore did not have time to prepare an adequate reply to the opposition papers.

5. *Trial court's ruling.*

On May 20, 2011, both motions for summary judgment came on for hearing and were taken under submission. At the conclusion of the hearing, the trial court "ask[ed] that the record reflect that Ms. Stroud spoke not just at length but with genuine passion that this is a matter that clearly has weighed on her mind to a very great extent and it's a

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<sup>3</sup> On a motion for summary judgment, opposition papers must be filed and served no later than 14 days prior to the hearing. (Code Civ. Proc., § 437c, subd. (b)(2).)

matter that troubles her deeply. I understand that. She was very effective in communicating that point with eloquence. Thank you.”

Thereafter, the trial court issued an extensive minute order granting the motions for summary judgment. The trial court set forth its rationale as follows:

“Plaintiff Ruby Stroud has failed to file separate statements in opposition to these motions. Stroud filed two declarations in opposition to Defendant Bank of America’s motion for summary judgment, but did not file a memorandum of points and authorities or a separate statement. Stroud has not filed any documents in opposition to Defendant California Credit Union’s motion for summary judgment. The court therefore grants the motions for failure to comply with Code of Civil Procedure section 437c. [¶] Further, Stroud has not filed proofs of service of the declarations on Defendants, and the court cannot consider them.

“The court also grants the motion based on the evidence Defendants have advanced, which refutes Stroud’s claims. In her complaint, Stroud sets forth a lengthy factual narrative about her dealings with Bank of America and California Credit Union. *However, in her causes of action, Stroud makes only two claims against Bank of America: that Bank of America failed to credit Stroud’s account for one of two deposits of \$10,000, and that Bank of America claimed Stroud’s equity line of credit had been exhausted when Stroud had not withdrawn all available funds.* Stroud alleges in November and December 2006, Stroud made two \$10,000 deposits to her checking account at Bank of America: one with funds from a personal check, and another with the funds withdrawn from California Credit Union. Stroud alleges Bank of America only credited her account for one \$10,000 deposit, when Stroud made two deposits. Bank of America has also advanced evidence that Stroud’s claims about her deposits fail. Stroud admitted, via a letter from her prior counsel to Bank of America’s counsel, that ‘she is mistaken about the additional \$10,000 deposit.’ Stroud further alleges Bank of America also informed Stroud that her equity line of credit had been exhausted, when it should have had a balance of approximately \$27,500. Bank of America has advanced evidence showing that Stroud made seventeen withdrawals on the equity line of credit

from Bank of America between May 31, 2007 and May 15, 2008, totaling \$50,080.26. Bank of America has demonstrated that after each withdrawal, Stroud immediately deposited the funds withdrawn into her Bank of America checking account. Thus, Bank of America has accounted for how Stroud exhausted the equity line of credit.

“California Credit Union has similarly refuted Stroud’s claims. Stroud alleges in November 2006, California Credit Union offered Plaintiff a \$10,000 loan to be repaid over 48 months. Stroud alleges she accepted the loan and placed the funds in her California Credit Union savings account, but, in December 2006, California Credit Union deducted the \$10,000 from Stroud’s savings account. California Credit Union has demonstrated that on December 11, 2006, Stroud used the \$10,000 in her savings account to pay off the loan. California Credit Union has advanced a copy of the teller authorization for the transaction, which bears Stroud’s signature.” (Italics added.)

The trial court entered judgments in favor of the Bank and the Credit Union. This timely appeal followed.

### **CONTENTIONS**

Stroud’s opening brief lists the contentions as follows: “A. The Trial Court committed error in granting the Respondent’s Motion for Summary Judgment, inasmuch as there was a triable issue of material fact which existed in the pending litigation; [¶] B. Objection to evidence was contained in Responding Party’s Paper RE The Motion for Summary Judgment; [¶] C. The Trial Worthiness of Plaintiff’s Case as set forth in the Complaint, as Amended, in the Trial Court Proceeding Required a Trial on the Motion.”

However, in the Legal Argument section of the opening brief, Stroud does not pursue any of these points. She merely reiterates the allegations of her second amended complaint. Then, in the legal discussion portion of Stroud’s brief, which begins at page 9 and concludes on page 20, she does nothing more than recite generic legal principles applicable to summary judgment proceedings. The opening brief makes no attempt to apply those legal principles to the facts of this case. The opening brief is bereft of any legal argument. Stroud’s position seems to be that the defendants’ moving papers failed

to meet their initial burden, so that the burden did not shift to Stroud’s opposition papers to show the existence of a triable issue of material fact.

