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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TIMOTHY SHUEY, as Conservator, etc. et al.,
Plaintiffs and Appellants,

v.

SCOTT EDWARD DARLING et al.,
Defendants and Respondents.

E050812

(Super.Ct.No. RIC449219)

TIMOTHY SHUEY, as Conservator, etc. et al.,
Plaintiffs and Appellants,

v.

FINANCIAL FREEDOM SENIOR FUNDING CORPORATION,
Defendant and Respondent.

E051380

(Super.Ct.No. RIC449219)

TIMOTHY SHUEY, as Conservator, etc. et al.,
Plaintiffs and Appellants,

v.

PMA, INC. et al.,

Defendants and Respondents.

E052786

(Super.Ct.No. RIC449219)

OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger and Bernard Schwartz, Judges. Affirmed.

The Arkin Law Firm and Sharon J. Arkin for Plaintiffs and Appellants.

Middlebrook, Kaiser, Hengesbach & Dawson, Michael R. Kaiser, Michael C. Knighten and Nicole R. Cieslinski for Defendants and Respondents Scott Edward Darling and Scott Edward Darling, a Professional Corporation.

The Law Offices of C. Fred Cassity and C. Fred Cassity for Defendants and Respondents PMA, Inc. et al.

Fidelity National Law Group, Christopher E. Deal, Douglas W. Stern, James A. Hazlehurst and Amy J. Cooper for Defendant and Respondent Financial Freedom Senior Funding Corporation.

Plaintiff and Appellant Timothy Shuey, as Conservator of the Person and Estate of Bessie Neilson et al., appeals from the judgments entered upon the trial court's grant of (1) the motion for judgment on the pleadings of defendants and respondents Scott Edward Darling et al., (2) the motion for summary adjudication and the motion for summary judgment of defendant and respondent Financial Freedom Senior Funding Corporation, and (3) the motion for summary judgment of PMA, Inc. et al.¹

¹ Appellant filed three separate appeals from the three separate judgments. We assigned each appeal a different case number, but consolidated all three appeals for purposes of oral argument and decision by order dated February 18, 2011. We designated case No. E050812, as the master file.

INTRODUCTION

Husband and wife Robert and Bessie Neilsen (collectively “the Neilsens”²) executed a trust agreement in 2002 (the “2002 Trust”) that named Robert as the sole trustee, gave Robert the power to encumber real property comprising part of the corpus of the trust, and permitted an unlimited power of revocation. The Neilsens contemporaneously executed a power of attorney (the “2002 POA”) which named Robert as Bessie’s attorney-in-fact in the event that Bessie was determined to be incapable or disabled, upon the written statements of two licensed physicians who had examined her. The 2002 POA empowered Robert to act with all powers in Bessie’s stead, including any and all transactions regarding her real property.

In late 2004, Robert applied, through licensed mortgage brokers defendants and respondents PMA, Inc. et al. (PMA), individually and on behalf of Bessie, for a reverse mortgage on the separate property residence of Bessie, which was one of the items constituting the corpus of the 2002 Trust. Defendant and respondent Financial Freedom Senior Funding Corporation (Freedom) approved the reverse mortgage loan and disbursed \$204,244.79 to Robert’s son Donald, as directed by Robert, on March 1, 2005. The loan had an adjustable interest rate and was secured by a deed of trust on the property. “[T]he Neilsens were not required to make loan payments and no additional amounts were funded. Rather, over time, interest would accrue and be capitalized to the

² Individual members of the Neilsen family will be referred to by their first names, for ease of reference and not out of any disrespect.

loan amount at a ‘maturity’ event, such as the death of both of the Neilsens or the sale of the Property, the amount owing would be repaid from the sale proceeds.”

Robert died on May 1, 2005; Timothy Shuey (Shuey), Bessie’s son, was named as her temporary conservator. Shuey sought to recover the funds distributed by Freedom on the reverse mortgage and reconveyance of the deed of trust to the 2002 Trust, contending Bessie was incompetent when she signed the 2002 Trust and 2002 POA (collectively, the “2002 documents”). In a settlement agreement with Donald, Shuey successfully recovered the funds distributed on the mortgage plus interest, but refused to repay the amount to Freedom despite Freedom’s offer to reconvey the deed of trust upon receipt of the disbursed funds. Instead, Shuey filed the current suit alleging causes of action for negligence, elder financial abuse, and breach of fiduciary duties against all defendants including defendant and respondent Scott Darling, the attorney who drafted the 2002 documents. Freedom cross-complained for declaratory relief and to quiet title on their deed of trust.³

Freedom filed a motion for summary adjudication (MSA) of its causes of action on its cross-complaint. It likewise filed a motion for summary judgment (MSJ) with respect to Shuey’s causes of action against it.⁴ PMA likewise filed a MSJ. Similarly, Darling filed a MSJ, which the trial court denied. The trial court granted Freedom’s

³ The Cross-Complaint is not contained in the record.

⁴ Only Freedom’s *amended* MSJ is included in the record.

MSA; it further granted the MSJs of both Freedom and PMA. The trial court then granted Darling's motion for judgment on the pleadings. We affirm the judgments.

FACTUAL AND PROCEDURAL HISTORY

The Neilsens married in late 1986. On June 6, 1994, the Neilsens entered into a trust declaration (hereinafter the "1994 Trust") in which each were named as cotrustees and the corpus of the trust would initially be held for the benefit of both of them. In the event that either cotrustee should die or be deemed unable to serve, the other cotrustee would become the sole trustee. Upon certified incapacity of either cotrustee, the remaining trustee would be permitted to distribute amounts from both the interest and the principal of the trust necessary to support the incapacitated spouse. In the event such incapacity was certified by two licensed physicians, "[a]nyone dealing with the trust [could] rely on the written medical certificate presented to them by the successor trustee or cotrustee, and shall incur no liability to any beneficiary for any dealings with the cotrustee or the successor trustee in good faith reliance on the certificate. This provision is to encourage third parties to deal with the cotrustee or the successor trustee without the need of court proceedings." The 1994 Trust listed Timothy, Glynda and Carl Shuey, Bessie's offspring, as respective successor trustees should both original cotrustees be deemed unable to serve.

