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

MOTHER LODGE BANK, a California  
corporation,

Plaintiff and Respondent,

v.

STEPHEN W. SLOAN,

Defendant and Appellant.

F068840

(Super. Ct. No. CV57470)

**OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Rodarakis & Sousa, George P. Rodarakis, Eric J. Sousa and Raquel A. Hatfield for Defendant and Appellant.

Neumiller & Beardslee and Paul N. Balestracci for Plaintiff and Respondent.

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**INTRODUCTION**

Stephen W. Sloan defaulted on two separate loans owed to Mother Lode Bank (the Bank) that were secured by real property after receiving seven extensions over a two-year

period. The Bank sought judicial foreclosure as its remedy, and its motion for summary judgment was granted.

On appeal, Sloan argues the trial court improperly granted the Bank summary judgment for four reasons: (1) Sloan's cross-complaint was not a part of the Bank's motion or its separate statement of undisputed facts and the Bank failed to negate issues raised by Sloan's cross-complaint; (2) there are triable issues of material fact regarding the Bank's right to foreclose; (3) there are triable issues of fact regarding each of Sloan's defenses; and (4) the trial court applied the wrong standard for summary judgment, ignoring the Bank's burden of persuasion and considering Sloan's pleadings rather than his evidence. We will affirm.

### **SUMMARY OF FACTUAL AND PROCEDURAL BACKGROUND**

Sloan executed a promissory note to the Bank in the sum of \$612,500 on February 4, 2005, for a five-year term. The note was secured by Sloan's real property in Jamestown. When the note became due on February 4, 2010, and Sloan could not pay, the parties agreed to an extension. Additional extensions were executed thereafter, the second of which required further security in the form of a second deed of trust on Sloan's real property in Bear Valley.

Sloan also executed a promissory note to the Bank in the sum of \$350,000 on July 24, 2009, for a one-year term. The note was secured by a first deed of trust on Sloan's real property in Bear Valley. When this note became due and Sloan could not pay, the Bank agreed to an extension if Sloan brought the interest current and paid certain fees. Similar extensions were granted twice thereafter.

Suffice to say, when payments were not made by Sloan as called for, the Bank eventually called the loans due and judicial foreclosure proceedings commenced.

In May 2012, the Bank filed a complaint for judicial foreclosure of the deeds of trust and for deficiency judgment. Sloan answered the complaint, asserting 33 affirmative defenses.

In January 2013, the Bank moved for summary judgment on its complaint.

While the Bank's motion was pending before the court, Sloan moved for the court's permission to: file a cross-complaint, reopen discovery, reopen the deadline to designate expert witnesses, continue the hearing on the motion for summary judgment, and continue the trial date. The Bank opposed the motion and Sloan replied thereto. On or about April 19, 2013, the motion was granted in whole or in part.

Sloan filed his cross-complaint on April 22, 2013. The Bank answered shortly after.

On August 9, 2013, Sloan filed his opposition to the Bank's motion for summary judgment. The Bank replied to Sloan's opposition.

Following argument on the motion for summary judgment, the court issued its ruling, granting the Bank's motion. Thereafter, the trial court adopted the order prepared by the Bank and judgment was entered accordingly.

Sloan then moved for new trial on a number of bases pertaining to the grant of summary judgment. The Bank opposed and Sloan replied thereto. Ultimately, the motion for new trial was denied as a matter of law when the court lost jurisdiction. (Code Civ. Proc.,<sup>1</sup> § 660.)

A notice of appeal followed on January 10, 2014. At about the same time, the Bank moved for additional attorney fees over those awarded as part of the earlier judgment. Sloan opposed the motion on the ground the judgment was not final pending appeal. The Bank replied to Sloan's opposition. The trial court awarded the Bank its requested fees.

## **DISCUSSION**

Section 437c, subdivision (c) provides as follows:

“The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the

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<sup>1</sup>Further statutory references are to the Code of Civil Procedure unless otherwise noted.

papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.”

Subdivision (p)(1) of section 437c states:

“A plaintiff ... has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff ... has met that burden, the burden shifts to the defendant ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant ... may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.”

Appellate courts determine whether a triable issue of material fact exists by conducting an independent review of “the record that was before the trial court when it ruled on [the] motion.” (*Martinez v. Combs* (2010) 49 Cal.4th 35, 68.) When conducting this independent review of the record, appellate courts view the evidence in the light most favorable to the nonmoving parties, resolving evidentiary doubts and ambiguities in their favor. (*Ibid.*)

### **1. Issues Pertaining to the Cross-complaint**

Sloan argues summary judgment was improperly granted because his cross-complaint was not a part of the Bank’s motion for summary judgment or its separate statement of undisputed facts. Sloan’s argument is premised upon his conclusion the court’s ruling on the Bank’s motion for summary judgment served to dismiss or otherwise adjudicate his cross-complaint. Because we find Sloan’s underlying premise to be faulty, we also deny his claim summary judgment was improperly granted in favor of the Bank on that basis.

## **A. Relevant Background**

The Bank filed its motion for summary judgment on January 11, 2013. The motion plainly references the Bank's complaint only. In fact, Sloan had not yet filed his cross-complaint.

On August 9, 2013,<sup>2</sup> Sloan filed his opposition to the Bank's motion for summary judgment, including his separate statement of undisputed facts. The opposition, like the motion, concerned the Bank's complaint only.

