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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

WILLIAM MORSCHAUSER,

Plaintiff and Appellant,

v.

CONTINENTAL CAPITAL, LLC et al.,

Defendants and Respondents.

E052930

(Super.Ct.No. SCVSS124603)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed.

William Morschauser, in pro. per.; McKennon Schindler, McKennon Law Group, Robert J. McKennon, Eric J. Schindler and Reid A. Winthrop for Plaintiff and Appellant.

Hagan & Associates, Cara J. Hagan and Michelle E. Partington for Defendants and Respondents.

Plaintiff and appellant William Morschauser filed an action against defendants and respondents Continental Capital, LLC (ConCap), Stephen J. Collias, and Thia Fuller (collectively referred to as respondents) for damages caused by their alleged negligent

and fraudulent misrepresentations and other conduct in connection with the sale and foreclosure proceedings of real property (the Property) owned by the Devore Stop partnership and Morschauser. Morschauser, individually, and as a partner with Mohammad Abdizadeh, was a trustor of record on the underlying Deed of Trust, the beneficial interest of which had previously been assigned to ConCap. Morschauser alleged causes of action for fraud and intentional infliction of emotional distress against respondents.<sup>1</sup> Respondents moved for summary judgment on the grounds that they had made no representations to Morschauser and in good faith believed he had signed all relevant documents and/or that his partner, Abdizadeh, had the authority to bind the partnership. The trial court agreed, granted the motion, and entered judgment in favor of respondents. Morschauser appeals, contending there are triable issues of fact as to respondents' conduct.

## I. STANDARD OF REVIEW

The well-known principles generally governing appellate review of an order granting a motion for summary judgment are as follows: “A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court’s decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the

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<sup>1</sup> Although Morschauser also alleged negligence and a second fraud claim (as to ConCap’s actions involving the settlement of claims in the bankruptcy), these claims were defeated in respondents’ prior motion for summary judgment.

evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has ‘shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,’ the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff ‘may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .’ [Citations.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477; see also Code Civ. Proc.,<sup>2</sup> § 437c, subd. (o)(2).)

## II. PROCEDURAL BACKGROUND AND FACTS<sup>3</sup>

In February 1989, Morschauser and Abdizadeh established Devore Stop as a real estate development partnership (DS Partnership). They held title to the Property as tenants in common, with each holding an undivided 50 percent interest in the Property, which included three contiguous parcels: Parcel 1 is a gas station and convenience store owned and operated by the partnership, and parcels 2 and 3 are unimproved. On April 1, 1998, they, individually, and as Mohammed Abdizadeh William G. Morschauser, a California Partnership, executed a promissory note and a construction loan agreement

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<sup>2</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

<sup>3</sup> ConCap notes that in this same case, summary judgment was granted in favor of Graham, Vaage & Cisneros (GVC), its attorneys, which this court affirmed in an unpublished opinion in *Morschauser v. Graham Vaage & Cisneros* (Nov. 22, 2011, E050809 [nonpub. opn.] (*Morschauser*)). This court’s opinion in that case sets forth a detailed discussion of the underlying facts. On our own motion, we take judicial notice of our opinion in case No. E050809 and will refer to our prior opinion’s statement of facts to the extent applicable.

whereby California State Bank made a construction loan in the principal sum of \$850,000.<sup>4</sup> The loan was secured by a deed of trust on parcels 1 and 2. On March 24, 1999, Abdizadeh executed a promissory note and business loan agreement whereby First Security Bank of California (a successor to California State Bank due to a merger) made a business loan to Abdizadeh in the principal amount of \$150,000. This loan was secured by a deed of trust on parcel 3. Later, Wells Fargo Bank became the owner of both by merger with First Security Bank of California. In April 2000, the \$850,000 loan was modified to change the variable rate to a fixed rate. According to Morschauser, the decision to change the rate was up to the lender and Abdizadeh. Nonetheless, Morschauser claims he never approved this change; however, his signature is on the necessary document and is notarized.