The 1994 Trust specifically provided that "[n]otwithstanding any other provision to the contrary, the Trustors specifically authorize either of the original cotrustees, during their joint lives and while serving as cotrustees, to act independently of the other and have the authority to perform all powers and acts as granted under this Declaration of

Trust, except as affects an interest in real property, by example, but not limited thereto, to sell, transfer, assign, mortgage, hypothecate or otherwise encumber the real property of the trust estate, which will necessitate the concurrence of both original cotrustees as long as both are alive.” Should Bessie die first, all personal property would be left to her children; however, Robert would be entitled to live in Bessie’s residence rent-free for the remainder of his life. The 1994 Trust does not appear to specify the distribution of any real property contained within the corpus of the trust upon the Neilsens’ deaths, including Bessie’s separate property residence.⁵ Nevertheless, the trustee was “empowered to borrow money, and to encumber trust property by mortgage, deed of trust, pledge or otherwise, for the debts of the trust or the joint debts of the trust and a co-owner of the property” The trustee was “authorized to establish lines of credit and to guarantee any and all loans made to the trustors regardless of the purpose of the loan” In addition, the 1994 Trust provided that “[a]ny powers to revoke or amend this trust may be exercised on the trustors’ behalf by a duly appointed attorney-in-fact if and to the extent that the appointing instrument clearly and expressly authorizes the attorney-in-fact to exercise those powers with respect to this particular trust.”

⁵ Indeed, the 1994 Trust makes frequent references to two separate lists of trust property delineated as “Trust A” and “Trust B” which are ostensibly attached to the trust document. However, the only attachment to the document contained in these records are “Attachment A” and “Attachment B” which purport to be documents permitting gifts to and from the respective spouses, but which are blank.

Robert's children, Donald and Jana, were specifically excluded from inheriting any amount from the 1994 Trust. Instead, should both Robert and Bessie die, all property remaining in the trust would be distributed equally between Bessie's children.⁶

Bessie concurrently executed a durable power of attorney (hereinafter the "1994 POA") naming Robert as her attorney-in-fact if two physicians licensed to practice medicine in California certified she was incapable of handling her affairs. The 1994 POA empowered Bessie's attorney-in-fact to transfer any interest she had in real property. It further permitted her attorney-in-fact to "let lapse any power I may have under any trust whether or not created by me, including any power of appointment, amendment, revocation or withdrawal."

Attorney Conrad Wilkinson, the drafter of the 1994 Trust and the 1994 POA (collectively, the "1994 documents"), declared that the trust "provide[d] Robert . . . with a life estate in the family residence . . . previously owned by Bessie . . . prior to her marriage to Robert" Additionally, he averred that the 1994 Trust "restricted Robert[']s authority to mortgage or encumber the property of Bessie unless it was for her benefit. Robert . . . did not have the authority to encumber Bessie[']s residence at will under the 1994 Power-of-Attorney."

On December 7, 2001, Dr. Charles Thompson wrote a memorandum in which he noted he had been Bessie's physician for 17 years and had last examined her on November 19, 2001, at which time he "observed her continuing mental deterioration and

⁶ Presumably, this would include distribution of Bessie's separate property residence.

discussed this with [Robert].” He observed that Bessie’s “dementia is progressing and she is totally dependent on her husband, Robert, for her care.” He concluded: “I feel that [Robert] should have durable power of attorney for his wife and certainly should be appointed her guardian.” On December 15, 2009, Dr. Thompson executed a declaration confirming the observations and discussions he noted in his memorandum. He averred that, in his opinion, Bessie “would not have been able, on December 3, 2001, or March 4, 2002, to recollect and understand the nature and situation of her property”; “to remember and understand her relations to her six children and any other living descendants”; or “understand the nature of [a] testamentary act.” Dr. Thompson advised Robert to have Bessie evaluated by Larry Southard, a marriage and family therapist whom Bessie had been seeing for over 20 years.

On December 4, 2001, Southard wrote a memorandum noting he interviewed Bessie on December 3, 2001. He wrote that Bessie first complained of some memory loss and a growing dependence on others in 1997. He noted that Bessie had “a d[i]minished funding of knowledge,” reported relying on Robert for basic hygiene and grooming, and had “deteriorated significantly over the past five years.” He concluded: “*She is a grave danger to herself without the direct supervision of a care giver.*” He recommended that a durable power of attorney be executed in favor of Robert to ensure her protection and safety. On December 22, 2009, Southard executed a declaration in which he confirmed his initial observations and conclusions and averred that both on and after December 3, 2001, Bessie was incapable of understanding the nature and situation of her property, her relation to friends and family, and the nature of a testamentary act.

In support of his MSJ, Darling submitted his own declaration averring that in late 2001 the Neilsens came to him for the purpose of estate planning.⁷ Darling apparently met with the Neilsens twice. While he never met individually with either of the Neilsens, he averred that he questioned Bessie to determine whether she understood the nature of the testamentary act; her responses indicated that she did. Darling questioned Bessie regarding whether she understood and recollected the nature and situation of her property; she appeared to understand. Darling also questioned Bessie regarding her living relations and how they would be affected by testamentary acts; Bessie's responses indicated that she understood. Darling noted that Bessie asked numerous questions regarding the effect of the estate planning documents. Darling had not received any indication from anyone that Bessie suffered from any mental incapacity. On March 4, 2002, the Neilsens executed the 2002 documents prepared by Darling.

The 2002 Trust distributed all the Neilsens' property to the trust.⁸ It named Robert as the successor executor; a friend and Robert's son Donald were named as successive executors should Robert be incapable of serving. Likewise, it named Robert the sole trustee of the trust with a friend and Donald as successive trustees should Robert be unable to serve. The 2002 Trust specifically disinherited Bessie's offspring. It made Donald a successive beneficiary of 50 percent of the remainder of the 2002 Trust upon

⁷ Darling's deposition testimony established that his first meeting with the Neilsens took place on December 3, 2001, the same day Southard interviewed Bessie. It is unclear from the record which meeting took place first.

⁸ The 2002 Trust revoked and amended the 1994 trust in its entirety.

final distribution.⁹ The trust was freely revocable in whole or in part. It provided “[t]he trustee shall have the power to borrow money and to encumber or hypothecate trust property by mortgage, deed of trust, pledge, or . . . otherwise[.]”

Bessie contemporaneously executed a quitclaim deed of her separate property residence to the 2002 Trust. Additionally, Bessie concurrently executed another durable power of attorney, specifically over her assets, naming Robert as her attorney-in-fact; again, effective only upon certification by two physicians that she was incapable of handling her affairs. The 2002 POA explicitly permitted Bessie’s attorney-in-fact to transfer any assets in her name to the trustees or successor trustees including “any and all interests in real property.”

Shuey learned in 2002 of Bessie’s quit claim deed of her residence to the 2002 Trust. Shuey noted that from 1997 through May 2005, when Robert died, there were long periods of time during which Shuey would not see his mother; he saw her about once every year and a half during that period. He testified Robert prevented him and his siblings from speaking with her. Prior to 1997, Shuey saw his mother two to three times a year. Robert informed Shuey in 2003 he and Bessie had created a trust in which Bessie had quit claimed the deed to her separate property residence to the 2002 Trust.

