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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SALMA MERRITT et al.,

Plaintiffs and Appellants,

v.

JOHN BENSON,

Defendant and Respondent.

H038378

(Santa Clara County

Super. Ct. No. CV159993)

Plaintiffs David Merritt and Salma Merritt obtained two loans to purchase a townhouse. After they were unable to repay these loans, they filed an action against multiple defendants for alleged predatory lending practices. The Merritts alleged that defendant John Benson, an appraiser, participated in a conspiracy with the other named defendants by falsely inflating the value of the Merritts' townhouse. After the trial court granted Benson's motion to set aside the default and default judgment, it granted his motion for summary judgment. We affirm the judgment.

I. Statement of the Case

In December 2009, the Merritts filed a complaint against Angelo Mozilo, David Sambol, Michael Colyer, Countrywide Home Loans, Inc., and Countrywide Financial Corporation (collectively Countrywide), Ken Lewis, Bank of America Corporation, John

Stumpf, Wells Fargo Bank, Johnny Chen, and Benson. The complaint alleged causes of action for conspiracy to commit fraud, misleading statements, unfair business practices, violation of Civil Code section 1920, race discrimination in housing, and conspiracy. The complaint alleged, among other things: the Merritts purchased a townhouse at 660 Pinnacles Terrace in Sunnyvale, California (the property); Chen was the Merritts' real estate agent and one of the sellers of the property; Chen conspired with Colyer, who was the mortgage broker for Countrywide Financial Corporation, to induce Benson to falsely inflate his appraisal of the property, and thus justify a loan of \$739,000 when the property was "actually possibly worth" \$690,000; Countrywide engaged in various predatory loan practices and financed the Merritts' purchase of the property. It was also alleged that Bank of America and Wells Fargo later became part of the conspiracy. After the trial court overruled Benson's demurrer to the complaint, Benson filed an answer on August 12, 2010.

Four days later, the Merritts filed a verified first amended complaint. The causes of action alleged in the first amended complaint included fraud, conspiracy, breach of fiduciary duty, unfair business practices, breach of contract, breach of title insurance contract, and intentional infliction of emotional distress. MERSCORPS Holding, Inc. and First American Title Insurance Company were added as defendants. The first amended complaint alleged that Benson conspired with the other named defendants "in doing the things alleged in this Amended Complaint." It was alleged that Benson was part of a "network of appraisers" who falsely inflated property values. More specifically, the amended complaint alleged that Countrywide, Colyer, and Chen hired Benson to produce a false appraisal, which he did. However, the amended complaint also alleged that the Merritts entered into a contract with Benson in which he agreed to produce an accurate appraisal of the property. In September 2010, Benson filed a verified answer to the first amended complaint.

In December 2010, the Merritts filed an unverified second amended complaint, which alleged causes of action for fraud and misrepresentation, conspiracy, breach of fiduciary duty, unfair business practices, breach of contract, breach of title insurance contract, and intentional infliction of emotional distress. In February 2011, Benson filed an unverified answer to the second amended complaint.

On March 25, 2011, Benson filed motion for summary judgment. The hearing date for this motion was July 21, 2011.

On April 15, 2011, the Merritts filed their third amended complaint. The third amended complaint alleged causes of action for conspiracy to commit the following: fraud, breach of fiduciary duty, unfair business practices, violation of Business and Professions Code section 17200 (fraudulent practices/acts), unfair business practices (untrue or misleading advertising), breach of title insurance contract, and intentional infliction of emotional distress. The third amended complaint alleged: Benson participated in a network of appraisers, who falsely inflated property values, for Countrywide; Benson was a coconspirator; Colyer asked Chen to contact Benson to produce an appraisal of \$740,000 for the property; on March 17, 2006, Benson falsely appraised the property at \$740,000 and gave it to Colyer and Chen; on March 18, 2006, Colyer, Chen, and Benson represented to the Merritts that the property was appraised at \$739,000; and the property was worth \$670,000. Benson did not file an answer or other responsive pleading to the third amended complaint.

On July 7, 2011, the Merritts filed opposition to the motion for summary judgment. However, Benson's counsel e-mailed the Merritts on July 11, 2011, that he was taking the motion for summary judgment off calendar. He stated: "Only reason for doing so was out of an abundance of caution that the court might be concerned about the fact that there is now a third amended complaint – I don't think that's a problem, but if the court disagrees I don't want to have to go through the process a second time. Therefore, will be refiling motion shortly based on the third amended complaint."

