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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

CEN FUND 1 LIMITED PARTNERSHIP,

Plaintiff and Respondent,

v.

KARL SCHIERSCH et al.,

Defendants and Appellants.

E054321

(Super.Ct.No. RIC10017537)

OPINION

APPEAL from the Superior Court of Riverside County. Kenneth G. Ziebarth, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Law Offices of Ronald T. Golan and Ronald T. Golan for Defendants and Appellants.

Goodkin & Lynch, Daniel L. Goodkin, Steven S. Yamin-Esfandiary and Marshal P. Wilke for Plaintiff and Respondent.

## I

### INTRODUCTION

Defendants Karl Schiersch and Pamela Schiersch (defendants) borrowed \$250,000 and then defaulted. Defendants appeal from a judgment entered after the trial court granted the motion for summary adjudication by plaintiff CEN 1 Fund Limited Partnership (CEN Fund).

Defendants based their opposition to the motion solely on their objections to the supporting declaration submitted by CEN Fund. Defendants' evidentiary objections lack merit and the trial court properly granted CEN Fund's motion. We affirm the judgment.

## II

### FACTUAL AND PROCEDURAL BACKGROUND

#### *A. The Complaint and Answer*

CEN Fund filed a verified complaint in September 2010, asserting four causes of action for breach of a promissory note, money lent, account stated, and unjust enrichment. The verification was executed by Gary A. Finicle as the authorized agent and signatory for CEN Fund. The promissory note was for a unsecured line of credit in the amount of \$250,000 loaned to defendants by CEN Fund's predecessor, 1st Centennial Bank. The note was dated March 23, 2007. Defendants promised to pay the monthly interest and the principal on the maturity date of March 23, 2010.

CEN Fund alleges that the Federal Deposit Insurance Corporation (FDIC) was appointed as the receiver for 1st Centennial Bank on January 23, 2009. FDIC assigned defendants' loan to CEN Fund in June 2009.

Defendants defaulted by failing to make the principal payment on March 23, 2010. The unpaid principal was \$248,069.71. In July 2010, CEN Fund declared a default and made a demand for a payoff in the amount of \$252,180.04. The total sum due as of September 1, 2010, was \$253,768.44.

Defendants filed a general denial to the “unverified complaint” although the complaint was verified. Defendants’ answer included a third affirmative defense asserting the subject loan was part of a transaction with 1st Centennial Bank for the purchase of residential real property, affording defendants the anti-deficiency protections of Code of Civil Procedure sections 580a, 580b, 580.7, and 726.

*B. CEN Fund’s Motion for Summary Judgment*

CEN Fund filed a motion for summary judgment or adjudication, supported by the declaration of Gary A. Finicle. He attested that in his role as authorized signer he managed CEN Fund’s acquisition of defendants’ loan from 1st Centennial Bank. Finicle’s declaration stated he was responsible for “monitoring CEN Fund’s maintenance of the Loan and Note. In connection with my role, I monitor the maintenance of the Loan and Note through a company I hired to service the Loan.” According to Finicle, defendants, following execution of the note, “took advances on the line of credit evidenced by the Note in the amount of no less than \$250,000.00,” making that amount due to CEN Fund. After defendants’ failure to pay the note when due, Finicle directed the preparation of the default notice and the demand for payoff. Defendants failed to repay the loan after the demand. As of March 24, 2011, the amount owing to CEN Fund in principal, interest, and late fees is \$273,471.94.

Defendants' opposition to the summary judgment motion, consisted almost wholly of objections to the admissibility of Finicle's declaration based on lack of personal knowledge, foundation, and hearsay. Defendants offered one bare legal argument, unsupported by any evidence, that the complaint was a disguised effort to foreclose judicially on a trust deed secured by residential real property, citing the anti-deficiency statutes, Code of Civil Procedure sections 580a, 580b, 580.7, and 726.

CEN Fund's reply asserts that the subject loan is an unsecured loan, as it states on the face of the promissory note and defendants presented no evidence to the contrary to date. Furthermore, Finicle had demonstrated the requisite personal knowledge as CEN Fund's authorized signer and agent. Defendants admitted the existence of the subject note and offered no evidence to support their opposition. (Cal. Rules of Court, rule 3.1350(e)(3), (f)(3).)