In May 2001, Abdizadeh lost his Arco AM/PM franchise rights and could not make the monthly rent payments due for use of the Property. Commencing in July 2002, Wells Fargo proceeded with a nonjudicial foreclosure of the Property. TD Services Company (TD) acted as sales/foreclosure trustee for Wells Fargo in the foreclosure, which was authorized by power of sale contained within the trust deed recorded in April 1998. In order to stop the foreclosure proceedings, Abdizadeh filed individual bankruptcy; however, his bankruptcy case was dismissed in December 2002.

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<sup>4</sup> Later modified on February 8, 1999.

On February 3, 2003, Morschauser filed a fraud claim with Wells Fargo, claiming that Abdizadeh must have signed his name to the modification documents that converted the loan rate from variable to fixed.

As of April 3, 2003, Wells Fargo sold its interest in the deeds of trust to ConCap. On April 4, DS Partnership filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code to stop the foreclosure. Morschauser, personally, as one of the general partners of DS Partnership, signed the bankruptcy petition and all supporting pleadings. He listed himself and Abdizadeh as general partners in the bankruptcy petition without any limiting language as to their respective powers or duties. The petition identifies the attorney for DS Partnership as Arshak Bartoumian of the Law Office of Stanley W. Hodge. At the bankruptcy hearings, Bartoumian appeared as counsel for DS Partnership, while Morschauser appeared on behalf of DS Partnership and himself. At no time did Morschauser claim Abdizadeh was not authorized to act on behalf of the partnership.

Shortly after acquiring the deeds of trust, ConCap retained GVC to represent ConCap's interest in DS Partnership bankruptcy. GVC immediately filed a motion for relief from the automatic stay in the bankruptcy proceedings in order to allow ConCap to continue with the foreclosure. Morschauser, through Bartoumian as partnership counsel, opposed the motion.

Between May 2 and May 13, 2003, counsel for the parties (GVC and Bartoumian, the partnership's attorney) negotiated repayment of the obligations admittedly owed to ConCap. On May 13, the parties reached an agreement, which they placed on the record

in the bankruptcy court. Morschauser was present and affirmed the agreement reached between them. According to the agreement, ConCap agreed to provide Morschauser time to sell the Property, and thus, there would be no foreclosure unless there was a default in the agreement. DS Partnership would pay ConCap \$10,000 on June 1 and July 1, 2003, until escrow closed on or before July 14, 2003. If necessary, the buyer or seller of the Property could opt to extend the closing of escrow two times, with each extension being 15 days. The obligation to pay \$10,000 on August 1, 2003, would apply if the extension continued into August. At the close of escrow, ConCap would receive a payoff of all obligations.

Morschauser sent a letter dated May 13, 2003, to GVC, stating he had represented himself, that Bartoumian was not court approved, and that certain payoff amounts were not correct because Abdizadeh had forged Morschauser's name. The agreement was formalized into a stipulation for relief from stay, which was received by the bankruptcy court on July 21, 2003. The stipulation reaffirmed that ConCap held a perfected security interest in the partnership's real property by virtue of the two trust deeds, and that the obligations were accruing interest on a daily basis as well as fees and costs. Abdizadeh signed the stipulation as general partner on behalf of DS Partnership. On July 22, an order was entered approving the stipulation without any objections to the contents of the stipulation or the fact that Abdizadeh signed it on behalf of the partnership.

Prior to the stipulation being entered in the bankruptcy court, DS Partnership found a buyer for the Property. Thus, Bartoumian, on behalf of the partnership, filed a motion for authority to sell the Property subject to ConCap's liens. Before the hearing on

the motion, Bartoumian sent a letter to GVC on July 24, 2003, on behalf of DS Partnership and Morschauser, explaining that Morschauser had not signed the stipulation “because he does not agree with the bank documents to wit, he did not sign the modification of the note, and other facts surrounding the settlement.” Bartoumian further outlined various grounds that Morschauser allegedly had “against the lender in an adversarial action . . . .” However, Bartoumian conveyed Morschauser’s offer to settle the matter. In response, GVC advised that if Morschauser insisted on changing the terms of the stipulation for relief from stay, ConCap would oppose the upcoming motion to approve a sale that would change the previously negotiated terms. The motion to sell was approved, and Bartoumian prepared an order, which provided that ConCap would be paid a discounted sum of \$1,075,000 on both loans out of the sale proceeds, if and only if escrow closed on or before August 11, 2003.