On August 9, 2011, the Merritts filed a request for entry of default. However, default was not entered. Though the Merritts declared, under penalty of perjury, that this request for entry of default was mailed first-class, postage prepaid to Benson's counsel, Benson's counsel's declaration stated that neither he nor his office ever received the document.

On August 19, 2011, the Merritts filed a second request for entry of default, which was entered by the clerk. The Merritts again declared, under penalty of perjury, that the request for entry of default had been mailed first-class, postage prepaid, to Benson's counsel. Ronald Merritt also declared, under penalty of perjury, that he had mailed first-class, postage prepaid, a statement of damages, dated August 18, 2011, to Benson's counsel. However, Benson's counsel's declaration stated that neither he nor his office ever received the document.

On January 9, 2012, the trial court held the default prove-up hearing and took the matter under submission.

On January 11, 2012, Benson refiled and served his motion for summary judgment, which was set for hearing on April 3, 2012.

On February 16, 2012, the trial court entered a default judgment in the amount of \$1,869,387.80.

On March 9, 2012, the Merritts filed an ex parte application for an order "that defendant Benson motion for summary judgment hearing set of April 3, 2012 [be] vacated and stricken from calendar." The application was denied.

On April 3, 2012, Benson's motion for summary judgment came on for hearing. No opposition to the motion had been filed. At the hearing, Benson's counsel learned for the first time that a default had been taken against Benson. Benson's counsel immediately requested a hearing date be set, on shortened time, for a motion to set aside the default. However, the trial court indicated that the motion would not be scheduled on shortened time, because the matter had not yet been set for trial.

At an ex parte hearing on April 6, 2012, the trial court set both the motion to set aside the default and the default judgment and the motion for summary judgment for May 17, 2012. The trial court specifically advised David Merritt that he was required to submit admissible evidence in support of his opposition to the motion for summary judgment.

On April 24, 2012, Benson filed his motion to set aside the default and default judgment against him.

On May 3, 2012, the Merritts filed opposition to the motion for summary judgment. The following day, the Merritts filed opposition to the motion to set aside the default and default judgment. They also filed an amended separate statement in opposition to the motion for summary judgment.

On May 10, 2012, Benson filed evidentiary objections. On the same day, he filed supplemental declarations in support of his motion for summary judgment as well as a reply to the opposition to the motion to set aside the default and default judgment. On May 14, 2012, the Merritts filed an amendment to their opposition to summary judgment.

On May 17, 2012, the trial court held a hearing on Benson's motion to set aside the default and default judgment as well as the motion for summary judgment. The trial court granted Benson's motion to set aside the default and default judgment, finding that the default judgment was void on the ground that he was not required to file an answer to the third amended complaint. The trial court also granted Benson's motion for summary judgment. Judgment was entered in favor of Benson on June 6, 2012.

The Merritts prematurely filed their notice of appeal on May 30, 2012.¹

¹ "A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment." (Cal. Rules of Court, rule 8.104(d)(1).)

II. Discussion

A. Motion to Set Aside the Default and Default Judgment

The Merritts contend that the trial court erred in setting aside the default and default judgment because the default judgment was not void.

Code of Civil Procedure section 473, subdivision (d) provides: “The court may, . . . on motion of either party after notice to the other party, set aside any void judgment or order.” When the record affirmatively shows that the trial court was without jurisdiction to enter the judgment, the judgment is void on its face. (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239.) “[A] default entered after the answer has been filed is void” (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 863.) This court reviews a trial court’s determination that a judgment is void under the de novo standard. (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496.)

At issue in the present case is whether an answer had been filed before the default was entered. Here, Benson filed answers to the original as well as the first and second amended complaints. The Merritts point out that the third amended complaint was verified. “When the complaint is verified, the answer shall be verified.” (Code Civ. Proc., § 446.) Thus, they argue that since Benson’s only verified answer was to the first amended complaint and there was no verified answer to the third amended complaint, default was properly entered. However, “the failure to verify a pleading—even where the verification is required by statute—is a mere defect curable by amendment. [Citations.]” (*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 915, fn. omitted.) However, even assuming that the Merritts are correct, we conclude that Benson’s verified answer to the first amended complaint could stand as an answer to the third amended complaint.