Robert applied for a reverse mortgage on the residence in late 2004, individually and as attorney-in-fact for Bessie through PMA, an entity Freedom described as an

⁹ The 2002 Trust also contradictorily made Bessie’s daughter Darcie Tosssetti a 50 percent successive beneficiary even though she had been specifically disinherited in an earlier section of the trust document.

independent mortgage broker.¹⁰ PMA was a licensed mortgage broker under California law. The loan application included two letters from physicians currently treating Bessie, noting she was not competent at that time to handle her affairs. One letter signed by Dr. Paul Whiteside dated October 27, 2004, noted he had been treating Bessie for two years and she was “unable to make medical [or] financial decisions for herself. [She] is incapable of being counseled and signing loan documents”

Freedom requested confirmation Bessie was competent when she executed the 2002 documents. According to Freedom, Bessie’s treating physician as of 1994 and 2002 could not be located.¹¹ Instead, a letter from Dr. Whiteside dated January 15, 2005, was submitted in which he noted that from a review of Bessie’s medical records, he could not determine when she became incompetent to sign documents. Freedom also received a letter from Darling asserting Bessie was competent at the time she executed the 2002 documents. An underwriting condition of Freedom specific to the instant loan, signed on

¹⁰ Freedom submitted the declaration of Gail Balettie, its First Vice President of National Production Operations in which she averred: “As an independent broker, PMA . . . was expressly not an agent of [Freedom].” She attached a correspondent agreement which provided that any entity engaging in any activities pursuant to that agreement “shall serve as an independent contractor and not as an agent for Lender.” However, the document is unsigned and does not appear to specifically mention PMA anywhere. Rather, it appears to be a blank form Freedom might generally use with its “correspondents” in processing reverse mortgage loans. PMA contrarily contended that it was acting directly as an agent for Freedom. However, in its own reply to Shuey’s opposition to its MSJ, PMA stated that in “2004, PMA was the broker and/or correspondent lender for [Freedom].” It further noted: “Robert . . . applied for the reverse mortgage through [PMA], an independent mortgage broker.”

¹¹ Shuey testified that as of May 2005, Dr. Thompson, the doctor who had treated Bessie for 20 years, and who originally expressed concern for her mental competency, continued to practice medicine.

February 16, 2005, appears to note the title company reported that the signing of the loan application by an attorney-in-fact was prohibited; rather, it recommended removal of Bessie as a trustee unless she was capable of signing the deed at closing.¹²

Linda Gold signed a HUD addendum to the loan application dated October 25, 2004, as a loan officer of the lender; however, none of the pertinent information regarding the loan such as the loan amount, the interest rate, or proposed maturity date are contained on that document. Gold also signed a lender's certificate on October 25, 2004, again as a loan officer for the lender, who was specifically named in the document as PMA. Another HUD addendum was signed on February 16, 2005, by Maria Frias, with all the pertinent loan information completed.¹³ An undated, unsigned amendment, apparently to the 2002 Trust, provided the Neilsens were applying for a HUD insured Home Equity Conversion Mortgage (HECM).

Freedom approved the requested reverse mortgage loan, with an adjustable rate second note, and disbursed \$204,244.79 through a paying agent on March 1, 2005, to Donald; the mortgage was secured by a deed of trust on the property.

On April 5, 2005, Shuey sent a letter to Freedom informing it the mortgage had been obtained fraudulently and requesting it reconvey the deed of trust. Freedom responded it was legally prohibited from discussing the loan with Shuey due to privacy

¹² Of course, according to the 2002 Trust, Bessie was not a trustee because Robert was its sole trustee.

¹³ It is unclear whether Frias was an employee of PMA or Freedom, as both entities' names appear on the document

laws. Freedom received a court document dated May 6, 2005, naming Shuey as the temporary conservator for Bessie. Shuey sent Freedom a letter dated May 11, 2005, informing Freedom that Robert died on May 1, 2005; Shuey had been appointed conservator for Bessie; he was attempting to recover the funds distributed from the reverse mortgage and expected to return them to Freedom in return for reconveyance of the deed of trust on the residence.

On May 11, 2005, Shuey filed a petition in the San Bernardino Superior Court seeking the return of funds and personal property to the conservatorship. On December 6, 2005, Shuey filed another petition in the San Bernardino Superior Court seeking to determine the validity of the 2002 Trust and to set aside transfers of property conducted under its aegis. At some point, Shuey commenced legal action against Robert's children; the parties settled the matter on March 15, 2006. According to the settlement agreement, Robert's children were to pay Shuey a total of \$237,074.¹⁴ The settlement agreement anticipated Shuey would use the recovered money to pay the mortgage in order to extinguish the deed of trust on Bessie's residence.

On April 26, 2006, the San Bernardino Superior Court issued an order and judgment on Shuey's petition to determine the validity of the 2002 Trust and to set aside transfers of property. The court determined the 2002 Trust was "null, void, and of no legal effect on the ground that on March 4, 2002, Bessie . . . lacked the mental capacity

¹⁴ The settlement agreement concluded disputes between the parties not only over the funds disbursed regarding the reverse mortgage on Bessie's residence, but also a Banker's Life Insurance Company annuity, a vehicle, use of a storage unit, a coroner's trust account, and an unspecified number of personal property items.

. . . to make any testamentary disposition.” The court found all transfers of real property to either trustee under the 2002 Trust were also “null, void and without legal effect.”

Shuey initially intended to repay the loan amount upon recovery of the funds in return for reconveyance of the deed from Freedom; however, he never did so. On May 5, 2006, Shuey filed his initial complaint against Darling. Freedom received a letter dated June 29, 2006, from Shuey’s attorney requesting the payoff amount of the reverse mortgage. Freedom responded by letter dated June 30, 2006, that the then payoff amount was \$236,756.86. However, Shuey testified he changed his mind about paying off the loan sometime after May 1, 2006, because he felt he was being given the “run-around” by Freedom. On July 3, 2006, Shuey filed his first amended complaint naming both Freedom and PMA as defendants.

Shuey’s attorney sent Freedom an e-mail on August 3, 2006, instructing Freedom that Shuey intended to ratify the Freedom trust deed forthwith. Attached to the e-mail was a proposed document titled “ratification of deed of trust.” Nevertheless, Shuey never formally executed any ratification of the loan.

By letter dated November 17, 2006, Shuey received a payment of \$233,543 from his attorney pursuant to the settlement agreement he entered into with Robert’s children. Shuey placed the money into a certificate of deposit (CD). On August 20, 2008, Freedom sent Shuey a letter noting it had “previously offered, and hereby offers, to unwind the Loan and reconvey the deed of trust securing the Loan” in return for the loan funds Shuey received from his settlement of the lawsuit with Donald that he “deposited . . . in a segregated account with a current balance in excess of \$250,000. [Freedom] will accept

these loan funds and the interest that has accrued thereon in full satisfaction of the amount due on the Loan, even though the amount being held by you is approximately \$20,000 less than the amount on the Loan. [Freedom] will then reconvey the deed of trust securing the Loan back to the Bessie Neilsen Estate.”

