

CERTIFIED FOR PARTIAL PUBLICATION*

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

SUSAN WANGER,

Plaintiff and Appellant,

v.

EMC MORTGAGE CORPORATION,

Defendant and Respondent.

F037422

(Super. Ct. No. 604565-2)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Stephen J. Kane and Edward Sarkisian, Jr., Judges.

John L. Flowers for Plaintiff and Appellant.

Rosenthal, Withem & Zeff, Michael L. Withem and Matthew D. Reinstein for Defendant and Respondent.

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Appellant Susan Wanger appeals from the grant of summary judgment in favor of the mortgage company that foreclosed upon real estate that secured her loan. Wanger contends triable issues of material fact exist concerning her claims for breach of contract, negligence, violation of statutory duties, and interference with prospective economic advantage. We agree and reverse judgment.

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I., II., III., V., VI., and VII. of DISCUSSION.

PROCEDURAL BACKGROUND

Wanger filed a complaint on January 28, 1998, to set aside the trustee's sale of a single family residential real estate located on West Alluvial Avenue in Fresno, California (the Property). After a series of demurrers, on November 22, 1999, Wanger filed her fifth amended complaint against respondent EMC Mortgage Corporation (EMC) and others. The fifth amended complaint alleges claims for breach of contract, negligence, violation of statutory duties, and interference with prospective economic advantage.

On August 21, 2000, EMC filed a motion for summary judgment or in the alternative summary adjudication, a separate statement of undisputed facts, and supporting declarations. On September 8, 2000, Wanger filed an opposition to the motion for summary judgment, a response to EMC's separate statement, and supporting declarations. On September 15, 2000, EMC filed evidentiary objections to the declaration of Wanger and to exhibits A through Q attached to the declaration of her attorney.

The court issued a written tentative ruling granting the motion for summary judgment. Wanger did not request oral argument. On September 21, 2000, the superior court adopted its tentative ruling as the order of the court and sustained EMC's evidentiary objections to five documents attached as exhibits D, G, K, M and Q to the declaration of Wanger's attorney. Wanger filed a timely notice of appeal.

FACTUAL BACKGROUND

In 1991, Wanger obtained a loan from First California Mortgage Company (First California)¹ and signed a promissory note and a deed of trust on the Property. In October 1993, Wanger and First California discussed a loan modification reducing the interest

¹For purposes of this opinion, we refer to First California Mortgage Company and Mortgage Service America Co., a company with which it appears to have merged, as First California.

rate and the monthly payments. A modification document was sent to Wanger, which she signed and returned to First California. Wanger thought that the modification had become effective, but uncertainty arose as to whether the modification was effective. Part of this uncertainty appears to have been caused when First California was unable to locate the loan file.

First California eventually took the position that the modification was not effective. Wanger had not been making monthly payments under the loan and, based on the original loan terms, First California claimed \$26,616.96 was owed. Wanger paid \$24,999.35 by cashier check on February 3, 1995, but continued to dispute the amount owed and claimed violations of the Real Estate Settlement Procedures Act of 1974 (RESPA), as amended, 12 United States Code section 2601 et seq. Also, in February 1995, Wanger leased the Property to a husband and wife and, presumably, she had moved from the Property before renting it.

In April 1995, Wanger asserts she reached an agreement with First California to resolve her claims. Under the agreement, First California was to credit the sum of \$7,352.75 against her loan and Wanger was to commence regular monthly payments of \$1,470.55 on June 1, 1995. From July through November of 1995, Wanger claims she sent her monthly mortgage payments to First California.

In the meantime, First California sold Wanger's loan to EMC. The transfer was effective on April 17, 1995. Both First California and EMC sent notice of the transfer to Wanger at the Property address. However, Wanger had moved to Washington and did not receive these notices. In an April 14, 1995, letter, Wanger had notified First California of her new mailing address in Seattle.

In September 1995, Wanger deeded the Property to her daughter, Lisa Marie Keller. In her deposition testimony, Wanger testified Keller was the executor of her estate and she transferred title to the Property to Keller for estate planning purposes.

In December 1995, EMC caused the law firm acting as trustee under the deed of trust to file a notice of default. Wanger states she first learned of EMC and its rights as

assignee of the note and deed of trust on December 9, 1995, when she received a notice of trustee's sale from the trustee. As a result of Wanger's communications with the trustee, this notice of trustee's sale was rescinded. Also in December, Wanger obtained the eviction of the tenants who had stopped paying rent, and she listed the Property for sale with a real estate broker.

During 1996 and 1997, Wanger and EMC were not able to settle their dispute. EMC resumed nonjudicial foreclosure proceedings. A notice of default was recorded on September 16, 1997. EMC purchased the Property with a credit bid at the January 13, 1998, trustee's sale. Two weeks later, Wanger began her lawsuit against EMC and the trustee. The law firm that acted as trustee under the deed of trust settled with Wanger in June 1999 and is no longer involved in this lawsuit.