“Where the amended complaint does not change the basic cause of action pleaded in the original or add any new cause of action, defendants may answer de novo if they

choose. But if they elect not to do so, they are not in default. Their original answer is effective to deny the original allegations that are repeated in the amended complaint.” (Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2014) § 6:691, p. 6-175.) “Where the amended complaint makes new allegations concerning one of several defendants, the others need not answer the amended pleading. Their answers to the original complaint prevent entry of default.” (*Id.* at § 6:693, p. 6-175.)

Carrasco v. Craft (1985) 164 Cal.App.3d 796 (*Carrasco*) is instructive. In *Carrasco*, the defendants filed an answer to the plaintiff’s complaint. (*Id.* at pp. 800-801.) However, after the defendants failed to answer the plaintiff’s amended complaint, a default judgment was entered against them. (*Id.* at p. 801.) The defendants then brought a motion to set aside the default and default judgment, which the trial court denied. (*Ibid.*) *Carrasco* held the default and default judgment were void because the original answer could stand as an answer to the amended complaint. (*Id.* at pp. 808-811.)

We first note that the factual allegations as to Benson in the first amended complaint and the third amended complaint are essentially the same. Both complaints allege: on March 10, 2006, Colyer asked Chen to contact Benson on behalf of Countrywide and request that he produce an appraisal report which would inflate the value of the property beyond its market value of \$670,000; Chen contacted Benson, who agreed to falsely inflate the value of the property to \$740,000; and Benson produced a false appraisal report. Moreover, both complaints sought injunctive relief as well as monetary damages.

Though there were differences in the titling of the causes of action in the first amended complaint and the third amended complaint, the causes of action as to Benson were almost identical. The first amended complaint alleged that Benson “knew . . . that the other defendants were engaged in or planning to engage in violations of law alleged in this Amended Complaint, . . . facilitated the commission of those unlawful acts, . . . and intended to, and did encourage, facilitate, or assist in the commission of the

unlawful acts” and that he was, among other things, a “conspirator of” the other defendants. These allegations were incorporated by reference into each successive cause of action in the first amended complaint. The first amended complaint also alleged a separate cause of action for conspiracy. Thus, the causes of action for fraud, unfair business practices, and intentional infliction of emotional distress in the first amended complaint were indistinguishable from the causes of action in the third amended complaint for conspiracy to commit fraud, conspiracy to commit unfair business practices, and conspiracy to commit intentional infliction of emotional distress.

The first amended complaint also alleged breach of fiduciary duty and incorporated by reference the prior conspiracy allegations, but did not name Benson. The conspiracy to commit breach of fiduciary duty cause of action in the third amended complaint mentions Benson’s name, but it does not allege any fiduciary duty owed by Benson or how he may have breached that duty. Thus, both complaints alleged that Benson engaged in a conspiracy to commit breach of fiduciary duty by producing the false appraisal report. Similarly, the unfair business practices cause of action in the first amended complaint incorporated the prior conspiracy allegations. This cause of action alleged that various defendants engaged in fraudulent practices and deceptive advertising. These allegations were essentially the same allegations that are included in the causes of action for conspiracy to violate Business and Professions Code section 17200 (fraudulent acts or practices) and conspiracy to commit unfair business practices (untrue or misleading advertising) in the third amended complaint, which were directed at Benson only to the extent that he participated in the conspiracy by agreeing to produce false appraisal reports. The Merritts concede that the conspiracy to breach the title insurance contract was not directed at Benson.

Since the third amended complaint did not change the causes of action against Benson that were pleaded in the first amended complaint, his answer to the first amended complaint was effective to deny the allegations in the third amended complaint.

Accordingly, after concluding that Benson was not in default for failing to file an answer, the trial court properly granted Benson's motion to set aside the default and default judgment on the ground that the default judgment was void.

We also note that the trial court's ruling was proper on an alternative ground. When a defendant has answered the complaint, a plaintiff must obtain leave of the court to amend the complaint. (Code Civ. Proc., § 472; *Tingley v. Times Mirror Co.* (1907) 151 Cal. 1, 10-11.) Here, Benson filed an answer to the Merritts' original complaint, as well as answers to the first and second amended complaints. The Merritts were given leave to amend as to other defendants when the trial court sustained demurrers brought by these defendants. However, the Merritts never sought leave of court to amend its original complaint as to Benson. Since they failed to do so, Benson was never required to file an answer to the third amended complaint. Accordingly, the default and default judgment were void on this ground.²