Freedom contended that since Shuey asserted the loan should not have been made, he had no basis to retain the funds disbursed pursuant to the loan. “We respectfully suggest that should you decline this offer, you will have once again confirmed, by your conduct, your ratification of the Loan.” Shuey rejected the proposal. Shuey now maintained that the expenses and time he incurred in litigation seeking reconveyance of the deed exceeded the amount of the loan. As of June 30, 2009, the value of the segregated CD was \$256,906.36.

On January 15, 2010, the court held a hearing on Darling’s MSJ. The court denied Darling’s motion finding, “the opposition has presented substantial evidence that Bessie . . . was severely in a state of dementia at the time that the [2002] documents were signed as it related to the estate planning papers. The Court believes that there is a triable issue of material fact as to whether or not she was competent.”

On the same date, the court heard argument on Freedom’s MSA. The court found Freedom did not owe a duty to Bessie or her estate and Shuey had ratified the reverse mortgage by retaining the proceeds of the loan he recovered from Donald. The court noted the San Bernardino Superior Court’s order declaring the 2002 Trust null and void, did not vacate Freedom’s deed of trust or negate the reverse mortgage. The court found Freedom was not made a party to that action and, therefore, was not bound by it.

Moreover, it found there was no evidence contradicting Freedom's claim it was a good faith encumbrancer and bona fide purchaser having no knowledge of any impropriety regarding the execution of the 2002 documents. Thus, the court granted Freedom's MSA to quiet title on its deed of trust and for declaratory relief.

Also on the same date, the court heard argument on the MSJs of Freedom and PMA. The court found that Freedom "as a mortgage lender, owed no duty to disregard the information provided by Bessie[s] agents as to the validity of her consent to the trust and the powers of attorney." Thus, it had no duty of care to Bessie's heirs to investigate the validity of the information provided to it regarding her competency.

As to PMA, the court found that "as a broker, [PMA] did owe a duty of care, but the court does not believe that there [are] triable issues of material fact . . . [s]uch that PMA breached that duty." "The relevant question, however, is not whether a loan broker owes a fiduciary duty to the client, rather [it is] the extent of that duty." The court found Shuey had adduced no evidence PMA was presented any evidence of Bessie incompetency at the time it brokered the loan or "more importantly, that PMA ever assumed a duty to ensure that Bessie . . . had validly executed the power of attorney to her husband" Thus, "If Robert . . . was perpetrating a fraud on the heirs of Bessie[,], that is a matter between the heirs and [Robert]. The Plaintiff has cited no authority that would justify a holding that a loan broker would be liable for obtaining the type of loan that the client requested." Therefore, the court granted the MSJs of Freedom and PMA.

On February 11, 2010, Darling orally moved for judgment on the pleadings on the theory Shuey failed to allege sufficient facts to support the element of causation

necessary to constitute valid causes of action against him. The court noted the parties and the court had been discussing a number of issues in chambers for “a long couple [of] days.” The court noted that whether Robert had the authority to obtain a reverse mortgage on Bessie’s separate property residence under either the 1994 or 2002 Trusts was a legal determination for the court to make. The court’s reading of the 1994 Trust permitted unilateral revocation of the trust by either trustor so long as they were alive and mentally incompetent. The court ruled that once Bessie became incompetent, Robert had authority to revoke or amend the 1994 Trust unilaterally.

The court additionally ruled that once Robert became the sole trustee of the 1994 Trust, “Robert [became] a fiduciary of Bessie. And so while he has authority to do virtually anything, if he were to use that authority in such a way as to do harm to Bessie, he would be in violation of his fiduciary duty and Bessie’s representative could successfully sue Robert for all he’s worth because he’ll be breaching fiduciary duties.” Thus, the court found that “for purposes of this case as an operation of law that the 2002 documents did not increase Robert[’s] authority or discretion as it relates to the home . . . that he had by virtue of the 1994 documents.” Therefore, “[i]t does appear to the Court that if the [2002] documents prepared by the defendant did not appreciatively effect the power and authority of Robert[,] vis-à-vis the separate property of his wife over and above what existed vis-à-vis the 1994 documents, that that fact which is a legal fact which I’ve just made appears to be an important and critical fact in the chain of reasoning that converts the acts of the defendant, even if he knew that Bessie . . . was not competent

when he did what he did, that we can't find causation." The court then granted Darling's motion for judgment on the pleadings.

DISCUSSION

A. JUDGMENT ON THE PLEADINGS IN FAVOR OF DARLING

Shuey contends the court erred in granting Darling's motion for judgment on the pleadings because he had set forth sufficient allegations to support his causes of action. As succinctly stated in his opening brief, "the fundamental issue is whether the 1994 trust documents permitted Robert to encumber Bessie's separate real property to the same extent as the 2002 trust documents drafted by Darling" Shuey contends the 2002 documents enabled Robert to obtain the reverse mortgage on Bessie's residence while the 1994 documents would not. We disagree.

"A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. (Code Civ. Proc., § 438, subd. (c)(3)(B)(ii).) A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review. [Citations.] All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law; judicially noticeable matters may be considered. [Citations.]" (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.) "When reviewing a judgment on the pleadings, we must accept as true the material facts alleged in the complaint. [Citation.]" (*Azure Ltd. v. I-Flow Corp.* (2009) 46 Cal.4th 1323, 1330.)

"The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law

relieving the actor from liability because of the manner in which his negligence has resulted in the harm.’ [¶] . . . ‘The word “substantial” is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility rather than in the so-called “philosophic sense,” which includes every one of the great number of events without which any happening would not have occurred.’” (6 Witkin, Summary of Cal Law. (10th ed. 2005) Torts, § 1182, pp. 549-550, quoting Rest.2d Torts, Chap. 16.)

“[T]he question before the court is whether the actor’s negligence was in fact the cause of the other’s harm—that is, whether it had any effect in producing it—or whether it was the result of some other cause, the [evidence] making it clear that it must be one or the other, and that the harm is not due to the combined effects of both. In such a case, the question, whether the defendant’s negligence has a substantial as distinguished from a merely negligible effect in bringing about the plaintiff’s harm, does not arise if the [evidence] clearly proves that the harm is from a cause other than the actor’s negligence.” (6 Witkin, Summary of cal. law, *supra*, Torts, § 1182 at p. 550; see also *Wilson v. Blue Cross of So. California* (1990) 222 Cal.App.3d 660, 673 [restatement correctly reflects California law on issue of causation].)