On August 8, 2003, Bartoumian ceased representing the partnership in the bankruptcy due to a “breakdown of the relationship . . . and a potential conflict.” Bartoumian later signed a declaration dated November 16, 2004, stating that his office was never approved by the bankruptcy court to represent the partnership and thus was not allowed to file any paperwork.

When escrow did not close on the specified date as required in the order, counsel entered into further negotiations. As a result of those negotiations, the discounted amount originally agreed upon was not extended. Rather, ConCap’s demand was increased to include the full amount then owed, including accrued default interest at the contract default rates, late charges, all fees incurred and costs. A settlement agreement

was drafted, which provided that the partnership's cumulative obligation to ConCap on the notes was \$1,253,773.99, but the repayment required for release of the liens was reduced to \$1,175,000 (later amended to \$1,100,000 per agreement with another creditor) in full and complete satisfaction of both outstanding promissory notes. This amount was to be paid from the pending sale of parcel 1. The \$75,000 balance was to be secured by parcel 2 (co-owned by Morschauser and Abdizadeh as tenants in common) and would be repaid in monthly installments, and released when ConCap was paid in full. The final settlement agreement was sent to Bartoumian.

On August 12, 2003, another creditor called GVC and proposed that if ConCap consented to yet another delay in close of escrow, the other creditor would receive \$25,000 less than what they were owed by Devore Stop and ConCap would receive that additional \$25,000 as an extension payment out of escrow proceeds. GVC then changed the dollar amounts on the settlement agreement to \$1,100,000 and faxed a copy of the revised settlement agreement to Bartoumian. Prior to receipt of the fully executed settlement agreement, Bartoumian called GVC and explained that, while Bartoumian and Abdizadeh had signed the agreement, Morschauser disagreed with the amounts owed to ConCap in the agreement and he would not sign the new settlement agreement. GVC advised Bartoumian that if the agreement was not signed, then ConCap would not release its lien on parcel 1 and allow the pending sale to go forward, which would then allow ConCap to proceed with its foreclosure for the full amount previously agreed to by the parties in the settlement agreement. Shortly after this discussion, GVC received the signature page bearing Morschauser's signature.

In August 2003, \$1,100,000 was paid to ConCap. On October 21, ConCap sent a letter to Morschauser notifying him that he was default on the remaining amount, demanding the full \$75,000. On or about November 19, ConCap, through TD, commenced nonjudicial foreclosure on parcel 2 because it never received the remaining \$75,000 payment. Morschauser repeatedly objected to this foreclosure, claiming that it was improper because the bankruptcy had not been dismissed, and in any event, the loan had been paid off.

Prior to the completion of the foreclosure, Morschauser paid \$81,464.61 to ConCap to pay off remaining obligations owed under the settlement agreement and stopped the foreclosure.

On March 17, 2005, Morschauser sued respondents and other parties. In his first amended complaint, Morschauser raised four causes of action against respondents: First—fraud in their actions involving the modification of the loan/trust deeds; Third—fraud in their actions involving the settlement agreement; Fourth—negligence in their actions involving the modification of the loan/trust deeds and the settlement agreement; and Fifth—emotional distress caused by their extreme conduct. Following respondents' initial motion for summary judgment (joinder with GVC's motion), on December 17, 2009, the trial court ordered judgment in their favor on the Third and Fourth causes of action. The remaining causes involved respondents' actions regarding the loan modification and trust deeds. When TD moved for summary judgment, respondents joined, arguing there were no triable issues of fact as to the First and Fifth causes of action regarding respondents' conduct involving the loan modification and trust deeds.

On July 22, 2010, the trial court agreed and granted summary judgment in favor of respondents on the last two remaining causes of action. Judgment was entered on December 17, 2010, and Morschauser appealed.

### III CONCAP'S JOINDER TO MOTION FOR SUMMARY JUDGMENT

Morschauser contends the trial court erred in considering ConCap's joinder to TD's motion for summary judgment because it was without jurisdiction to reconsider its prior ruling denying ConCap's initial motion for summary judgment. (§ 1008; *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 383 (*Kerns*) [Legislature intended to make Section 1008 jurisdictional].) We disagree.