Relying on *Gray v. Hall* (1928) 203 Cal. 306 (*Gray*), *Johnson v. E-Z Ins. Brokerage, Inc.* (2009) 175 Cal.App.4th 86 (*Johnson*), and *Lee v. An* (2008) 168 Cal.App.4th 558 (*Lee*), the Merritts argue that the trial court erred in ruling that the default judgment was "void," because it had jurisdiction over the parties and the subject matter. "The difference between a void judgment and a voidable one is that a party seeking to set aside a voidable judgment or order must act to set aside the order or judgment before the matter becomes final." [Citation.] (*Lee*, at pp. 566-567.) Thus, the Merritts reason that the only available remedy to Benson was a motion under Code of Civil Procedure section 473, subdivision (b), which must be brought within six months of

² The Merritts' argument that a comparison of Benson's statement of undisputed facts set forth in his 2011 and 2012 motions for summary judgment establishes that their third amended complaint required a different answer has no merit. In determining whether a party was required to file an answer to an amended complaint, this court reviews the complaint and the amended complaint. We do not review a party's summary judgment motion to resolve the issue.

default, and since his motion was filed more than eight months after default was entered, the trial court erred in granting the motion.

In *Gray* the defendant never brought a motion to set aside the default and default judgment or appeal from the judgment in a prior case. (*Gray, supra*, 203 Cal. at p. 309.) *Gray* held that the defendant could not collaterally attack the prior judgment. (*Id.* at pp. 313-314.) In *Johnson* and *Lee*, the defendants did not bring their motions to set aside and vacate a default and default judgment within the six-month period specified in Code of Civil Procedure section 473. (*Johnson, supra*, 175 Cal.App.4th at p. 89 [12 years]; *Lee, supra*, 168 Cal.App.4th at pp. 562-563 [three years].) Even assuming that the default judgment in the present case was voidable, rather than void, *Gray, Johnson*, and *Lee* are distinguishable from the present case.

“The provisions of section 473 of the Code of Civil Procedure, which limit the power of the court to relieve a party from his default to a period of not exceeding six months from the entry of the default, have no application ‘where a clerk exceeds the limited power conferred upon him by statute, in which event the clerk’s action is a nullity and open to attack at any time.’ [Citation.] The clerk, in entering the default in the present case, exceeded the power conferred upon him by statute, and his action in entering the default was void.” (*Miller v. Cortese* (1952) 110 Cal.App.2d 101, 105.) Similarly, here, since the clerk’s entry of default on August 19, 2011 was void because Benson had filed an adequate answer to the third amended complaint, Benson could challenge entry of default at any time. Moreover, the default judgment was entered on February 16, 2012, and Benson filed his motion to set aside and vacate the default judgment on April 24, 2012. Thus, even assuming the default judgment was voidable,

unlike in *Gray, Johnson, and Lee*, Benson's motion was timely under Code of Civil Procedure section 473.³

B. Motion for Summary Judgment

1. Procedural Issue

The Merritts contend that the trial court committed reversible error when it accepted and considered Benson's motion for summary judgment because a default judgment had been entered against him. Benson argues that the issue has been waived on appeal.

“‘A defendant against whom a default has been entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action; he cannot thereafter, until such default is set aside in a proper proceeding, file pleadings or move for a new trial or demand notice of subsequent proceedings.’ [Citation.]” (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-386.)

Here, default was entered in August 2011. The motion for summary judgment was filed on January 11, 2012. On February 13, 2012, the trial court conducted a trial setting conference at which David Merritt and Benson's counsel were present. David Merritt did not mention to either the trial court or Benson's counsel that he had filed a request for default or that he was in the process of obtaining a default judgment. After the Merritts obtained a default judgment on February 16, 2012, they filed “an ex parte application to strike April 3, 2012 summary judgment hearing of[f] calendar due to August 2011 default” on March 9, 2012. The application was denied. In their reply

³ The Merritts also contend: Benson's default was not due to their fraud or his counsel's mistake; and his default was the result of his own instructions to his counsel not to file an answer. However, since we have concluded that the trial court properly granted the motion to set aside default and default judgment because an answer was on file, we need not consider these contentions.

brief, the Merritts state: “Trial court Judge explaining that since the summary judgment was already filed and that he did not know of any rule that prohibited a party from filing such while default was entered, that he would deny their *ex parte* application.” On the same day, the Merritts filed a document entitled “Plaintiffs’ Notice to Court Regarding April 3, 2012 Summary Judgment Hearing.” The Merritts asserted that Benson had no right to file the summary judgment motion because he had not filed an answer to the third amended complaint. However, they did not refer to the entry of default and default judgment against Benson. Benson’s counsel first learned of the default during the hearing on the motion for summary judgment on April 3, 2012. There is nothing in the record indicating that the Merritts argued at this hearing that Benson could not file the summary judgment motion after his default had been entered.