Although proximate cause is generally regarded as a question of fact for jury determination (see *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045; 6 Witkin, Summary of Cal. Law, *supra*, Torts, § 1184 at p. 552); on undisputed facts, the question is regarded as one of law. (*Phillips v. TLC Plumbing, Inc.*

(2009) 172 Cal.App.4th 1133, 1139; *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 56; Witkin, at pp. 551-552.) The parties here do not dispute the pertinent facts in this case, i.e., the language of the 1994 Trust; rather, they disagree on their interpretations of the 1994 Trust, specifically as to whether the 1994 documents would have permitted Robert to encumber Bessie's residence regardless of the 2002 documents. Interpretation of a trust is a question of law subject to our independent review. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 604.)

Here, although both PMA and Freedom relied upon the 2002 documents in granting Robert's application for a reverse mortgage on Bessie's separate property residence, we find, as did the court below, that the 1994 documents would have permitted the encumbrance regardless. Although the 1994 Trust required the approval of *both* trustees in encumbering any real property contained in the trust, it also provided that upon certification of incapacity of one of the trustees, the other should take over as the *sole* trustee. The remaining trustee would be empowered to distribute amounts both from interest and *principal* of the trust necessary to support the incapacitated spouse. In the event of such incapacity, third parties dealing with the remaining trust were encouraged to deal with the successor trustee in good faith reliance upon any certification of incapacity of the former cotrustee. The trustees, whether acting together or alone as a successor trustee upon certification of medical incapacity, were empowered "to encumber trust property by mortgage [or] deed of trust"

The 1994 POA also empowered Robert to act as Bessie's attorney-in-fact should she be deemed incapacitated. It specifically let lapse any power Bessie would have had

under the trust in such circumstances, i.e., the requirement that she approve any encumbrance of her separate property residence. Moreover, the 1994 POA empowered Robert to transfer any interest Bessie had in real property.¹⁵

¹⁵ At oral argument, Shuey contested our statements on these latter two matters. However, the contents of the 1994 POA contradicts his assertion: “I, Bessie E. Neilsen, hereby appoint my spouse, Robert A. Neilsen my attorney in fact.” “My attorney in fact shall act for me in my name, place and stead and for my use and benefit to exercise any or all of the following powers.” “To transfer any real or personal property in which I have an interest to any Trust that I have created alone or with another, *and to exercise (in whole or in part), release, or let lapse any power I may have under any trust whether or not created by me, including any power of appointment, amendment, revocation or withdrawal.*” (Italics added.) “In connection with the exercise of any of the powers described, the appointed attorney in fact is authorized in fact . . . and empowered to perform *any other act necessary or incidental to the exercise of such powers with the same validity and effect as if I were personally present, competent and personally exercised the powers myself.*” (Italics added.) “All powers described in this document are exercisable equally with respect to *any benefit or assets* existing at the time of the giving of the power of attorney or thereafter acquired . . .” (Italics added.) “GIVING AND GRANTING unto my said attorney in fact full power and authority to do and perform each and every act and thing whatsoever requisite, necessary or appropriate to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, and I hereby ratify all that my said attorney in fact shall lawfully do or caused to be done by virtue of these presents. The powers and authority hereby conferred upon my said attorney in fact shall be applicable to all real and personal property or interests therein now owned or hereafter acquired by me and wherever located.” Thus, once Bessie became incapacitated, Robert stood in Bessie’s stead for all purposes with respect to the 1994 Trust, e.g., for purposes of the dissolution of corpus assets or the revocation of the trust itself.

Shuey also contended at oral argument that the remedy for exhaustion of the trust interest upon Bessie’s incapacitation would be the appointment of an independent conservator to represent her in any dissolution of the trust corpus for her benefit; however, the 1994 POA specifically provides for the appointment of Robert as her conservator in such a situation: “If at any time it becomes necessary to appoint a conservator of my estate or person, or both, I hereby nominate my appointed attorney in fact as such a conservator.” Thus, it is difficult to see how, even if Robert was not empowered as an attorney-in-fact under the 1994 documents to encumber the property, he would not have been so empowered as conservator under the same documents.

Thus, even assuming Darling knew of the existence of the 1994 documents and Bessie's incompetency at the time Bessie executed the 2002 documents, any wrongdoing on his part could not be deemed a cause of damages to Bessie or her progeny, because the 1994 documents would have permitted Robert to encumber the property in the same manner he accomplished in 2005. Indeed, as a requirement of the 2005 loan, Robert produced two legally competent letters attesting to Bessie's incapacity, the only prerequisite to his exercise of powers to encumber the property devolved upon him through the 1994 documents. Moreover, the parties appear to unanimously agree that Bessie was competent to exercise the 1994 documents.¹⁶

Shuey contends the 1994 Trust's requirement that both cotrustees approve the encumbrance of any real property was a nonmodifiable term of the 1994 Trust, which would have prohibited any such encumbrance without the express approval of both cotrustees, regardless of the incapacity of either or both.¹⁷ However, this interpretation is at odds with the other provisions of the 1994 documents discussed above, which would allow for such an encumbrance in the event of Bessie's incapacity. Moreover, such an

¹⁶ Shuey testified he believed Bessie became mentally incompetent in 1996.

¹⁷ At oral argument, Shuey maintained this provision, section 1.16 of the 1994 Trust, must be implemented under all circumstances in order to give effect to the settlors' intent. This is only one interpretation of the 1994 Trust. Another is that the provision conflicts with others, which gave Robert the power to encumber real property in the corpus of the trust upon certification of Bessie's incapacitation. A third, the one which we shall exposit, is that section 1.16 was meant to restrain a cotrustee from acting unilaterally when both cotrustees were competent, but became inapplicable once one of the cotrustees became incompetent. Thus, leaving the sole remaining trustee free to independently encumber trust property so long as he or she acted in the best interest of the beneficiaries.

interpretation would not allow for the proper care of Bessie should her condition have exhausted the personal property and interest assets of the trust. Thus, the only reasonable interpretation of the 1994 documents is that they would permit the successor trustee, here Robert, to encumber Bessie’s separate property residence should it prove necessary for her care. Indeed, Wilkinson, the drafter of the 1994 Trust and POA, declared the trust “restricted Robert[’s] authority to mortgage or encumber the property of Bessie *unless it was for her benefit*. Robert . . . did not have the authority to encumber Bessie[’s] residence *at will* under the 1994 [POA].” (Italics added.) Finally, Shuey himself admitted that Robert was empowered to act on Bessie’s behalf under the 1994 POA.