The Bank replied to Sloan's opposition on or about August 16, 2013. This pleading, too, is concerned with the Bank's underlying complaint for foreclosure and the affirmative defenses asserted by Sloan in his answer to that complaint.

The Bank's motion was heard and argued August 23, 2013. The arguments asserted by both plaintiff and defense counsel concerned the Bank's complaint and Sloan's affirmative defenses asserted thereto. Thirty-nine pages of reporter's transcript encompass that argument before anything more than a passing reference to Sloan's cross-complaint was made:

“[BANK'S COUNSEL]: With regard to the cross-complaint, doesn't mean anything here. It's the facts that are before this Court. You know, he could have filed a cross-complaint yesterday. That doesn't change the facts that are before this Court in this motion. I don't believe that's of any significance.”

Certainly the substance of the causes of action asserted in the cross-complaint were not the subject of argument. At the conclusion of the hearing, the trial court took the matter under submission.

Nearly two months later, the trial court issued its ruling on the Bank's motion for summary judgment. We find it helpful to quote the relevant portion of the ruling:

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<sup>2</sup>The delay appears to have been the result of a proceeding to disqualify another judge after a conflict of interest came to the parties' attention as well as Sloan's motion for leave to file a cross-complaint and to continue the hearing on the motion for summary judgment, among other things.

“The undisputed evidence presented by [the Bank] is that the loans in question were in fact made to [Sloan] and that at each extension of these loans, new documents evidencing those loan extensions were made. Moreover, [Sloan] does not dispute that he borrowed the money and that he owes the principal amounts of the loans and any extensions [(Sloan)’s deposition testimony].

“The primary dispute in this case relates to [Sloan]’s claim as set forth in his many affirmative defenses as well as his cross-complaint that he was misled [*sic*] by the bank, its officers and employees to believe that he would continue to receive extensions on his loans whenever he requested them because of the bank’s earlier conduct in granting him several extensions on these loans.

“There is no substantial dispute as to the material facts regarding these loans and [Sloan]’s obligations pursuant to the terms of written loan documents. The evidence is clear that [Sloan] applied for the loans and the extensions of those loans and performed pursuant to the terms of those loans and their extensions until the [Bank] called the loans due. Failure to pay the loans when due is a default and the [Bank] is entitled to collect the unpaid debt by way of judicial or non-judicial foreclosure.

“The [Bank] in this case has elected to seek Judicial Foreclosure in order to collect any deficiency that may result if the security is sold for less than the amount due on the notes.

“[Sloan] asserts several affirmative defenses some of which are the basis for [Sloan]’s cross-complaint as outlined above. There are no factual allegations in the many affirmative defenses alleged in [Sloan]’s answer but there are factual allegations in support of the four causes of action alleged in the Cross complaint. However, the Court finds that neither the alleged affirmative defenses nor the causes of action raised in the cross complaint raise a triable issue of material fact that requires a resolution by trial. Moreover, most of the defenses raise issues of law, not fact. (What is the lawful interest rate post default, is the post default interest provision an unlawful liquidated damages clause, are attorney fees proper?)

“The Court therefore finds that the evidence establishes the following:

“[Sloan] has admitted the genuineness of the notes secured by the Jamestown and the Bear Valley property as well as all of their amendments or extensions.

“[Sloan] has admitted owing the principal amount stated on each of the notes.

“The interest calculations for each notes are correct and consistent with the provisions of those documents.

“All documents evidencing the subject loans have attorney fees provisions and pursuant to the terms of the deeds of trust securing these notes, the attorney fees are proper expenses which are a part of the total indebtedness.

“The [Bank] is the owner of the subject notes as well as the beneficial interest in the deeds of trust securing the indebtedness.

“[Sloan] has never occupied any dwelling on either the Jamestown or the Bear Valley properties.

“The [Bank] was not the seller of either the Jamestown or the Bear Valley properties.

“The Deeds of Trust securing these notes have been properly recorded.

“None of the affirmative defenses asserted by [Sloan] raises a triable issue of material fact.

“**It is therefore ordered** that the [Bank]’s Motion for Summary Judgment is granted.”

## **B. Our Analysis**

Following review, it is clear the trial court did not consider the cross-complaint as a whole in its determination of the summary judgment motion. Rather, because the trial court expressly found Sloan’s affirmative defenses, as alleged in his answer to the Bank’s complaint, lacked factual support, it apparently considered these facts pertaining to the causes of action asserted in the cross-complaint that mirrored the affirmative defenses in Sloan’s answer to the original complaint.

Notably, neither the language employed in the trial court’s ruling, nor the language employed in the order that followed, purports to make a final determination regarding the cross-complaint. Both clearly address the Bank’s causes of action for judicial foreclosure. Moreover, both the ruling and the order referred to the “affirmative defenses asserted by [Sloan]” rather than the specific causes of action asserted therein. As we interpret this record, the trial court did not make any order or findings concerning the

causes of action<sup>3</sup> asserted in Sloan's cross-complaint. The judgment does not purport to dismiss or otherwise adjudicate the cross-complaint. References to the cross-complaint do not automatically turn the Bank's motion for summary judgment on its complaint into one that purports to decide the cross-complaint.

Sloan cites to *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308 (*San Diego Watercrafts, Inc.*) for the proposition that a "trial court must consider all the evidence submitted, except that evidence which was not properly included in the moving party's separate statement of undisputed facts," arguing the trial court erred in considering facts "not in the Bank's separate statement, namely the allegations in Sloan[']s Cross Complaint."