In *Kerns*, the defendant insurer renewed its previously denied summary judgment motion on the same grounds, facts and law as the original motion. (*Kerns, supra*, 106 Cal.App.4th at pp. 377-379, 382-383.) The trial judge granted the motion and the plaintiff appealed. The appellate court considered the issue of whether Section 1008 is jurisdictional and agreed that "trial courts have the inherent power to reconsider and correct their own interim decisions in order to achieve substantial justice. [Citations.]" (*Kerns, supra*, at p. 388.) However, the court reversed the lower court's grant of summary judgment, finding that "[a]s applied to the circumstances of this case—in which [the law and motion judge's] previous denial of summary judgment was clearly put in issue not on the trial court's own motion but instead by . . . [the defendant's] verbatim reapplication for summary judgment—the provisions of section 1008 were jurisdictional and controlling." (*Id.* at p. 391.) The *Kerns* court observed that the defendant's actions

were “difficult to distinguish . . . from the kind of brazen forum shopping section 1008 is specifically intended to bar. [Citation.]” (*Ibid.*)

In contrast, here, ConCap’s first motion was denied prior to completion of discovery. By the time TD’s motion, along with ConCap’s motion via joinder, were heard on July 22, 2010, discovery was complete<sup>5</sup> and Morschauser’s deposition had been taken on September 21, 2009. Thus, in joining in TD’s motion, ConCap was not simply renewing its initial motion for summary judgment; rather, it was identifying each issue that had previously been decided against Morschauser, along with joining in TD’s motion to the extent the trial court’s ruling as to issues of fact applied to ConCap. This case does not present any possibility of forum shopping. Instead, the lower court was reconsidering its prior order in light of the current state of discovery and pleadings. As such, we conclude the “circumstances of this case” (*Kerns, supra*, 106 Cal.App.4th at p. 391) are different from those that convinced the *Kerns* court to reverse the lower court’s order granting reconsideration despite its conclusion that Section 1008 is not jurisdictional.

#### IV. TRIAL COURT’S RULINGS ON CONCAP’S EVIDENTIARY OBJECTIONS TO THE DECLARATION OF MORSCHAUSER

Morschauser challenges the trial court’s ruling on the evidentiary objections to his declaration. However, we note that he references the rulings made on December 17, 2009, with respect to ConCap’s initial motion for summary judgment via joinder to

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<sup>5</sup> The summary judgment motions were brought on the eve of trial. By the time judgment was entered in favor of ConCap, more than five years had passed since Morschauser filed his complaint.

GVC's motion. Unfortunately, the time for challenging those rulings has long expired. While Morschauser submitted a declaration in opposition to ConCap's most recent joinder to TD's motion for summary judgment, and ConCap filed evidentiary objections to such declaration, this court has not been directed to, and is unable to locate, ConCap's evidentiary objections. Failure to cite to the record in support of a contention violates California Rules of Court, rule 8.204 (a)(1)(C). Moreover, "[I]t is counsel's duty to point out portions of the record that support the position taken on appeal. The appellate court is not required to search the record on its own . . . . [A]ny point raised that lacks citation may, in this court's discretion, be deemed waived. [Citation.]" (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 [Fourth Dist., Div. Two].) A violation of the rules of court may also result in the striking of the offending document, the imposition of fines and/or the dismissal of the appeal. (*Ibid.*) Given the size of the record on appeal, we exercise our discretion and deem Morschauser's evidentiary objections waived.

## V. FRAUD

According to Morschauser, the "crux of the trial court's ruling" that his fraud claim failed is that Abdizadeh had the authority to bind the partnership to the settlement agreement and there was no triable issue with regard to the execution of the settlement agreement or its enforceability. Morschauser challenges the court's findings.

### A. *Abdizadeh's Authority to Bind Partnership*

Regarding Abdizadeh's authority to bind the partnership to the settlement agreement, Morschauser argues that Abdizadeh was not authorized to bind the partnership, because execution of the settlement agreement was not for the "carrying on

in the ordinary course of the partnership's business," ConCap had actual notice that Abdizadeh could not bind the partnership, and ConCap knew that Abdizadeh had filed personal bankruptcy which caused him to be "dissociated" from the partnership.