Thus, Robert was empowered to encumber the property. Darling’s drafting of the 2002 documents did not cause damages to Bessie or her progeny, because Robert’s encumbrance of the property for other purposes, i.e., his son’s benefit, while presumably a breach of his own fiduciary duty to Bessie, was merely a negligible effect in bringing about any harm. In other words, Darling’s acts, even if wrongful, only caused damage insofar as they were combined with the acts of Robert and/or Wilkinson to the extent that the latter had been instructed to draft the 1994 documents to prevent such an occurrence. Thus, as a matter of law, Darling’s acts, as alleged in the complaint, could not be deemed the cause in fact of Shuey’s damages.¹⁸ Therefore, the trial court’s ruling

¹⁸ At oral argument, Shuey complained that we did not address his elder abuse cause of action. We noted the cause of action in our introduction on page 4; however, we did not address the issue further because the elements of that cause of action are substantially similar to that of negligence which we addressed at length. In other words, in order to prevail on a cause of action for financial abuse of an elder, Shuey would have

[footnote continued on next page]

that Shuey failed to allege sufficient facts to sustain his causes of action against Darling was legally correct. Its order granting the motion for judgment on the pleadings was, therefore, correct.

B. FREEDOM'S MSA

Shuey maintains the trial court erred in granting Freedom's MSA on its causes of action to quiet title on the deed of trust and for declaratory relief. Shuey contends that since the deed of trust was acquired via the 2002 documents, and the San Bernardino Superior Court ruled the 2002 Trust, and any transfer of real property pursuant to that trust, void, Freedom's deed of trust was, therefore, likewise invalid. We disagree.

“We review a summary adjudication order de novo. [Citation.] We strictly construe the moving party's evidence and liberally construe the evidence favoring the party opposing the motion. [Citation.] We resolve all doubts in favor of the opposing party. [Citation.] We affirm an order granting summary adjudication if it is legally correct on any ground raised in the trial court proceedings. [Citation.]” (*Knight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377, 1387.)

We note at the outset that although the trial court issued its ruling on Darling's motion for judgment on the pleadings after it ruled on Freedom's MSA and the MSJs of PMA and Freedom; and that its reasoning in ruling on the latter motions differed from

[footnote continued from previous page]

had to prove, among other things causation. (*Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 744.) Since, as we have addressed at length above, Shuey failed to allege legally sufficient facts to establish the 2002 documents were the cause of his damages, he could not succeed on that cause of action either, regardless of its broader definition of duty or narrower definition of breach.

that espoused in its ruling on Darling’s motion, its reasoning supporting the latter ruling would appear to be dispositive of the remaining issues. In other words, because Shuey’s allegations in the complaint failed, as a matter of law, to establish that the actions of Darling, PMA or Freedom, *caused* any damages sustained by Bessie or her inheritors, Freedom was entitled to summary adjudication of its causes of action and summary judgment of Shuey’s causes of action against it. Likewise, PMA would similarly be entitled to summary judgment due to Shuey’s failure to allege legally adequate causation of damages.

“If the decision of the trial court is correct on any theory of law applicable to the case, the appellate court will affirm the judgment[.]” (*In re Estate of Kampen* (2011) 201 Cal.App.4th 971, 1000; accord *Ceja v. Department of Transp.* (2011) 201 Cal.App.4th 1475, 1483; *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, 944 [“[W]e look for any correct legal basis on which to sustain the judgment.”].)

Nevertheless, in abundance of caution, we shall address Shuey’s contention that the trial court’s stated reasons for granting Freedom’s MSA and the MSJs of Freedom and PMA were erroneous.

As noted by Shuey, the San Bernardino Superior Court ruled the 2002 Trust was “null, void, and of no legal effect on the ground that on March 4, 2002[,] Bessie . . . lacked the mental capacity . . . to make any testamentary disposition.” The court further ruled all transfers of real property *to either trustee* under the 2002 Trust were also “null, void, and without legal effect.” However, as Freedom accurately observes, the San Bernardino Superior Court did not rule, nor was it asked to rule, on the validity of the

2002 POA or the deed of trust Freedom secured upon the property after approving the reverse mortgage and disbursing the proceeds therefrom. Rather, the petitions filed by Shuey in that court were directed at recovering the loan proceeds distributed to Donald under a constructive trust theory, and to set aside the quit claim deed in favor of the trust; in other words, they did not seek to invalidate the reverse mortgage, but sought reimbursement to Shuey as beneficiary and successor trustee of the 1994 Trust in the amounts disbursed by Freedom pursuant to the reverse mortgage. Thus, the San Bernardino Superior Court's judgment had no effect upon Freedom's deed of trust.

To the extent Shuey contends the San Bernardino Superior Court's order bound both PMA and Freedom by setting aside the deed of trust, it is notable that Shuey did not join either party to that action. "A person is an indispensable party to litigation "if his or her rights must necessarily be affected by the judgment." [Citations.] Stated differently, "Where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party." [Citation.]" (*Washington Mutual Bank v. Blechman* (2007) 157 Cal.App.4th 662, 667.) "An "indispensable party is not bound by a judgment in an action in which he was not joined." [Citation.]" (*Id.* at pp. 667-668.) Here, to the extent the San Bernardino Superior Court's order could be construed as setting aside Freedom's deed of trust, Freedom would indubitably qualify as an indispensable party, because it would be the entity most affected by such a ruling. Shuey's failure to join Freedom as a party, therefore, would shield Freedom against any effect the court's judgment would have

upon its interest. Thus, the court's order could not be considered effective at rendering Freedom's deed of trust void.

Moreover, Shuey effectively conceded the validity of Freedom's deed of trust. In his deposition testimony, Shuey admitted a portion of the damages he sought in the current suit stemmed from Freedom's deed of trust on the property. During argument on Shuey's demurrer to Freedom's fourth amended cross-complaint, Shuey's counsel argued that any contention Shuey had been unjustly enriched in his receipt of the funds disbursed on the reverse mortgage failed, because Freedom had a deed of trust on the property. Thus, Shuey's position below was not that the deed was not valid, but that he should be compensated for the cloud on the title to the property the deed of trust represented. This effectively admitted that the deed was valid, while preserving Shuey's contention he should be entitled to damages resulting from the deed, and any expenses incurred in his attempts to recover the proceeds distributed from the loan.

Finally, Shuey ratified the deed of trust by refusing to surrender the proceeds for the reverse mortgage, which he obtained in settlement with Donald. "Ratification is the subsequent adoption by one claiming the benefits of an act, which without authority, another has voluntarily done while ostensibly acting as the agent of him who affirms the act and who had the power to confer authority [Citation.] A principal cannot split an agency transaction and accept the benefits thereof without the burdens [citation]."

(Reusche v. California Pacific Title Ins. Co. (1965) 231 Cal.App.2d 731, 737; see also

Rakestraw v. Rodrigues (1972) 8 Cal.3d 67, 73.)¹⁹ Here, the very terms of Shuey’s settlement with Donald recognized the validity of the deed of trust and Shuey’s intent to pay off the loan in order to have the deed expunged. Shuey intended to immediately ratify the mortgage upon receipt of the funds from his settlement agreement; his attorney requested that Freedom inform it of the payoff amount and prepared a proposed written ratification of the reverse mortgage. Shuey placed the proceeds of the settlement in a segregated CD earning interest at, arguably, a lower rate than that accruing on the reverse mortgage. Nearly two years later, Freedom again offered to reconvey the deed in exchange for the amount Shuey retained in the CD despite the fact that the payoff amount of the loan was now more than \$20,000 greater than that retained by Shuey. Shuey refused. Nearly three years after receiving the funds from Donald, Shuey continued to retain the proceeds of the reverse mortgage. Thus, Shuey’s continued acceptance of the benefits of the reverse mortgage amounted to a corresponding ratification of its burden: the deed of trust.