We note Sloan fails to provide a point page citation within *San Diego Watercrafts, Inc.* Nevertheless, the case is distinguishable and Sloan's characterization of its holding is inaccurate. There, the issue involved consideration of a supplemental declaration containing new facts offered in the moving party's reply to the nonmoving party's opposition to the summary judgment motion. (*San Diego Watercrafts, Inc., supra*, 102 Cal.App.4th at pp. 312-313.) Ultimately, the court held that whether a court considers "evidence not referenced in the moving party's separate statement rests within the sound discretion of the trial court," a decision reviewed for an abuse of discretion. (*Id.* at p. 316.)

This case is unlike *San Diego Watercrafts, Inc.*, because this is not a situation wherein new facts were presented by the moving party in its reply to the nonmoving party's opposition. The same facts and evidence were available in Sloan's opposition papers to the motion for summary judgment. In any event, we find the trial court's limited consideration of the cross-complaint was not an abuse of its discretion.

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<sup>3</sup>Sloan's cross-complaint alleged the following five causes of action (although they are mistakenly numbered 1-3, then 5-6): breach of contract, breach of confidential relationship, promise without intent to perform, declaratory relief, and unfair competition. At oral argument, counsel for Sloan agreed the causes of action asserted in the cross-complaint "fairly tracked" with the affirmative defenses asserted in the answer to the Bank's complaint.

Further, Sloan's references to *Magaña Cathcart McCarthy v. CB Richard Ellis, Inc.* (2009) 174 Cal.App.4th 106, 111, and *Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 646, 654-655, are misplaced. Those matters are plainly procedurally distinguishable and hence not discussed here.

A comparison of Sloan's cross-complaint against his separate statement of undisputed facts reveals the trial court had before it the same information. Said another way, even if the trial court considered facts in Sloan's cross-complaint, those same facts were available to the court in Sloan's separate statement submitted with his opposition to the Bank's motion, as well as Sloan's own declaration in support of his opposition to the Bank's motion. In his briefing, Sloan has failed to identify any particular fact or facts he claims was improperly considered by the trial court.

All moving papers filed, and the opposition filed in response thereto, provided the trial court with the evidence it relied upon in making its ruling. (§ 437c, subd. (c).) In sum, we find no error as a result of the trial court's limited reference to Sloan's cross-complaint.

Next, Sloan complains the Bank failed to negate the issues raised by his cross-complaint. Again, Sloan's argument is premised on the notion the trial court's ruling on the Bank's motion for summary judgment, concerning only its complaint, also operated to dismiss Sloan's cross-complaint. As noted above, we do not find that to be the case. In any event, the Bank was not required to disprove or otherwise negate Sloan's defenses.

“[S]ummary judgment law in this state no longer requires a plaintiff moving for summary judgment to disprove any defense asserted by the defendant as well as prove each element of his own cause of action.... All that the plaintiff need do is to ‘prove[] each element of the cause of action.’” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.)

Sloan's reliance upon *People ex rel. Dept. of Transportation v. Outdoor Media Group* (1993) 13 Cal.App.4th 1067 for the proposition the Bank is required to negate his defenses is misplaced. While the *Outdoor Media Group* opinion did in fact state “[a]

plaintiff seeking summary judgment must sustain the burden of proof on all theories of its complaint and must also negate all issues raised by the answer and cross complaint” (*id.* at page 1074), the case cited within the opinion for that proposition has been superseded by statute as stated in *Aguilar v. Atlantic Richfield Co.*

Subdivision (p)(1) of section 437c provides that a plaintiff meets its “burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff ... has met that burden, the burden shifts to the defendant.” For the foregoing reasons, the Bank was not required to disprove or otherwise negate Sloan’s defenses.

## **2. The Bank’s Right to Foreclose**

Sloan argues summary judgment should not have been granted because triable issues of material fact existed regarding the Bank’s right to foreclose.

Subdivision (a) of section 726 provides:

“There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter. In the action the court may, by its judgment, direct the sale of the encumbered real property or estate for years therein (or so much of the real property or estate for years as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, the expenses of levy and sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney’s fees, the sum for attorney’s fees as the court shall find reasonable, not exceeding the amount named in the mortgage.”

The Bank’s complaint asserted two causes of action: (1) judicial foreclosure of the Jamestown deed of trust, the Bear Valley second deed of trust, and for deficiency judgment; and (2) judicial foreclosure of the Bear Valley first deed of trust and for deficiency judgment.

More specifically, the Bank asserted Sloan had defaulted under the terms of the Jamestown deed of trust and the Bear Valley second deed of trust, that it had fully performed its obligations, that a principal sum of \$515,122.13 was due and owing, that \$33,677.97 in interest had accrued as of that date and continued to accrue at a daily rate

of \$162.30, and that it had incurred attorney fees, legal expenses and costs as a result. Additionally, the Bank contended Sloan had defaulted under the terms of the Bear Valley first deed of trust, that it had fully performed its obligations, that a principal sum of \$280,000 was due and owing, that \$18,588.88 in unpaid interest and late charges of \$90.41 had accrued, that interest continued to accrue at a daily rate of \$88.22, and that it had incurred attorney fees, legal expenses and costs as a result.