Morschauser cites to the record and case law to support his argument. This same issue was raised in Morschauser's prior appeal against GVC, and this court concluded there was no triable issue of fact as to Abdizadeh's authority. (*Morschauser, supra*, E050809.)

According to the record before this court, Abdizadeh filed a personal bankruptcy on July 19, 2002. This personal bankruptcy case was dismissed five months later, on December 18, 2002. Four months after the dismissal, on April 4, 2003, DS Partnership filed for bankruptcy. About the same time as the partnership filed bankruptcy, Wells Fargo sold its interest in the deeds of trust to ConCap. While Morschauser notes that ConCap was aware of Abdizadeh's personal bankruptcy, such knowledge is irrelevant, given the subsequent actions of Morschauser in the partnership's bankruptcy proceedings.

ConCap entered the picture after the partnership filed bankruptcy. According to the record, upon the partnership filing bankruptcy, Morschauser, personally, as one of the general partners of DS Partnership, signed the bankruptcy petition and all supporting pleadings, wherein he listed Abdizadeh as a general partner, without any limiting language as to his powers or duties in the bankruptcy petition. (Corp. Code, § 16301,

subd. (1)).<sup>6</sup> At the bankruptcy hearings, Morschauser appeared on his own behalf and that of DS Partnership. At no time did Morschauser claim Abdizadeh was not authorized to act on behalf of the partnership. Even Morschauser's declaration in support of opposition to motion from relief from stay signed on April 30, 2003, refers to the "partnership" and that Abdizadeh was a partner. If Morschauser believed Abdizadeh lacked the authority to bind the partnership, then Morschauser should not have noted in the bankruptcy pleadings that Abdizadeh was a general partner. Rather, Morschauser should have advised all parties and the court of the disassociation. Having failed to do so, he is estopped from denying Abdizadeh's authority as a general partner of DS Partnership. (Evid. Code, § 623.)<sup>7</sup> As ConCap observes, Morschauser "wants to use the partnership argument both as a shield and a sword" by claiming that Abdizadeh was "a partner for purposes of the bankruptcy and that Abdizadeh was authorized to act on its behalf . . . but then asserts to the contrary in his allegations against Respondent[s]."

Notwithstanding the above, Morschauser argues that the issue he is now raising was not before this court in his appeal from the judgment in favor of GVC. He maintains

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<sup>6</sup> "Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority." (Corp. Code, § 16301, subd. (1).)

<sup>7</sup> "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (Evid. Code, § 623.)

that Abdizadeh had no authority to sign the Settlement Agreement because the partnership “was by definition a landlord and leased-land and a convenience store/gas station structure. [Citation.] It was not in the business of holding the property for sale, and certainly was not in the business of executing settlement agreements concerning partnership property liens.” Morschauser’s argument is misplaced. Regardless of its primary purpose, the partnership was tasked with paying its mortgage obligations, which Abdizadeh did until 2002. As Morschauser testified, he paid attention to Abdizadeh’s payments on the loan only if he received notice from Wells Fargo about defaults; otherwise, the responsibility was Abdizadeh’s. Further, Morschauser testified that any decision regarding the construction loan, including whether to keep it at a variable rate or change it to a fixed rate, was to be made by Abdizadeh who “did the up[.]front stuff.” Clearly, given the authority Abdizadeh had, up front and during the course of paying on the loan, when the partnership was no longer able to pay its bills, Abdizadeh was authorized to pursue a course of action that would be best for the partnership. Such course included filing bankruptcy and entering into the Settlement Agreement. That is precisely what Abdizadeh did.

For the above reasons, we conclude the trial court correctly found that Abdizadeh had the authority to bind the partnership.

*B. Triable Issues of Fact as to Fraud*

Morschauser contends he has alleged and proffered evidence of fraud “in connection with a deliberate scheme to con Morschauser and the [DS partnership] out of substantial sums of money.” According to Morschauser, ConCap conspired with its

attorneys to defraud him by misrepresenting the amount of money owed under the loan agreements to all the parties and the bankruptcy court, concealing information regarding the bankruptcy order, and falsely promising to calculate the balance owed on the loans. He accuses ConCap, through its attorneys, of manipulating Abdizadeh, the weakest link, along with the partnership's attorney Bartoumian, into negotiating the Settlement Agreement to its (ConCap's) advantage. According to Morschauser, the "fraudulent Settlement Agreement" created the Deed of Trust for the \$75,000 (the new lien on Parcel 2), and the additional \$100,000.