Therefore, as the trial court ruled, Freedom was entitled to judgment on its causes of action to quiet title on the deed of trust and for declaratory relief. Shuey ratified the deed of trust by retaining the benefits of that transaction. Shuey conceded the deed of trust was a liability against the estate. No material issue of fact remained to be resolved on the issue of the validity of the deed of trust.

¹⁹ “An agency may be created, and an authority may be conferred, by a precedent authorization *or a subsequent ratification.*” (Civ. Code § 2307, italics added.)

C. FREEDOM'S MSJ

Shuey maintains the trial court erred in granting Freedom's MSJ because there was a triable issue of fact regarding whether Freedom owed Bessie a duty to have conducted further investigation into her capacity to execute the 2002 documents. Thus, Shuey contends there was at least a triable issue of fact regarding whether Freedom was negligent and/or breached its fiduciary duty to Bessie in approving the reverse mortgage. We disagree.

“[O]n appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.’ [Citation.]” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534) “We review de novo a trial court’s grant of summary judgment along with its resolution of any underlying issues of statutory construction. [Citation.] A trial court may only grant a motion for summary judgment if no triable issues of material fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] The evidence must be viewed in the light most favorable to the nonmoving party. [Citation.]” (*Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.)

Except under special circumstances, lenders do not owe borrowers a fiduciary duty of care. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979; *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1098; *Perlas v. GMAC Mortgage LLC* (2010) 187 Cal.App.4th 429, 436.) “[A] bank may be liable as an aider and abettor of a tort if the bank, in providing ordinary services, ‘actually knew those transactions

were assisting the customer in committing a specific tort.’ [Citation.]” (*Das v. Bank of America, N.A, supra*, 186 Cal.App.4th at p. 745) However, where “a bank provides ordinary services that effectuate financial abuse by a third party, the bank may be found to have ‘assisted’ the financial abuse only if it knew of the third party’s wrongful conduct.” (*Ibid.*, fn. omitted.)

Shuey failed to adduce any evidence that the circumstances under which Freedom issued the reverse mortgage on Bessie’s property qualified as anything other than a typical lender/borrower transaction. Moreover, Shuey failed to produce evidence that Freedom knew Bessie was ostensibly incompetent when she executed the 2002 documents. Robert applied for a reverse mortgage on the residence in late 2004, individually, and as attorney-in-fact for Bessie through PMA, an entity Freedom described as an independent mortgage broker. The loan application included two letters from physicians currently treating Bessie, noting that she was not competent at that time to handle her affairs. One letter signed by Dr. Whiteside dated October 27, 2004, noted that he had been treating Bessie for two years and that she was “unable to make medical [or] financial decisions for herself. [She] is incapable of being counseled and signing loan documents”

Freedom requested confirmation that Bessie was competent when she executed the 2002 documents.

According to Freedom, Bessie’s treating physician as of 1994 and 2002 could not be located. Instead, a letter from Dr. Whiteside dated January 15, 2005, was submitted wherein he noted that from a review of Bessie’s medical records, he could not determine

when she became incompetent to sign documents. Freedom also received a letter from Darling asserting Bessie was competent at the time she executed the 2002 documents. Shuey has failed to establish that Freedom owed Bessie any duty to investigate any further than it did in determining the appropriateness of the documentation respecting Bessie's disability. He failed to demonstrate Freedom had any direct knowledge Bessie was incapacitated when she executed the 2002 documents and that Robert was, thereby, attempting to effectuate fraud or abuse concerning her financial interests. Thus, there was no triable issue of material fact as to whether Freedom owed a duty to Bessie. Therefore, the court appropriately granted Freedom's MSJ.

Shuey argues that both Freedom's internal guidelines and HUD directives regarding reverse mortgages either established that Freedom did owe Bessie a fiduciary duty to further investigate her competency to execute the 2002 documents or, at the very least, amounted to evidence of such a duty sufficient to establish a triable issue of fact. Shuey notes that an underwriting condition of Freedom's proposed loan to the Neilsens required either a "letter from a Licensed Physician stating that Bessie . . . was competent when the POA was executed" or removal of Bessie as a trustee unless she was capable of signing the loan documents at closing. He additionally observes Freedom's internal documents establish that these criteria had not been met. Shuey further notes HUD directive 4235.1 regarding the issuance of reverse mortgages requires that borrowers lacking mental competency may not sign a mortgage loan application; "[a] person holding a durable [POA] specifically designed to survive incapacity . . . may execute any

necessary documents, including the mortgage loan application. [¶] . . . To be valid, a durable [POA] must be prepared when the ‘principal’ is competent.”

Shuey’s contention that Freedom’s own guidelines created a duty to Bessie fails because such guidelines were intended to protect Freedom. The guidelines were not intended to bestow an affirmative duty to act for the benefit of Bessie because they did not form a basis of negotiation regarding the terms of the loan; thus, Shuey has no standing to raise Freedom’s internal guidelines as evidence of a duty to Bessie. (See *Regency Outdoor Advertising, Inc. v. Carolina Lanes, Inc.* (1995) 31 Cal.App.4th 1323, 1331-1332 [statutory protections afforded lessor from sublease of property not intended to provide corresponding benefit to judgment debtor lessee]; *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1193 [lender’s policy of obtaining preliminary title report for insurance purposes did not create duty to guarantee clear title to borrower].) Shuey himself admitted in his deposition testimony Freedom was free to modify or waive its underwriting guidelines. For the same reasons, compliance with HUD directives regarding the issuance of reverse mortgages inure to the lender’s benefit; a failure to follow such guidelines does not directly bestow a countervailing benefit to the borrower. (*Regency*, at pp. 1331-1332, *Siegel*, at p. 1193.)

In any event, Shuey failed to adduce evidence that Freedom failed to follow the HUD directives. As discussed above, Freedom received a letter from Bessie’s current physician in which he noted a review of her medical records failed to disclose when she

became incompetent. Freedom could not find Bessie's previously treating physician.²⁰ Freedom acquired a letter from Darling asserting that Bessie was competent at the time she executed the 2002 documents. Shuey cites no authority for the proposition that Freedom owed Bessie a duty to go above and beyond the efforts it had already made, in determining Bessie's competency at the time she executed the 2002 documents.