On summary judgment, the Bank established its right to foreclosure. We agree with the trial court the undisputed evidence indicates the loans in question were made to Sloan, Sloan acknowledged he borrowed the money from the Bank and owed the principal amounts, and the Bank established that at maturity Sloan failed to pay the loans. The Bank established the notes were in default, the deeds provided the right to judicial foreclosure, and Sloan was personally liable for these obligations. (§ 726, subd. (a).) Hence, the Bank met its burden of production. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.)

The burden then shifted to Sloan to make a prima facie showing of the existence of a triable issue of material fact. “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 851.) Our review leads us to conclude the trial court properly found Sloan had not met his burden in this regard.

Sloan argues there is a triable issue of material fact as to whether Sloan was in default. More specifically, he claims the Bank was estopped from declaring default.

Relying on *Lupertino v. Carbahal* (1973) 35 Cal.App.3d 742, Sloan contends his evidence established the four elements of estoppel.

“Four elements are essential to raise an equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.” (*Id.* at p. 749.)

With regard to the Bank's conduct in particular, Sloan complains it was reasonable for him to continue to expect "the extensions would keep coming" based upon the Bank's responses to his advising it that he could not pay the note then due. However, Sloan had no right to expect continued extensions. The undisputed evidence established that with each extension, Sloan was advised of the new date upon which his obligation would become due and owing. At no time was Sloan advised by anyone at the Bank the extensions previously afforded to him would continue to be granted. It is immaterial to the dispute that Sloan assumed he would continue to receive extensions.

With regard to Sloan's claim he was ignorant of the true state of facts, we do not find it material that Sloan contends he was unprepared "for the Bank's sudden change in position." Sloan was aware with each extension executed that the loans he was obliged to repay would become due and owing on the next date provided for within the extension. By virtue of that knowledge, Sloan knew the Bank could foreclose if he were to default. The true state of facts did not require the Bank to continue to afford Sloan extension after extension.

In sum, Sloan cannot and did not establish prima facie evidence to support his claim he was not in default as a result of the principles of estoppel.

Next, Sloan asserts there was a triable issue of fact regarding the total amount due and payable under both the Jamestown and Bear Valley notes. Specifically, he claims a dispute exists as to the default interest or prejudgment interest. The Bank contends the interest rates claimed are legal in all respects.

With one exception, the record establishes each agreement between the parties includes the following language on this point: "INTEREST AFTER DEFAULT. Upon default, the interest rate on this Note shall immediately increase by 4.000 percentage points, if permitted under applicable law."

The single exception reads: "INTEREST AFTER DEFAULT. Upon default, the interest rate on this Note shall, if permitted under applicable law, immediately increase by adding a 4.000 percentage point margin ('Default Rate Margin'). The Default Rate

Margin shall also apply to each succeeding interest rate change that would have applied had there been no default.” The Bank asserts the language in the agreements reveals the definition of default is not tied to an acceleration clause that would preclude its entitlement to default interest.

“A promissory note that is due on a date certain is not automatically delinquent for nonpayment unless it expressly provides, or is deemed to provide, that it is due and payable without notice or demand. If it does include such terms, it is due and delinquent without notice or demand.” (4 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 10:108, p. 10-393, fns. omitted.) Here, the agreements between the Bank and Sloan provide a date certain and provide payment is due and payable without notice or demand.

Sloan’s reliance on *In re Crystal Properties, Ltd., L.P.* (9th Cir. 2001) 268 F.3d 743 and *JCC Development Corp. v. Levy* (2012) 208 Cal.App.4th 1522 is misplaced.

*In re Crystal Properties, Ltd., L.P., supra*, 268 F.3d 743 concerned a default provision that read: “Should default be made in any payment provided for in this note, ... at the option of the holder hereof and without notice or demand, the entire balance of principal and accrued interest then remaining unpaid shall become immediately due and payable, and thereafter bear interest, until paid in full, at the increased rate ....” (*Id.* at p. 753.) The relevant language concerning default interest was tied to an option to accelerate. (*Id.* at p. 754.) That is not the case here. The default interest claimed by the Bank was not in the nature of an acceleration clause. Default did not result after a missed installment payment and acceleration by the Bank.

Further, unlike *JCC Development Corp. v. Levy, supra*, 208 Cal.App.4th 1522, the default interest rate at issue here was not made expressly applicable to the circumstance of acceleration only. (*Id.* at p. 1535.) Because the agreements between Sloan and the Bank expressly defined default to include, among others, any failure of the borrower “to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or In any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender

and Borrower,” default was not made expressly applicable to the circumstance of acceleration only.

Sloan also argues the default interest rate is an unlawful penalty amounting to liquidated damages. However, his argument on this point lacks meaningful legal analysis and is merely conclusory. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1247-1248 [the “excessive noneconomic damages issue is forfeited because the single paragraph on this issue is devoid of meaningful legal analysis”].) Notably, too, as the Bank points out, the authority cited by Sloan is plainly distinguishable as it is applicable to leases of real property.

Sloan’s contention the fees he paid to the Bank concerning each of the seven extensions obtained “should be used to offset the judgment” or otherwise be credited suffers a worse fate than the aforementioned argument. It is utterly devoid of citation to legal authority or analysis. (*Taylor v. Nabors Drilling USA, LP, supra*, 222 Cal.App.4th at pp. 1247-1248; *Taylor v. Roseville Toyota, Inc.* (2006) 138 Cal.App.4th 994, 1001, fn. 2 [point merely asserted on appeal without argument or authority is forfeited].) Accordingly, this contention is forfeited.

