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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

KNOWLEDGE HARDY,

Plaintiff and Appellant,

v.

ONEWEST BANK, FSB,

Defendant and Respondent.

F066222

(Stanislaus Super. Ct. No. 651557)

**OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Timothy W. Salter, Judge.

Knowledge Hardy, in pro. per., for Plaintiff and Appellant.

Allen Matkins Leck Gamble Mallory & Natsis, Andrew E. Miller and Joshua R. Mandell, for Defendant and Respondent.

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## INTRODUCTION

In his sixth amended complaint (the “complaint”), appellant Knowledge Hardy (plaintiff) alleged various causes of action against respondent OneWest Bank, FSB (OneWest) and other defendants. The complaint alleges that OneWest acted negligently and fraudulently in servicing his mortgage and wrongfully foreclosed on his home. The trial court granted summary judgment to OneWest, and plaintiff appeals in pro. per.

## FACTS<sup>1</sup>

### The Mortgage Loan

In June 2006, plaintiff obtained a loan of \$445,600 for residential property in Modesto, California. The loan was evidenced by a 30-year promissory note secured by a deed of trust.

### OneWest’s Acquisition of Servicing Rights

In an agreement dated March 2009, OneWest acquired the servicing rights to certain mortgage loans, including plaintiff’s loan. OneWest acquired the servicing rights from the FDIC, acting as receiver for an entity called IndyMac Federal Bank, FSB (IndyMac Federal). Prior to that time, IndyMac Federal had the servicing rights to plaintiff’s loan.

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<sup>1</sup> “Because this is an appeal from a summary judgment, we draw the following facts from the moving and opposition papers in connection with defendants’ motion for summary judgment. We accept all facts listed in defendants’ separate statement that plaintiffs did not dispute. We also accept all facts listed in defendants’ separate statement that plaintiffs *did* dispute, to the extent that (1) there is evidence to support them (Code Civ. Proc., § 437c, subd. (b)(1)), and (2) there is no evidence to support the dispute (Code Civ. Proc., § 437c, subd. (b)(3))....” (*Doe v. California Lutheran High School Assn.* (2009) 170 Cal.App.4th 828, 830-831, original italics.)

### Plaintiff's Final Mortgage Payment in 2008

The last payment IndyMac Federal received from plaintiff was in December 2008 for payment that was due in September 2008. OneWest never received any payments from plaintiff.

Plaintiff's home was eventually sold at a trustee's sale.

### Case Below

Plaintiff sued OneWest, among others, based on their allegedly "negligent, fraudulent and unlawful conduct concerning a [the] residential mortgage loan transaction..." The sixth amended complaint set forth several causes of action. As to OneWest, only causes of action for negligence and unfair business practices survived the pleadings stage.<sup>2</sup> OneWest moved for summary judgment. No party requested oral argument after the tentative ruling was posted. (See Cal. Rules of Court, rule 3.1308.) The trial court granted the motion, and plaintiff now appeals.

## **DISCUSSION**

We review the grant of summary judgment de novo. (*Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1231.)

### Issues Framed by the Pleadings

"First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond..." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.)

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<sup>2</sup> OneWest filed a number of demurrers in this case. Those demurrers and the rulings thereon are not included in the appellate record. But both parties acknowledge in their appellate briefs that only the negligence and unfair business practices claims against OneWest survived the pleadings stage. (Cf. *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152 [reviewing court may treat facts contained in appellate briefs as admissions].) The trial court's order granting the motion for summary judgment references the fraud and wrongful foreclosure claims as having been "previously dismissed."

The vast majority of the complaint's negligence cause of action relates to defendants other than OneWest. The cause of action contains a single paragraph referencing OneWest. It alleges that OneWest "breached its duty of care" in three ways: (1) by taking "payments to which it was not entitled" (2) charging "fees it was not entitled to charge," and (3) wrongfully authorizing "negative reporting of Plaintiff's creditworthiness to various credit bureaus." Importantly, the complaint does not allege that OneWest improperly failed to offer plaintiff loan modification options.<sup>3</sup>

The unfair business practices claim contained no additional factual averments as to OneWest, but simply alleged the other causes of action also constituted unlawful, unfair and/or fraudulent business practices. Specifically, the unfair business practices claim alleged that "OneWest's violation of the Rosenthal Act, its negligence, fraud and illegal foreclosure activities, as alleged herein, constitute unlawful, unfair, and/or fraudulent

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<sup>3</sup> Much of plaintiff's appellate brief and oral argument concerned OneWest's alleged failure to offer loan modification options. For example, in his appellate brief, plaintiff alleges he "only wanted to keep himself and his family in their home and to have a fair loan payment with fair loan terms.... Not only did OneWest know [plaintiff] wanted to stay in his home, they were well aware [plaintiff] and his wife still held their jobs and had the ability to pay a modified mortgage payment. [] OneWest [chose] not [to] help [plaintiff,] instead they filed a Motion for Summary [Judgment]...." And, at oral argument, plaintiff eloquently explained his unfortunate circumstances and explained that he was willing and able to pay a reduced mortgage payment. However, plaintiff's complaint does not allege that OneWest wrongfully failed to offer loan modification options. Therefore, it was not OneWest's burden to address the issue in its motion for summary judgment. "A defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues ...." (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98, fn. 4.)