Even assuming that the Merritts did not waive this issue on appeal, we find no prejudicial error. As previously discussed, the trial court properly set aside the default and default judgment prior to ruling on the motion for summary judgment. Even if the trial court had ordered Benson’s motion for summary judgment stricken prior to ruling on the default motion, Benson would have been able to refile it once the default and default judgment had been set aside. Contrary to the Merritts’ assertions, there is nothing in the record indicating that “the trial court’s determination to ‘void’ default[] was tainted by its determination to also deny [them] a trial on the merits.” Thus, the Merritts have shown no prejudice.

2. Order Granting Motion for Summary Judgment

a. Standard of Review

“Appellate review of a ruling on a summary judgment or summary adjudication motion is *de novo*.” (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210.) In performing our independent review, we apply the same three-step process as the trial court. “Because summary judgment is defined by the material allegations in the pleadings, we first look to the pleadings to identify the elements of the causes of action

for which relief is sought.” (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 159 (*Baptist*).

“We then examine the moving party’s motion, including the evidence offered in support of the motion.” (*Baptist, supra*, 143 Cal.App.4th at p. 159.) When the defendant moves for summary judgment, the defendant bears both the initial burden of production and the burden of persuasion. The “initial burden of production [requires the defendant] 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.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*)). “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Id.* at p. 851.) The burden of persuasion requires the defendant to show that there are no triable issues of material fact and that the defendant is entitled to judgment as a matter of law. (*Id.* at p. 850.)

If the moving papers make a prima facie showing that justifies a judgment in the defendant’s favor, the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 849.)

In determining whether the parties have met their respective burdens, the court must “‘consider all of the evidence’ and ‘all’ of the ‘inferences’ reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party.” (*Aguilar, supra*, 25 Cal.4th at p. 843.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Id.* at p. 850.)

b. Third Amended Complaint

Here, the third amended complaint alleged six causes of action against Benson. They were conspiracy to commit the following: fraud, breach of fiduciary duty, unfair business practices, violation of Business and Professions Code section 17200 (fraudulent practices/acts), unfair business practices (untrue or misleading advertising), and intentional infliction of emotional distress. The only allegation of misconduct by Benson in the third amended complaint was that he agreed to participate in the conspiracy with Countrywide, Chen, and Colyer by falsely appraising the property, thereby assisting the other defendants in their predatory lending practices and intentional infliction of emotional distress.

c. Benson's Evidence in Support of the Summary Judgment Motion

Benson submitted a declaration in which he stated that on or about March 3, 2006, AT Associates, LLC requested that he appraise the property. Benson had no contractual or other relationship with any of the other named defendants. After receiving the request, Benson requested and received a copy of the Merritts' residential purchase agreement. The purchase agreement was attached as an exhibit to his declaration and indicated that in February 2006, the Merritts signed a residential purchase agreement in which they agreed to pay \$739,000 for the purchase of the property. Benson then inspected the property, obtained data on comparable properties, determined which three comparable properties were most similar to the subject property, drove by these three properties and photographed them, and prepared an appraisal report. According to Benson, this process conformed to the Uniform Standards of Professional Appraisal, met the accepted standards for real estate appraisers who appraised real estate in Santa Clara County, and was an accurate appraisal of the property in March 2006. None of the other defendants influenced Benson's appraisal of the property and he did not communicate with any of the defendants about how the appraisal would be conducted or the expected value of the appraisal. Benson also stated that he operated independently and was never an agent of

any other defendant regarding the appraisal of the property. Benson never saw any of the loan documents for the Merritts' purchase of the property.

d. The Merritts' Evidence in Opposition⁴

On or about February 23, 2006, the Merritts entered into an oral agreement with Chen to purchase the property for \$719,000. Chen told the Merritts that he knew an honest appraiser who could appraise the property. After Chen gave Benson's information to Earl Taylor of AT & Associates, the Merritts authorized Taylor to hire Benson to appraise the property. The Merritts then decided that they wanted to install wood floors and asked their broker to investigate funding for an additional \$10,000 over the purchase price. The Merritts contacted Taylor on or about February 26, 2006, and he confirmed that Benson was an honest appraiser. The Merritts authorized Taylor to investigate Benson. A day or two later, Taylor contacted the Merritts and told them that Benson had promised to perform an accurate appraisal.