Finally, Sloan maintains “there are triable issues of fact regarding the Bank’s claim for attorney fees and apportionment” because reasonableness was not determined. Further, he contends “it is reversible error to award fees while the issue is on appeal,” where the court awarded additional fees on April 25, 2014.

Civil Code section 1717 is relevant:

“(a) In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.

“Where a contract provides for attorney’s fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

“Reasonable attorney’s fees shall be fixed by the court, and shall be an element of the costs of suit.

“Attorney’s fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney’s fees is void.

“(b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.”

Below, the trial court found “[a]ll documents evidencing the subject loans and deeds of trust have attorney’s fees provisions and pursuant to the terms of the deeds of trust securing these notes, the attorney fees are proper expenses which are a part of the total indebtedness.” The evidence submitted establishes the following provision appeared in the parties’ agreements:

“ATTORNEYS’ FEES; EXPENSES. Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender’s attorneys’ fees and Lender’s legal expenses, whether or not there is a lawsuit, including attorneys’ fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. Borrower also will pay any court costs, in addition to all other sums provided by law.”

The Bank’s motion for summary judgment included the declaration of Paul N. Balestracci. Paragraphs numbers 15, 17, 18 and 19 pertain to the Bank’s attorney fees. Exhibit M includes invoices relevant to the action between Sloan and the Bank.

Our review of the record finds support for the trial court’s finding the agreements between the parties provided for attorney fees and costs, and the fees are proper or reasonable.

Here, the trial court reviewed the proffered invoices as a part of the Bank’s motion for summary judgment. The trial court acknowledged Sloan’s objection to exhibit M of

Balestracci's declaration, but overruled that objection. Sloan's objection read as follows: "Argumentative, Improper legal conclusion and/or expert opinion; Determination as to the reasonableness of attorney's fees is a matter exclusively within the purview of the Court. ... § 730; see also Civ. Code § 1717.)"<sup>4</sup> Sloan did not identify any unreasonable invoice or invoices proffered by the Bank in support of its request. Neither did Sloan offer any evidence to counter the apportionment suggested by the Bank. Further, Sloan's citations are unavailing as they are distinguishable.

Sloan cites *California Golf, L.L.C. v. Cooper* (2008) 163 Cal.App.4th 1053, 1073 in support of his argument that it was reversible error for the trial court to award attorney fees in light of the pending appeal.

The fees awarded April 25, 2014, represent fees incurred by the Bank subsequent to the filing of its motion for summary judgment in January 2013. At that time, the Bank sought \$51,576.92 in attorney fees. After the filing of the motion, necessary litigation continued, however. After its motion for summary judgment was granted, the Bank moved for an award of \$94,462.89 in additional fees and costs. The trial court granted the request over Sloan's opposition.

Simply put, *California Golf, L.L.C. v. Cooper* does not stand for the proposition asserted by Sloan. Rather, at 163 Cal.App.4th at page 1074, the appellate court concluded that wherein Wells Fargo had prevailed on its motion for attorney fees following summary judgment on its interpleader cross-complaint against California Golf and others, "the trial court must vacate its order apportioning Wells Fargo's attorney's fees between California Golf and the respondents, since such order depends on the trial court's ultimate determination of the issues raised by California Golf's cross-complaint." Here, attorney fees were awarded following the grant of summary judgment in favor of the Bank on its complaint alone. The order did not depend on the trial court's ultimate

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<sup>4</sup>Section 730 provides: "In all cases of foreclosure of mortgage the attorney's fee shall be fixed by the court in which the proceedings are had, any stipulation in the mortgage to the contrary notwithstanding."

determination of Sloan's cross-complaint. That Sloan has challenged the order on appeal, arguing the court's order did include his cross-complaint, does not itself operate to require reversal on appeal.

To conclude, we find no error in the trial court's award of additional or supplemental attorney fees to the Bank as the prevailing party. (See *Hsu v. Abbata* (1995) 9 Cal.4th 863, 876 [prevailing party in action under or relating to contract is entitled to recover its fees, whether incurred at trial or on appeal]; *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129; see also *Benson v. Greitzer* (1990) 220 Cal.App.3d 11, 13 ["Where an award of attorney's fees is authorized by statute, a trial court has jurisdiction following an appeal to award attorney's fees for the appeal"].)

In sum, the trial court's conclusion the Bank met its burden on summary judgment, of establishing entitlement to judicial foreclosure on the Jamestown and Bear Valley notes, was not error. Additionally, the trial court correctly ruled Sloan did not meet his own burden thereafter.

### **3. Sloan's Defenses to the Bank's Complaint**

Sloan maintains the trial court erred by granting the Bank summary judgment because there are triable issues of material fact on each of his affirmative defenses.

As referenced above, the trial court found none of the affirmative defenses asserted in defense of the Bank's complaint raised "a triable issue of material fact that requires a resolution by trial."

Because we have already determined estoppel did not apply, we briefly address the defenses of a failure to mitigate, ratification/modification, unclean hands, and bad faith.

#### **A. Failure to Mitigate**

Assuming he was in default at the maturity date of each of the loans and related extensions, Sloan argues "the Bank had a duty to mitigate its damages." He argues the Bank "should have never renewed/extended the Notes and in doing so, ... raises material questions of fact regarding the duty to mitigate damages."