### *C. The Court's Ruling*

The court overruled defendants' objections to Finicle's declaration, holding Finicle had personal knowledge not based on hearsay and the evidence did not lack foundation. The court granted CEN Fund's motion adjudicating the first, second, and fourth causes of action. CEN Fund dismissed the remaining third cause of action. The court entered judgment for CEN Fund and defendants appealed.

## III

### STANDARDS OF REVIEW

"On appeal from a ruling on a motion for summary judgment or adjudication, the appellate court conducts its own independent review of the moving and opposition papers

and applies the same standard as the trial court in determining whether the motion was properly granted. The appellate court is not bound by the trial court's stated reasons for its ruling on the motion, as the appellate court reviews only the ruling and not its rationale." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 457.) "Although our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in plaintiffs' brief. [Citations.] Issues not raised in an appellant's brief are deemed waived or abandoned. [Citation.]" (*Id.* at p. 466, fn. 6.)

On appellate review, we decide whether the trial court abused its discretion in overruling defendants' objections to plaintiff's evidence. (*Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335, 1342-1344.)

#### IV

#### DISCUSSION

A party opposing summary judgment must produce admissible evidence raising a triable issue of material fact. Claims and theories not supported by admissible evidence do not raise a triable issue. (Code Civ. Proc., § 437c, subd. (b)(3).) Courts should not hesitate to dispose summarily of meritless litigation based on nothing more than a "smoke and mirrors" presentation. (*Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 219, disapproved on other grounds in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238; *Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1006 [party cannot oppose orally without separate statement or affidavits].)

Even considering defendants' opposition liberally, we hold defendants offered no evidence to rebut CEN Fund's motion for summary judgment or adjudication. To

establish a triable issue of material fact, the party opposing the motion must produce substantial responsive evidence. Opposition to a motion must include the opposing party's evidence. (Cal. Rules of Court, rule 3.1350(e)(3).) Bare assertions are insufficient to avoid summary judgment. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 166; *Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 616.)

Defendants have not cited any evidence or authority prohibiting Finicle from acting as an agent on behalf of CEN Fund, the assignee of the promissory note. Instead, defendants merely speculate that Finicle lacked personal knowledge or competency without any factual basis or legal authority to support defendants' conclusions.

In their reply brief, defendants cite *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, in which the court reversed a grant of summary judgment on the ground the trial court improperly took judicial notice of statements made within recorded documents. (*Id.* at pp. 1375-1376.) In *Herrera*, the defendants sought judicial notice of the truth of recited facts within the recorded documents—for example, that a particular party is the beneficiary under a deed of trust. (*Id.* at p. 1375.) This type of statement is ineligible for judicial notice. (*Ibid.*) *Herrera* also found the trial court improperly took judicial notice of the legal effect of an assignment of a particular deed of trust, but the basis of its holding was the lack of proof in the record that the party making the assignment had the authority to do so—in other words, that the record did not contain evidence of the entire chain of title of the mortgage. (*Ibid.*; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 266-267.)

The present case differs in its particulars from *Herrera*. CEN Fund relied on the unobjectionable declaration by Finicle. CEN Fund did not improperly seek judicial notice of statements made within recorded documents. There is also no plausible factual dispute raised by defendants about the chain of title of the promissory note as it was transferred from 1st Centennial Bank to the FDIC and from the FDIC to CEN Fund. *Herrera* has no precedential application in the present case. For the foregoing reasons, we hold the court did not abuse its discretion in overruling defendants' objections to CEN Fund's evidence as set forth in Finicle's declaration. (*Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335, 1342-1344.)

Finicle's declaration was fully adequate to support CEN Fund's motion and defendants did not offer any opposing evidence in rebuttal. By not offering any evidence to oppose CEN Fund's motion, defendants have forfeited any legally cognizable issue on appeal. (See, e.g., *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [issues raised on appeal without supporting argument or citation to authority are deemed waived.] Based on our independent review and in the absence of any opposing evidence to CEN Fund's motion, we affirm the trial court's grant of summary adjudication.

## V

### DISPOSITION

In opposing CEN Fund's motion, defendants did not submit any evidence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (b)(3).) We affirm the

judgment. CEN Fund as prevailing party shall recover its costs on appeal.

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CODRINGTON  
J.

We concur:

HOLLENHORST  
Acting P. J.

RICHLI  
J.