Between February 28 to March 5, 2006, Chen contacted David Merritt daily and told him that the Merritts' brokers were incompetent and that they would receive more assistance with Countrywide in obtaining a mortgage loan. On or about March 3, 2006, Taylor told the Merritts that he had hired Benson. After Chen gave the Merritts Colyer's number, they began talking with him. He told them that he would be able to locate a loan "which would be a prime loan that was FHA backed and interest rates that no one else

⁴ The Merritts submitted the declarations of David Merritt and Ioannis Originos. They also submitted Benson's appraisal (exhibit A), a facsimile transmission, dated March 10, 2006, from Chen to Benson (exhibit B), a letter, dated May 25, 2011, from the assessor's office in Santa Clara County (exhibit C), a copy of a Web site for Cal West Appraisal Associates (exhibit D), and an appraisal report, dated March 30, 2009, by Peter Cella (exhibit E). The trial court sustained Benson's objections to exhibits E and D as unauthenticated documents and exhibit B as inadmissible hearsay. The trial court also sustained several objections to the declarations of David Merritt and Originos as inadmissible hearsay and lack of personal knowledge. Accordingly, we include as evidence in opposition only that evidence to which there was no sustained objection.

could provide.” During their talks, the Merritts told Colyer that they wanted to install wooden floors. He responded that “if the property could be valued higher that he could secure a higher loan” On or about March 10, 2006, the Merritts received a copy of Benson’s appraisal that valued the property at \$740,000. The Merritts relied on this appraisal as an accurate valuation of the fair market value of the property. During March 2006, the Merritts were at the property every day and they never saw Benson at the property.

On or about January 29, 2009 and February 5, 2009, David Merritt contacted Benson and asked him how he determined that the value of the property was \$740,000. He also asked him to “explain how it ended up being precisely what defendant Chen requested him to value home at.” Benson promised to research the appraisal and phone him. However, Benson never called him.

In August or September 2009, the Merritts hired Peter Cella to appraise the property as of March 2006. The Merritts later gave Cella a copy of Benson’s appraisal.

On May 26, 2011, David Merritt obtained records from the Santa Clara County Assessor by subpoena. He requested property values of structures that were sold and appraised prior to his property. The documents demonstrated to David Merritt that identical properties were appraised at “below \$690,000 and averaged around \$670,000.”

Since learning about Benson’s falsification of their property value, David Merritt has been diagnosed with high blood pressure, insomnia and other medical conditions. David Merritt also propounded a discovery request to Benson in which he requested a listing of the properties for which he conducted an appraisal in order “to first determine whether he had a normal practice of falsifying appraisals, and secondly to ascertain how many of them were performed for Countrywide, Chen or other defendants so that [he] could identify this support of Countrywide Unfair Business and other practices.” Benson objected to the requests.

Exhibit C consists of documents indicating the assessed values of seven properties on Pinnacles Terrace, Sunnyvale and four properties on Montara Terrace, Sunnyvale. The properties were assessed at lower amounts than the Merritts paid for their property.

e. Legal Analysis

Here, the third amended complaint alleged liability by Benson based on his agreement to participate in a conspiracy to commit fraud, conspiracy to breach fiduciary duty, conspiracy to commit unfair business practices, and conspiracy to commit intentional infliction of emotional distress by falsely appraising the property. Benson met his initial burden by producing evidence that he did not intentionally inflate the value of the property, he did not participate in any conspiracy, and he was entitled to judgment as a matter of law. Since the Merritts' evidence failed to establish the existence of a triable issue of material fact, Benson was entitled to judgment in his favor.

The Merritts argue that Benson “partnered with Countrywide [] after agreeing to by the appraisal agent for [them] . . . [which] created a dual agency role which required disclosure and duty of care.” However, the Merritts failed to present any evidence that Benson “partnered” with Countrywide. Moreover, they failed to allege in the third amended complaint that Benson was acting in a “dual agency role.”

The Merritts next rely on Chen's responses to requests for admissions and contend that the trial court erred by refusing their request for a continuance.