DISCUSSION

I. **Wanger Did Not Waive the Right to Appeal***

EMC contends that "Wanger waived the right to appeal the Summary Judgment when she accepted the trial court's tentative ruling without oral argument." We reject this argument because, among other things, it would not advance the economical use of judicial resources. As to the legal issue, we will not create a new bright line rule that waiver of the right to appeal must be implied when a party does not pursue oral argument after a trial court has issued its tentative ruling. As to the factual issues of intent and authorization raised under the general principles of law governing waiver of the right to appeal, there is an insufficient basis for implying that counsel for Wanger intended to relinquish that right and Wanger authorized its relinquishment. (Cf. *Linsk v. Linsk* (1969) 70 Cal.2d 272, 278; 1 Witkin, Cal. Procedure (4th ed. 1997) Attorneys, § 283, pp. 351-352 [an *express* waiver by counsel made without consideration or benefit to appellant must be authorized by appellant].)

*See footnote, *ante*, page 1.

II. Standard of Review for Summary Judgment*

The standards of review applicable to a motion for summary judgment are well known and we do not undertake to reiterate all of the rules here. (See Code Civ. Proc., § 437c (hereafter section 437c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 (*Aguilar*); *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591.) Nevertheless, we set forth some of the general principles governing motions for summary judgment or summary adjudication as background for the more specific principles that are significant in this case.

A. General Principles

We independently review whether a triable issue of material fact exists and whether the moving party is entitled to summary judgment as a matter of law. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) Notwithstanding the rule of independent appellate review of the existence of a triable issue of material fact, an abuse of discretion standard is applied to the superior court's rulings on (1) evidentiary objections (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169) and (2) matters committed to its discretion by the express language of section 437c. (See *id.*, subds. (b), (e).)

A *triable* issue of fact exists when the evidence reasonably permits the trier of fact, under the applicable standard of proof, to find the purportedly contested fact in favor of the party opposing the motion. (*Aguilar, supra*, 25 Cal.4th at p. 850.)

A defendant moving for summary judgment bears the burden of persuasion throughout the legal analysis of the motion and bears the initial burden of producing evidence “to make a prima facie showing of the nonexistence of any triable issue of material fact” (*Aguilar, supra*, 25 Cal.4th at p. 850.) If the moving party carries the

*See footnote, *ante*, page 1.

burden of production, then it shifts to the opposing party to make a prima facie showing of the existence of a triable issue of fact. (*Ibid.*)

Before analyzing either the showing made by the moving party (step two) or the showing made the opposing party (step three), the first step for a court analyzing a motion for summary judgment is to “identify the issues framed by the pleadings” because the motion is directed to the opponent’s allegations and “showing there is no factual basis for relief on any theory reasonably contemplated by the opponent’s pleading.” (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064; see *Brantley v. Pisaro, supra*, 42 Cal.App.4th at p. 1602 [describing the three-step analysis].)

B. Specific Principles

This appeal raises questions that require the application of specific principles regarding the identification of issues framed by the pleadings, the identification of undisputed facts, and the review of evidence and the inferences drawn from that evidence.

1. Issue Identification

The moving party’s contribution to the first step of identifying the issues framed by the pleadings is set forth in the documents supporting its motion, which include: “(1) Notice of motion by [*moving party*] for summary judgment or summary adjudication or both; [¶] (2) Separate statement of undisputed material facts in support of [*moving party’s*] motion for summary judgment or summary adjudication or both; [and] [¶] (3) Memorandum of points and authorities in support of [*moving party’s*] motion for summary judgment or summary adjudication or both” (Cal. Rules of Court, rule 342(c).)²

When a moving party seeks *summary adjudication*, “whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative

²All further rule references are to rule 342 of California Rules of Court.

defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts.” (Rule 342(b).) Similarly, Rule 342(d) provides, “The Separate Statement of Undisputed Material Facts in support of a motion must separately identify each cause of action, claim, issue of duty or affirmative defense, and each supporting material fact claimed to be without dispute with respect to the cause of action, claim, issue of duty, or affirmative defense.”

When a case, like this one, is poorly pled, the first step of identifying the issues framed by the pleadings requires more effort and has increased importance. In this case, the fifth amended complaint may be regarded as poorly pled because it contains four sets of paragraphs grouped together that are labeled as causes of action, but those paragraph groups contain more than one theory of liability.³ For instance, the third count for breach of statutory duties refers to violations of the provisions of RESPA and violations of “the provisions of Civil Code Sections 2924(b), (f) and (h) [*sic*].” Thus, what Wanger refers to as her third cause of action actually contains multiple causes of action, i.e., theories of liability.