Other than an initial passing reference to mitigation, this argument, like others before it, suffers from a lack meaningful legal analysis. (*Taylor v. Nabors Drilling USA, LP, supra*, 222 Cal.App.4th at pp. 1247-1248.) Sloan has offered no relevant legal authority to support his position the Bank was required to ignore his requests for and/or acceptance of its extensions of time because on the original dates of maturity the value of the properties was greater than at the time the Bank elected to seek judicial foreclosure as its remedy. Thus, we deem his argument to be forfeited.

**B. Ratification/Modification**

Next, Sloan contends that by “granting continuous extensions to Sloan,” the Bank created his expectation that before it refused to grant further extensions, the Bank “would provide him with a reasonable notice” that no further extensions were forthcoming. And, accordingly, that expectation amounts to a modification of the terms of the loan documents.

Sloan’s citation to *Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151 is unavailing and easily distinguished. In that case, the party opposing summary judgment provided evidence to establish “a tremendous number of changes” in an agreement between contractors to provide labor and materials in the construction of a paper mill. (*Id.* at pp. 156-158.)

Here, a review of the record reveals Sloan did not present evidence directly controverting the Bank’s evidence it was entitled to judicial foreclosure. There is no evidence relevant to a modification of terms in the form of continued extensions other than Sloan’s belief the Bank would continue to grant him extensions. Sloan’s belief does not amount to a prima facie showing of a triable issue of material fact. (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.)

### C. Unclean Hands

Sloan contends the “[e]vidence shows that the Bank’s hands are not clean” and that it “lulled [him] into a false sense of security” by granting him extensions “before slamming the door on him without any warning whatsoever.”<sup>5</sup>

In *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, this court stated:

“The defense of unclean hands arises from the maxim, “‘He who comes into Equity must come with clean hands.’” [Citation.] The doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim. [Citations.] The defense is available in legal as well as equitable actions. [Citations.] Whether the doctrine of unclean hands applies is a question of fact. [Citation.]

“The unclean hands doctrine protects judicial integrity and promotes justice. It protects judicial integrity because allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided by the judicial system. Thus, precluding recovery to the unclean plaintiff protects the court’s, rather than the opposing party’s, interests. [Citations.] The doctrine promotes justice by making a plaintiff answer for his own misconduct in the action. It prevents ‘a wrongdoer from enjoying the fruits of his transgression.’ [Citations.]

“Not every wrongful act constitutes unclean hands. But, the misconduct need not be a crime or an actionable tort. Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine. [Citations.]” (*Kendall-Jackson Winery, Ltd. v. Superior Court, supra*, 76 Cal.App.4th at pp. 978-979.)

The evidence reveals the Bank did not violate the terms of its agreements with Sloan. It loaned him the funds as required under the terms of those agreements. And when Sloan could not pay, it worked with him. The Bank is not a wrongdoer in the sense

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<sup>5</sup>Sloan has failed to provide record citations to his argument. Any reference in an appellate brief to matters in the record must be supported by a citation to the volume and page number of the record where that matter may be found. (Cal. Rules of Court, rule 8.204(a)(1)(C).) This rule applies to matters referenced at any point in the brief, not just in the statement of facts. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 96, fn. 2.)

contemplated by the doctrine of unclean hands. Sloan has cited to no legal authority finding unclean hands to be a defense to judicial foreclosure where the borrower is in default despite a lender's having met its contractual obligations and, additionally, where the lender worked with the borrower on several occasions in an effort to avoid foreclosure proceedings.

Even construing Sloan's evidence liberally, our review requires us to conclude the trial court was correct in determining Sloan's evidence did not raise a triable issue of material fact that required a resolution by trial.

#### **D. Bad Faith**

Sloan asserts there is a question of fact whether "the Bank acted in bad faith when it unilaterally entered default on the loans."<sup>6</sup>

Citing to *Lupertino v. Carbahal*, *supra*, 35 Cal.App.3d at pages 747 through 750 in the absence of any meaningful analysis, Sloan argues the Bank had a "heightened duty" to advise him it would no longer grant extensions as a result of the Bank's prior practice. The facts in *Lupertino*—failure to send notice of default to the known address—are so clearly distinguishable that the differences need not be addressed further.

Sloan's evidence did not amount to a prima facie case of a triable issue of material fact that the Bank breached its implied obligation to use good faith as it concerned the agreements between the parties. The Bank met its obligations to Sloan. Sloan, on the other hand, failed to meet his own obligations pursuant to the agreements.

Whether there has been a breach of the covenant of good faith and fair dealing is ordinarily a question of fact. (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509.) Unless the evidence is susceptible of only one interpretation, whether a party has acted in bad faith is for a jury to decide. (*Ibid.*) In this case, it was not error for the trial court to determine Sloan did not establish the existence of a triable issue of material fact regarding bad faith based on this record. The Bank's willingness to extend Sloan a

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<sup>6</sup>Again, Sloan has failed to provide record citations to support his argument. (*Lona v. Citibank, N.A.*, *supra*, 202 Cal.App.4th at p. 96, fn. 2.)

total of seven extensions in an effort to accommodate him when he was unable to meet his obligations, pursuant to the various agreements between them, is susceptible of only one interpretation: the Bank did not act in bad faith.