We are not deciding whether OneWest acted reasonably with respect to the nature and frequency of its interactions with plaintiff. The record does not permit, and our standard of review does not compel, consideration of that issue. We only hold that OneWest carried its burden on summary judgment and that plaintiff failed to raise a dispute of material fact.

business practices, as defined in the California Business and Professions Code § 17200 et seq.”

OneWest Met Its Burden and Plaintiff Failed to Raise a Dispute of Material Fact

“Second, we determine whether the moving party’s showing has established facts which negate the opponent’s claim and justify a judgment in the moving party’s favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact. [Citations.]” (*Hutton v. Fidelity National Title Co.*, *supra*, 213 Cal.App.4th at pp. 493-494.)

“The elements of an action for negligence are the existence of *duty* (the obligation to other persons to conform to a standard of care to avoid unreasonable risk of harm to them); *breach of duty* (conduct below the standard of care); *causation* (between the defendant’s act or omission and the plaintiff’s injuries); and *damages*. [Citation.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 500.)

“[A]s 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. [Citations.]” (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) Here, plaintiff claims OneWest negligently accepted his payments<sup>4</sup>, charged improper fees, and wrongfully authorized negative reporting of his creditworthiness. As to the negligent acceptance of payments, OneWest presented undisputed evidence that it did not receive any payments

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<sup>4</sup> It is not entirely clear how accepting payments from a borrower would ever constitute negligence. Regardless, OneWest negated the claim factually by presenting undisputed evidence that they did not accept any payments from plaintiff whatsoever.

from plaintiff whatsoever.<sup>5</sup> OneWest thereby negated plaintiff's claim that OneWest "took payments to which it was not entitled ...."<sup>6</sup>

As to the negligence claims regarding fees and negative credit, OneWest produced the adjustable rate note ("Note") signed by plaintiff. The Note states that plaintiff will "make a payment every month" and "will pay a late charge to the Note Holder" if payment is not received 15 calendar days after it becomes due. Plaintiff did not successfully dispute that his last payment on the loan was for the payment due September 2008.<sup>7</sup> Plaintiff produced no evidence that: (1) suggested he was not obligated to make

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<sup>5</sup> The evidence was a declaration from Charles Boyle. In his reply brief, appellant appears to raise an authentication objection to this evidence. The record contains no evidence of a written objection by plaintiff, and the court did not rule on this evidentiary objection in its summary judgment ruling. We deem this objection waived. (Code Civ. Proc., § 437c, subd. (b)(5).)

<sup>6</sup> To the extent the complaint endeavored to allege that OneWest was liable as a successor-in-interest for *IndyMac Federal's* allegedly improper acceptance of payments from plaintiff, that contention was also negated. In support of its summary judgment motion, OneWest produced its contract with the FDIC, acting as receiver for IndyMac Federal. This evidence showed that when OneWest purchased the servicing rights to plaintiff's loan from the FDIC as receiver for IndyMac Federal, OneWest expressly refused to assume "any claim against or liability based on any alleged act or omission of ... IndyMac Federal which ... is otherwise barred against the FDIC as receiver ... including claims and liabilities that are barred under 12 U.S.C. §§ 1821 ... (d)." One type of claim that falls under this provision is "any claim relating to any act or omission of" an institution for which the FDIC has been appointed receiver (such as IndyMac Federal). (12 U.S.C. § 1821, subd. (d)(13)(D).) Thus, assuming *arguendo* that IndyMac Federal had somehow acted wrongfully in accepting payments from plaintiff, the undisputed evidence shows OneWest did not assume any resultant liability.

At oral argument, plaintiff referenced language in the FDIC's contract with OneWest requiring that OneWest exercise care when servicing the mortgage loans. However, this provision imposes a prospective duty for OneWest to "exercise the degree of care which is standard in the industry" when servicing loans it acquired under the agreement. It does not relate to the nature or extent of OneWest's assumption of *IndyMac's* preexisting liabilities.

<sup>7</sup> In his separate statement, plaintiff responded to this fact by stating: "Disputed: Lacks information sufficient to form a belief." On summary judgment we "accept all

monthly payments, (2) suggested that he did in fact make payments after 2008, (3) disputed OneWest's evidence that plaintiff was in default on the loan, (4) disputed OneWest's evidence showing that it was entitled to charge late fees.

Because there was no dispute of material fact, the court properly granted summary judgment.

**DISPOSITION**

The judgment is affirmed. Respondent is awarded costs.

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Poochigian, Acting P.J.

WE CONCUR:

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Detjen, J.

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Peña, J.

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facts listed in defendants' separate statement that plaintiffs *did* dispute, to the extent that (1) there is evidence to support them (Code Civ. Proc., § 437c, subd. (b)(1)), and (2) *there is no evidence to support the dispute* (Code Civ. Proc., § 437c, subd. (b)(3))....” (*Doe v. California Lutheran High School Assn.*, *supra*, 170 Cal.App.4th at pp. 830-831, first italics in original, second italics added.) Plaintiff's response to this undisputed material fact did not cite any *evidence* to support the statement, and we therefore accept the fact as true. (See *ibid.*)