## DISCUSSION

### 1. *Standard of appellate review.*

Summary judgment “motions are to expedite litigation and eliminate needless trials. [Citation.] They are 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.’ [Citations.]” (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 590.)

A defendant meets its burden upon such a motion by showing one or more essential elements of the cause of action cannot be established, or by establishing a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) Once the moving defendant has met its initial burden, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (*Aguilar, supra*, at p. 849; Code Civ. Proc., § 437c, subd. (p)(2).)

We review the trial court’s ruling on a motion for summary judgment under the independent review standard. (*Rosse v. DeSoto Cab Co.* (1995) 34 Cal.App.4th 1047, 1050.)

### 2. *With respect to the Credit Union, Stroud’s failure to present an adequate record for review, or any legal argument, compels affirmance of the judgment in favor of the Credit Union.*

It is rudimentary that an appellant affirmatively must show error by an adequate record. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 628, p. 704.) Here, there were two motions for summary judgment – a motion by the Credit Union and a motion by the Bank. However, the four-volume clerk’s transcript is bereft of any papers filed in connection with the Credit Union’s motion for summary judgment.

If the defect were merely the absence of certain documents from the clerk’s transcript, this court could augment the record on appeal with the superior court file.

However, the defect is more fundamental. Stroud's opening brief is devoid of any legal argument with respect to the Credit Union's motion for summary judgment. Stroud's brief simply gives a narrative of her version of her dispute with the Credit Union. Stroud's brief does not discuss the Credit's Union's motion for summary judgment, the arguments and evidence presented by the Credit Union in its moving papers, her opposition thereto (if any), or the propriety of the trial court's ruling.

In sum, Stroud has not presented a legal argument to show the trial court erred in granting the Credit Union's motion for summary judgment. Therefore, the summary judgment in favor of the Credit Union must be affirmed.

3. *Summary judgment in favor of the Bank likewise was proper, given the showing made by the Bank in its moving papers.*

In granting the Bank's motion for summary judgment, the trial court relied, inter alia, on Stroud's failure to file a proper separate statement.

Failure to comply with the requirement of an opposing separate statement "may constitute a sufficient ground, in the court's discretion, for granting the motion." (Code Civ. Proc., § 437c, subd. (b)(3).) Here, Stroud's opposing separate statement was grossly untimely and deprived the Bank of the opportunity to reply thereto. Further, the opposing separate statement was not in proper form, in that "[e]ach material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence." (Code Civ. Proc., § 437c, subd. (b)(3).) On this record, the trial court acted within its discretion in granting the Bank's motion for summary judgment based on Stroud's noncompliance with the statutory requirements.

Of course, " '[w]hile subdivision (b) of section 437c allows the court, in its discretion, to grant summary judgment if the opposing party fails to file a proper separate statement, this provision does not authorize doing so without first determining that the moving party has met its initial burden of proof.' " (*Kojababian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 416.) Thus, given Stroud's deficient opposition papers, the inquiry before us is whether the Bank's *moving papers* made a prima facie showing so as to entitle the Bank to summary judgment.

As the trial court noted, although Stroud's complaint contains a lengthy factual narrative about her dealings with the Bank, in her causes of action Stroud made only two claims against the Bank: (1) the Bank failed to credit Stroud's checking account for one of two \$10,000 deposits; and (2) the Bank asserted Stroud's equity line of credit had been exhausted, even though she had not withdrawn all the available funds.

As set forth above, and as the trial court found, the Bank presented evidence that Stroud took 17 advances on the HELOC between May 31, 2007 and May 16, 2008, totaling \$50,080.26. The Bank further showed that after each withdrawal from the HELOC, Stroud immediately deposited said funds into her Bank of America checking account. Thus, the Bank accounted for how Stroud depleted the \$50,000 line of credit.

The Bank also presented evidence that Stroud deposited a single \$10,000 check into her checking account during November and December of 2006, so as to negate Stroud's allegation that she deposited two \$10,000 checks during said time frame.

Thus, on the record presented, the trial court properly granted the Bank's motion for summary judgment.

#### **DISPOSITION**

The judgments in favor of the Bank and the Credit Union are affirmed. Respondents shall recover their costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.