The trial court ruled: “Plaintiffs' request for continuance is DENIED because Plaintiffs fail to show that evidence material to Benson's motion may exist that cannot be presented at this time. [¶] In a supplemental opposition brief filed on May 14, 2012, only three days before the hearing on this motion, Plaintiffs submitted for the first time a copy of defendant Johnny Chen's ('Chen') Response to Plaintiff's Request For Admissions ('Response to RFAs') which was drafted in July 2011. Chen is an alleged co-conspirator of Benson who purportedly solicited Benson to prepare an inflated appraisal of Plaintiffs' home. In the Response to RFAs, Chen admits that in March 2006,

he faxed a set of MLS listings to Benson and Plaintiff's real estate broker. Plaintiffs claim that Chen's fax was comprised of the same set of MLS listings attached as Exhibit B to the declaration of David Merritt in opposition to Benson's motion for summary judgment. Plaintiffs also point out that three of the MLS listings included in Exhibit B were used by Benson in preparing his appraisal. Because the Response to RFAs was available to Plaintiffs when they submitted their original opposition brief, but was not relied upon by them or cited in their separate statement, the Court exercises its discretion to refuse to consider the document. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316; see also Cal. Rules of Court, rule 3.1300(d) [stating that a court has discretion to refuse to consider late filed papers]; . . . *Iverson v. Superior Court* (1985) 167 Cal.App.3d 544, 549 [implying that a court has discretion to refuse to consider late filed documents where the party filing the documents acted unreasonably in failing to file the documents sooner].) To decide otherwise would unfairly prejudice Benson, who was not accorded a sufficient opportunity to consider and respond to the Responses to RFAs."

In a footnote in its tentative ruling, the trial court stated: "Because the supplemental opposition was filed late, Benson did not have an opportunity to object to the Response to RFAs prior to the hearing on his motion, or explain whether the document should affect the outcome of his motion. Were the Court to reach these issues, it would likely find that the document is inadmissible, and that Chen's admissions do not create a triable issue of material fact as to whether there was a conspiracy between Benson and Chen because (1) there is no indication that Benson solicited the MLS listings faxed to him by Chen, and (2) the fact that the listings were also faxed to Plaintiffs' real estate broker suggests that there was no covert agreement between Chen and Benson to attempt to intentionally overvalue Plaintiffs' home."

The Merritts contend that the trial court abused its discretion in denying their request for a continuance. They first point out that Chen's communication with Benson

was first submitted in July 7, 2011, in opposition to Benson's first motion for summary judgment, and thus there was no prejudice to Benson. The Merritts are mistaken. Exhibit B in their opposition to this first motion was identical to the exhibit B in their opposition to the second motion for summary judgment. It consists of a facsimile transmission allegedly from Chen to Benson and includes MLS listings. The trial court properly found that the evidence was inadmissible hearsay. The Merritts offered no explanation for why they had failed to obtain a declaration from Chen. In any event, as the trial court found, the proffered evidence did not establish a triable issue of material fact as to whether Benson falsely appraised the value of the property at the request of any other defendant.

The Merritts next argue that Chen's responses to their requests for admissions establish that Chen "instructed Benson what property value to set and transmitted the exact comparable listings that Benson used to value the property." There is no merit to this argument. The responses state that Chen faxed Benson the MLS listings on March 10, 2006,. There is nothing in the responses that indicate Chen instructed Benson on what value to assign to the property. Moreover, Benson's supplemental declaration stated that his file demonstrated that he had already conducted his own MLS search on March 8, 2006. Thus, neither the facsimile transmission nor Chen's responses demonstrated or created an inference of a conspiracy between Benson and the other defendants to perform a false appraisal of the property. Further, Chen stated in his response: "Plaintiffs David and Salma Merritt have removed the 'appraisal' contingency prior to my faxing the listing to Benson and Taylor." Thus, the late-submitted responses to requests for admission indicate that the Merritts could not have relied on Benson's appraisal.

The Merritts also contend that the trial court improperly weighed the disputed evidence. Relying on *Atkins, Kroll & Co. v. Broadway Lumber Co.* (1963) 222 Cal.App.2d 646, they assert that "the complaint itself should have been viewed as authenticated evidence." However, *Atkins* is inapplicable since it did not involve review

of an order granting a motion for summary judgment. (*Id.* at p. 647.) There was no error by trial court.

III. Disposition

The judgment is affirmed. Costs are awarded to Benson.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Grover, J.