The implied covenant of good faith and fair dealing did not create an obligation on the part of the Bank to continue to offer Sloan extension after extension. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 [“The covenant of good faith and fair dealing ... exists merely to prevent one contracting party from unfairly frustrating the other party’s right to receive the *benefits of the agreement actually made*.... The covenant thus cannot “be endowed with an existence independent of its contractual underpinnings””].) Here, Sloan received the benefits of the agreements actually made: loan proceeds and extensions of time.

#### **4. The Standard Applied by the Trial Court**

Sloan contends the trial court applied an incorrect standard in making its determination regarding the Bank’s motion for summary judgment. He alleges the trial court ignored the Bank’s burden of persuasion, entered judgment against him on his pleadings rather than on his evidence, and erroneously required he present evidence of a “substantial dispute” as to a material fact.

“[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. [A]lthough not expressly, the 1992 and 1993 amendments impliedly provide for a burden of production *to make a prima facie showing*. A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.] No more is called for.” (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 850-851, fn. omitted.)

Sloan wrongfully contends that by failing to negate its affirmative defenses, the Bank did not meet its burden of persuasion. However, as we have already explained, the Bank was not required to negate Sloan’s defenses. Rather, the Bank met its burden by successfully making a prima facie showing it was entitled to judicial foreclosure.

(*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 850-851.) Neither was the Bank required to present “evidence negating the elements of Sloan’s Cross Complaint” as the Bank’s motion made no challenge in that regard.

Sloan also asserts the trial court’s judgment was not “based upon consideration of Sloan’s evidence, but on the sufficiency of the allegations contained” in his affirmative defenses and cross-complaint. He cites to a very brief excerpt of the trial court’s December 10, 2013, order. A review of the order as a whole reveals the trial court applied the correct legal standard.

We disagree with Sloan’s assertion that “[t]he very words of the judgment demonstrate that the trial court only looked at the pleadings and not the evidence.” Sloan’s interpretation is too narrow and is not supported by the record.

Next, Sloan complains the trial court required him to present evidence establishing that a “substantial dispute as to material facts” existed versus evidence establishing a triable issue of material fact. Again, Sloan’s parsing of the language employed by the trial court notwithstanding, a review of the entire order and of the record reveals no such requirement was asked by the trial court.

## **5. The Sufficiency of the Trial Court’s Ruling and Its Order**

Finally, Sloan argues the trial court’s ruling was statutorily insufficient because subdivision (b) of section 437c requires the court to “specify the reasons for its determination” and refer to the evidence in support of that determination, but the court failed to do so. He further contends the trial court abdicated its judicial responsibility when it adopted the proposed order provided by the Bank. We are not persuaded.

The court’s ruling is largely excerpted *ante*, pages 6-7. The order that followed, prepared by the Bank, additionally included specific references to the evidence in support of the ruling.

In relevant part, subdivision (g) of section 437c provides: “Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination.

The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any determination.”

The statute expressly requires the *order* on the motion for summary judgment be specific as to its reasons and the evidence proffered in support thereof. In fact, the *order* is specific in its reasoning, as was the court’s earlier ruling, and the evidence associated therewith:

“[The Bank] in support of its motion, proffered evidence that established each element necessary to sustain judgment in its favor, as follows:

“[Sloan] has admitted the genuineness of the notes secured by the Jamestown and the Bear Valley property as well as all of their amendments or extensions. Supporting evidence: Requests for Admission and Responses to Requests for Admission, Nos. 1, 4, 5, 7, 8, 9, 12, 13, 14, Declaration of Lisa Melville: 2:2-7, 19-21, 22-25; 3:23-4:8; 4:5-16, 17-51; 6:26-7:3, 12-16; 7:8-25, 26-8:11; 8:12-23; Deposition of Stephen W. Sloan: 45:8-24; 47:14-48:5; 49:15-19; 50:23-51:2.

“[Sloan] has admitted the genuineness of the deeds of trust against both properties. Supporting evidence: Requests for Admission and Responses to Requests for Admission, Nos. 3, 6, 11; Declaration of Lisa Melville: 2:12-21; 7:8-16. Request for Judicial Notice, Exhibits D, E, F.

“[Sloan] has admitted owing the principal amount stated on each of the notes, and the failure to pay is a default under the terms of the notes. The principal sum owing on the Jamestown Note is \$515,122.13. Supporting evidence: Sloan Depo., 57:3-7; Melville Dec. 5:12-6:5; Exhibit ‘H’ to Melville Dec. The principal sum owing on the Bear Valley Note is \$280,000.00. Supporting evidence: Sloan depo, 56:15-21; Melville Dec., 10:3-11.

“[Sloan], in opposition to [the Bank]’s motion, proffered evidence that disputed the amount due and owing on the notes claiming offsets for monies wrongfully charged in fees for extensions. (Sloan Depo, Exhs, 5, 6, 8, 9, 17, 18, 19, 20, 21; Daneke Depo, Exhs. 4, 6, 9, 12, 15) This evidence is not sufficient to raise a triable issue of fact in that there is no legal support that such fees are not allowed by law.