Both EMC’s separate statement and notice of motion state EMC is seeking summary adjudication of the following issue:

“ISSUE – Each of [Wanger’s] Causes of Action must fail as a matter of law because there is no evidence to support her claims that EMC ... either breached a written agreement with her or violated an applicable statute in its handling of her loan, through and beyond foreclosure.”

The catchall manner in which EMC chose to frame the issues to be summarily adjudicated creates two problems. First, as argued by Wanger, EMC failed to comply

³For purposes of this opinion, (1) each of the four sets of paragraphs grouped together in the fifth amended complaint and labeled by Wanger as a “cause of action” shall be referred to as a “count” (see 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 242, p. 657) and (2) the term “cause of action,” consistent with its meaning in section 437c, subdivision (f), shall mean a separate theory of liability. (See *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1853.)

with the requirements of Rule 342(d). Second, it is difficult to determine if EMC has addressed all of the theories of liability reasonably contemplated by the fifth amended complaint.

a. Compliance with Rule 342

Wanger argues EMC violated Rule 342(d) by not *separately* identifying each cause of action in its separate statement and then separately identifying each material fact without dispute *with respect to the cause of action*. EMC's single, catchall statement of the issues does not comply with Rule 342(d) as it applies to motions for summary adjudication. A single, catchall statement covering four counts containing several causes of action wrongly creates the impression that each of the facts following the statement of the issue is material to each cause of action and, therefore, a dispute as to any one of those facts precludes summary adjudication as to each cause of action. One consequence of the single, catchall statement of the issues is that the review of the motion by the superior court and this court is more burdensome because the courts must identify (1) the specific theories of liability challenged by the motion and (2) the facts that are material to each of the challenged theories of liability.

Nevertheless, Wanger had adequate notice of the ground on which EMC sought to eliminate *some* of Wanger's theories of liability and, thus, the superior court did not abuse its discretion by failing to deny EMC's motion as procedurally defective. (See *Frazer v. Seely* (2002) 95 Cal.App.4th 627, 636 [moving party's failure to comply with Rule 342 is, in court's discretion, proper grounds to deny motion].)

However, the preferred course is to enforce the requirement that a moving party must identify the undisputed facts that relate to a particular cause of action or other issue to be summarily adjudicated by setting forth the issue and immediately following it with the facts material to that issue in one column and the supporting evidence in another column. (See Rule 342(h).) After the statement of the first issue to be adjudicated and the material facts and supporting evidence, the second issue to be adjudicated should be set forth, followed by the material facts and supporting evidence. In this case, it would

not have been erroneous to summarily deny the motion without prejudice to EMC refiling it with a more specific,⁴ properly organized separate statement that separately stated the issues to be summarily adjudicated and identified which facts were material to which causes of action, i.e., theories of liability.

b. Identification of theories of liability pled

The identification of the issue to be adjudicated is important because a motion for summary adjudication may be granted only if it completely disposed of “a cause of action, an affirmative defense, a claim for damages, or an issue of duty.” (Code Civ. Proc., § 437c, subd. (f)(1).) In this case, some or all of the counts in the fifth amended complaint contain more than one cause of action for purposes of summary adjudication.

In such a situation, a defendant may choose to move for summary adjudication of each cause of action even if it is combined with other causes of action in a single count in the complaint. (6 Witkin, Cal. Procedure, *supra*, Proceedings Without Trial, § 242, p. 657.) Conversely, a defendant, like EMC, may choose to challenge an entire count containing more than one cause of action, rather than challenging each cause of action separately. The latter choice has its risks, especially when the moving party’s separate statement fails to comply with Rule 342. One risk is that a moving party may fail to identify a theory of liability reasonably contemplated by the opponent’s pleadings and that theory may survive the motion for summary adjudication and defeat the motion for summary judgment. In addition, a dispute over a fact material to one cause of action, but not material to other causes of action in the same count, will save the entire count. Once we have determined that a fact material to one theory of liability in a count is in dispute, we will end our analysis as to the entire count because of the broad way in which EMC framed the issue to be adjudicated. Concerns for procedural due process preclude

⁴For illustrative purposes, a more specific statement of an issue to be summarily adjudicated would have been: “ISSUE No. [] — The cause of action for violation of RESPA fails because EMC complied with the provisions requiring notice of a servicing transfer.” (See Rule 342(h).)

consideration of whether other causes of action pled in the count could have been summarily adjudicated on the record before us. In particular, the party opposing the request was not put on notice of a narrower request. (See 3 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2002) ¶¶ 10:88-10:89, p. 10-31 (rev. #1, 2002) [the rationale for not deciding more narrow issues is that the opposing party may have limited the triable issues of fact it raised to defeat the motion without intending to concede other issues].)

The application of these principles to the counts pled in this case will be addressed in the parts of the Discussion dealing with particular counts.