"The elements of fraud are similar to the elements of promissory estoppel, with the additional requirements that a false promise be made and that the promisor know of the falsity when making the promise. [Citation.]" (*Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 231.)

For the most part, Morschauser's case rests on his claim that less money was owed than what was paid, and that respondents knew this but intended to defraud him. As this court concluded in Morschauser's appeal involving GVC (*Morschauser, supra*, E050809) the record shows otherwise. Morschauser signed the original construction loan documents, which were notarized and contain a provision that at the end of the loan period, the loan would be termed out at certain agreed-upon terms, including a fixed interest rate. According to Morschauser, any decision regarding the construction loan, including whether to keep it at a variable rate or change it to a fixed rate, was to be made by Abdizadeh, who "did the up[ ]front stuff." The loan was modified and the interest rate was changed. Thus, Morschauser erred in using the lower variable interest rate to

calculate the amounts owed under the loan agreements.<sup>8</sup> Because this error provided the basis of his claim of misrepresentation of the amount owed, his claim fails.

Morschauser claims ConCap concealed information regarding the bankruptcy court's order. He argues the court's order stated ConCap would receive \$1,075,000 in exchange for the release of its liens; however, ConCap "preyed upon Abdizadeh, who was ignorant of the bankruptcy court's order," and falsely convinced him that ConCap was owed \$1,253,773, such that it was "financially advantageous for Morschauser and the partnership to agree to accept \$1,175,000, and that a \$75,000 lien should remain on parcel 2." What Morschauser fails to acknowledge is that the bankruptcy court's order also stated ConCap must receive a "full payoff by Monday August 11, 2003 at 5:00 p.m., or else the demand is null and void." When it became clear the August 11 deadline would not be met, the parties entered into the Settlement Agreement. If they had not done so, ConCap was authorized to proceed to foreclose on the Property or take any other action "provided for in the Notes, Agreements, Deeds, Change Agreements or California law." There was no concealing of information or misrepresentation of the court's order.

Nonetheless, Morschauser maintains that ConCap falsely promised to calculate, correctly, the balance owed. As previously stated, ConCap did calculate what was owed; Morschauser did not like the calculation and disagreed with the amount. However, as ConCap observes, "[a] dispute as to how much was owed on the business debt does not translate into a knowing and intentional misrepresentation by Respondent[s]." We agree.

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<sup>8</sup> Respondents note that Morschauser "also failed to account for the specified contractual default interest rates."

For the above reasons, we conclude the trial court correctly found that Morschauer's fraud claim fails.

## VI. NEGLIGENCE

In his final argument, Morschauer contends ConCap had a duty to provide an accurate accounting, to ensure that it accurately accounted for the amounts owed, and to “make sure it did not foreclose on the property improperly by falsifying the payoff amounts needed to avoid foreclosure.”

“Under the common law, banks ordinarily have limited duties to borrowers. Absent special circumstances, a loan does not establish a fiduciary relationship between a commercial bank and its debtor. [Citation.] Moreover, for purposes of a negligence claim, ‘as a general rule, a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.’ [Citation.] As explained in *Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 334, 335 . . . ‘[a] commercial lender is not to be regarded as the guarantor of a borrower’s success and is not liable for the hardships which may befall a borrower. [Citation.] It is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid. [Citations.] And in this state a commercial lender is privileged to pursue its own economic interests and may properly assert its contractual rights. [Citation.]’” (*Das v. Bank of American, N.A.* (2010) 186 Cal.App.4th 727, 740-741.)

Here, Morschauser claims ConCap misrepresented the amount owed and proceeded to foreclosure with a false payoff amount; however, this claim is based on his opinion that the interest rate should have remained variable, not fixed. There is no evidence, other than Morschauser's opinion based on an incorrect premise, that ConCap misrepresented any amount owed. Thus, the trial court correctly ruled there was no material triable issue of fact as to ConCap's alleged negligence.

VII. DISPOSITION

The judgment is affirmed. ConCap shall recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MILLER

J.

CODRINGTON

J.