Indeed, as the court below observed, "the internal guidelines can be used as evidence of a standard of care when there is a duty, but cannot create a legal duty that otherwise would not exist. Guidelines intended to protect the lender's own interest do not create a duty to the borrower." Freedom "as a mortgage lender, owed no duty to disregard the information provided by Bessie[']s agents as to the validity of her consent to the trust and the power of attorney." "Internal guidelines can be considered on an issue whether a person is negligent when a duty of care otherwise exists. [Citations.] However, if there is no duty of care, then it does not matter whether the defendant's conduct violated some abstract guideline."

Moreover, Freedom was entitled to protection as a bona fide encumbrancer. Probate Code section 18100 provides: "With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, if the third person acts in good faith and for a valuable consideration and without actual knowledge that the trustee

²⁰ Although Shuey testified Dr. Thompson, Bessie's physician of 20 years, was still practicing medicine in May 2005, there is no evidence in the record that Freedom was ever informed of the identity of Bessie's previously treating physician. Therefore, it is hard to find fault with Freedom's failure to discover Dr. Thompson, particularly since Dr. Whiteside implicitly conveyed he had reviewed all of Bessie's medical records.

is exceeding the trustee's powers or improperly exercising them: [¶] (a) The third person is not bound to inquire whether the trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise[;] [¶] (b) The third person is fully protected in dealing with or assisting the trustee just as if the trustee has and is properly exercising the power the trustee purports to exercise.”

Probate Code “[s]ection 18100 was specifically adopted to change the prior law that placed third parties on constructive or inquiry notice of possible breaches of the trust. [It] protects third parties who deal with or assist the trustee by excusing them from investigating and permitting them to assume “the existence of a trust power and its proper exercise,”” except where the third parties have actual knowledge of a breach of the trust. [Citation.]” (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 672, fns. omitted; accord *Wood v. Jamison* (2008) 167 Cal.App.4th 156, 163.) Thus, despite any internal guidelines or outside directives, Freedom had no duty to conduct a limitless investigation into the propriety of the 2002 documents, particularly when it already had evidence they were valid. Indeed, the language of Probate Code section 18100 is paraphrased in the 1994 Trust, the very trust Shuey contends would have prohibited the mortgage.

As the court below observed, “I do not think [Freedom had] an obligation to make these additional investigations. They relied on information they received, they have an obligation to procure the type of loan that’s requested, and that’s what they did here.” Shuey adduced no evidence of bad faith; hence, there was no triable issue of fact

regarding whether Freedom owed Bessie a duty to establish the validity of the 2002 documents. As such, Freedom was entitled to summary judgment.²¹

PMA'S MSJ

Shuey contends PMA was an agent of both Freedom and Bessie.²² Therefore, Shuey maintains PMA owed a fiduciary duty to Bessie to investigate the validity of the 2002 documents, and that Freedom became vicariously liable for PMA's failure to properly execute its duties. We disagree.

“A mortgage broker has a fiduciary duty to a borrower. A mortgage lender does not.” (*Smith v. Home Loan Funding, Inc.*, *supra*, 192 Cal.App.4th at p. 1332.) “The mortgage broker acts as the borrower's agent. [Citation.]” (*Id.* at p. 1335.) “A mortgage loan broker is customarily retained by a borrower to act as the *borrower's agent* in negotiating an acceptable loan. All persons engaged in this business in California are required to obtain real estate licenses. [Citation.] Thus, general principles of agency [citations] combine with statutory duties . . . to impose upon mortgage loan brokers an obligation to make a full and accurate disclosure of the terms of a loan to borrowers and

²¹ Shuey additionally contends Freedom was vicariously liable for the actions of PMA because the latter was its agent. Freedom disputes the contention that PMA was its agent, while PMA asserts that it was. Nevertheless, as we shall address in the next section, whether or not PMA was Freedom's agent, ensuring the validity of the 2002 documents was not within the scope of any duty PMA owed to Bessie or Freedom. Thus, Freedom could not be held vicariously liable for PMA's actions.

²² Shuey cites *Smith v. Home Loan Funding Inc.* (2011) 192 Cal.App.4th 1331, without a pinpoint cite, for the proposition that a mortgage broker can be an agent of the lender, the borrower, or both. However, our review of the case finds no such holding. Rather, it provides that a “mortgage broker acts as the borrower's agent. [Citation.]” (*Id.* at p. 1335.)

to act always in the utmost good faith toward their principals. “The law imposes on a real estate agent “the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary.” [Citations.] This relationship not only imposes upon him the duty of acting in the highest good faith toward his principal but precludes the agent from obtaining any advantage over the principal in any transaction had by virtue of his agency. [Citation.] [Citation.] A real estate licensee is ‘charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal’s decision. [Citations.]’ [Citations.]” (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 782.)

In the court’s written order granting PMA’s MSJ, the court ruled PMA did not owe *any* legal or fiduciary duties to the Neilsens. Moreover, the court observed PMA “acted as the broker/agent for [Freedom,] not as agents” for the Neilsens. Contrariwise, in its oral pronouncement of the ruling, the court stated that “PMA, as a broker, did owe a duty of care [to the Neilsens], but the Court does not believe there [are] triable issues of material fact . . . [s]uch that PMA breached that duty.” “The relevant question, however, is not whether a loan broker owes a fiduciary duty to the client, rather [it is] the extent of that fiduciary duty.” The court ruled that Shuey had adduced no evidence that PMA was presented any evidence of Bessie’s incompetency at the time it brokered the loan or “more importantly, that PMA ever assumed a duty to ensure that Bessie . . . had validly executed the power of attorney to . . . Robert.” The court reasoned that “If Robert . . . was perpetrating a fraud on the heirs of Bessie[,] that is a matter between the heirs and

[Robert]. The Plaintiff has cited no authority that would justify a holding that a loan broker would be liable for obtaining the type of loan that the client requested.”

We agree with the trial court’s oral pronouncement that while PMA did owe the Neilsens a fiduciary duty, Shuey offered no evidence that the scope of that duty included a determination that the 2002 documents were valid. As noted above, although a mortgage broker owes a fiduciary duty to borrowers to obtain the most favorable loan available and to disclose all pertinent terms of that loan (*Wyatt v. Union Mortgage Co.*, *supra*, 24 Cal.3d at p. 782), Shuey has offered no authority for the proposition that a mortgage broker’s duty, absent specific arrangements between the parties, extends any farther. PMA obtained documents supporting the authenticity of the 2002 documents. No evidence was adduced that PMA had been made aware of any impropriety in the execution of those documents. Moreover, PMA was entitled to the same protections under Probate Code Section 18100 as Freedom, as a third party dealing with a trust. Thus, PMA was entitled to accept at face value the documentation evidencing the validity of the 2002 documents. Therefore, there was no triable issue of fact that PMA breached its duty to the Neilsens; hence, PMA was entitled to summary judgment.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RICHLI
Acting P. J.

CODRINGTON
J.