“[Sloan], in opposition to [the Bank]’s motion, proffered evidence that he was lulled into believing that he would continue to receive

extensions of the notes. (Sloan Depo, 69:20-70:11, 71:21-72:4, Exhs. 2, 5, 6, 8, 9; Daneke Depo, Exhs. 2, 3, 8, 11, 14, 17, 19, 22, 25, 43) This evidence is not sufficient to raise a triable issue of fact in that these facts do not show all elements of an affirmative defense of estoppel, failure to mitigate, ratification/modification, unclean hands, or bad faith. Additionally, [Sloan] admitted in his deposition that no bank representative agreed or stated that it would enter into an extension of the maturity dates of either loan. (Sloan Depo, 70:1-16, 21-23-72:4)

“The interest calculations for each note are correct and consistent with the provisions of those documents. Supporting evidence: Melville Dec., 6:3-14; Exhibit ‘H’ to Melville Dec; Melville Dec., 10:3-15; Exhibit ‘J’ to Melville Dec.

“All documents evidencing the subject loans and deeds of trust have attorney’s fees provisions and pursuant to the terms of the deeds of trust securing these notes, the attorney fees are proper expenses which are a part of the total indebtedness. Melville Dec., 11:4-6; Declaration of Paul N., Balestracci (‘Balestracci Dec.’), 3:17-4-10; Exhibit ‘M’ to Balestracci Dec.

“The [Bank] is the owner of the subject notes as well as the beneficial interest in the deeds of trust securing the indebtedness. Supporting Evidence: Request for Judicial Notice (‘RJN’), Exhibits D, E, F; Melville Dec., 6:20-23.

“The subject notes and deeds of trust each provide for judicial foreclosure in the event of a default. Supporting evidence: Responses to Request for Admissions Nos. 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14; RJN, Exhibits D, E, F.

“[Sloan] has never occupied any dwelling on either the Jamestown or the Bear Valley properties. Supporting evidence: Sloan Depo, 42:21-43:8; Melville Dec., 3:22; RJN, Exhibits ‘E’ and ‘F.’

“The [Bank] was not the seller of either the Jamestown or the Bear Valley properties. Supporting evidence: Melville Dec., 6:18-19.

“The Deeds of Trust securing these notes have been properly recorded. Supporting Evidence: RJN, Exhibits D, E, and F.

“None of the remaining affirmative defenses asserted by [Sloan] raises a triable issue of material fact, as they raise legal, not factual defenses.”

The court's order reveals the court specified the reasons for its determination and has specifically referenced the evidence upon which it relied in coming to that determination.

Sloan complains that by adopting the proposed order prepared by the Bank, the court abdicated its statutory duty. He relies upon *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 691-693, to support his assertion. *Carnes*, however, is plainly distinguishable.

In *Carnes*, a visiting judge heard the Superior Court of Placer's motion for summary judgment in an action filed by its employee, Linda Carnes, asserting a number of employment related claims. (*Carnes v. Superior Court, supra*, 126 Cal.App.4th at p. 691.) After taking the matter under submission, a few weeks later the judge issued his ruling which stated in its entirety: "The Court grants defendants [*sic*] Motion for Summary Judgment and adjudicates each cause of action in defendants [*sic*] favor. Defendant to prepare the form of this order and include and [*sic*] all findings necessary to support this order." (*Ibid.*) Thereafter, the Superior Court of Placer submitted a 14-page proposed order. Carnes objected, however, the judge signed and filed the order and judgment of dismissal. (*Ibid.*)

On appeal, Carnes argued it was improper for the judge to sign the proposed order because the judge's own ruling on the motion failed to provide the basis for its ruling and amounted to an abdication of "his responsibility to provide an explanation of why he was denying [her] a trial." (*Carnes v. Superior Court, supra*, 126 Cal.App.4th at p. 692.) The Court of Appeal agreed:

"The impropriety of the judge's action in this case is highlighted by the fact that the judge granted the motion for summary judgment without having made any rulings on the parties' evidentiary objections, even though the parties requested such rulings at the hearing....

"Certainly it is not improper for the judge to adopt as his or her own the reasoning a [party] proposes for granting a motion for summary judgment, provided that reasoning is sound and the judge critically evaluates the reasoning before adopting it. Where, as here, a judge simply

grants the motion, then asks the prevailing party to provide the court with the reasoning that will support that result, confidence in the court's integrity is seriously and legitimately undermined." (*Carnes v. Superior Court*, *supra*, 126 Cal.App.4th at p. 693.)

None of the impropriety present in *Carnes* was present below. Unlike the judge in *Carnes*, here the trial court specified its reasons and referred to the evidence.

The trial court's seven-page ruling addressed Sloan's objections to the Bank's evidence and specifically identified its reasoning for granting the motion. The ruling references the evidence presented, but does not specifically identify that evidence. The nine-page order largely mirrors the trial court's ruling, but does add specific citations to the parties' evidence presented as a part of the motion and opposition.

Here, the trial court adopted a proposed order that included the language of its earlier ruling and offered specific citations to the evidence in support thereof. The trial court did not err; it in no way abdicated the statutory duty assigned it. Because it did not abdicate its duty, the trial court properly shifted the burden of preparing a formal order on the motion for summary judgment to counsel for the prevailing party, the Bank. (*Carnes v. Superior Court*, *supra*, 126 Cal.App.4th at p. 692, citing *Tera Pharmaceuticals, Inc. v. Superior Court* (1985) 170 Cal.App.3d 530.)

#### DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent Bank.

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PEÑA, J.

WE CONCUR:

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LEVY, Acting P.J.

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POOCHIGIAN, J.