2. Identification of Undisputed Material Facts

Section 437c, subdivision (b) requires the parties to identify all the material facts upon which they rely. This requirement is stated with more particularity in Rule 342(d) which provides: “The Separate Statement of Undisputed Material Facts in support of a motion must separately identify ... each supporting material fact claimed to be without dispute with respect to the cause of action, claim, issue of duty, or affirmative defense.” Consequently, the parties must include in their respective separate statements all the facts upon which the motion or the opposition is founded; the superior court is not required to search for the presence of a relevant fact elsewhere in the record.

Whether a superior court is subject to an absolute prohibition on consideration of facts and evidence not referenced in the separate statements is an issue that we do not reach in this case because the decision of the superior court did not rely on facts or evidence not referenced in the separate statements. A conflict over this question exists between the Second District, which has adopted the “Golden Rule of Summary Adjudication” prohibiting consideration of a fact not set forth in the separate statements (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337; see *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182, 198) and the Fourth District, which disagrees with this rule. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 311.)

In the present case, EMC's separate statement sets forth 17 separately numbered facts that it contended were undisputed. Wanger conceded six of these; the matters disputed by Wanger will be addressed in the part of the Discussion to which the facts are relevant.

3. *Evidence and Inferences*

The connection between a material fact and the evidence that establishes whether or not it is disputed is made by the parties in their separate statements. Each of the material facts stated in the moving party's separate statement "shall be followed by a reference to the supporting evidence." (Code Civ. Proc., § 437c, subd. (b).) Similarly, each material fact an opposing party contends is disputed shall be included in the opposing party's separate statement and "shall be followed by a reference to the supporting evidence." (*Ibid.*) The evidence supporting each party's position concerning a particular material fact must be set forth in the second column of its separate statement along with a citation, including reference to the exhibit, title, page and line numbers, to where the evidence can be found. (Rule 342(d), (f).)

A material fact can be established or controverted by direct evidence or by an inference reasonably drawn from the evidence. Therefore, in analyzing whether or not the material facts are in dispute, we must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence in the light most favorable to the opposing party. (*Aguilar, supra*, 25 Cal.4th at p. 843.)

An issue of material fact may not be resolved based on inferences, if contradicted by other inferences or evidence. (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 856.) "[T]he court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact," but must determine the question of law of "what any evidence or inference *could show or imply to a reasonable trier of fact.*" (*Aguilar*, at p. 856.) Where the evidence and inferences would allow a reasonable trier of fact to find the underlying fact in favor of a plaintiff in

accordance with the applicable standard of proof, then a defendant's motion for summary judgment must be denied. (*Id.* at p. 850.)

A reviewing court must consider all the evidence properly identified in the papers submitted, "except that to which objections have been made and sustained by the court" (Code Civ. Proc., § 437c, subd. (c); *Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 561, fn. 2.) Where a plaintiff does not challenge the superior court's ruling sustaining a moving defendant's objections to evidence offered in opposition to the summary judgment motion, "any issues concerning the correctness of the trial court's evidentiary rulings have been waived. [Citations.] We therefore consider all such evidence to have been 'properly excluded.' [Citation.]" (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015.)

In this case, the trial court sustained EMC's objections to certain documents attached as exhibits D, G, K, M and Q to the declaration of counsel for Wanger. Wanger has challenged those rulings in her appeal.

III. Breach of Contract*

EMC contends Wanger's breach of contract claim must fail because (1) the purported 1993 loan modification never became a binding and enforceable contract or, if it did, Wanger breached the modification document by failing to pay property taxes; (2) the reinstatement provisions in the deed of trust required Wanger to pay the entire loan arrearage, which she did not do; and (3) Wanger's failure to perform her obligations to pay principal and interest and to pay property taxes and insurance precludes her claim of breach.

A. 1993 Loan Modification Agreement

1. Undisputed Facts from EMC's Separate Statement

EMC's separate statement establishes as undisputed the facts set forth in the following two paragraphs.

*See footnote, *ante*, page 1.

Wanger claims to have signed a two-page loan modification agreement in 1993, but admits that she never saw any exhibits to it. Wanger claims the 1993 loan modification agreement reduced her monthly principal and interest payment, which had been \$1,470.55, by approximately \$300. In a April 14, 1995, letter to First California, Wanger stated she was confirming an agreement to settle damages on her loan and “[r]egular loan payments will commence on June 1, 1995 in the amount of \$1470.55.” Wanger admits (1) she never received any letters written by First California confirming that her loan was actually modified in 1993, and (2) she did not have the purported 1993 loan modification document notarized or recorded. For loans guaranteed by the Federal National Mortgage Association (Fannie Mae), a Fannie Mae approval may be a prerequisite for a modification, but it in no way obligates either the lender or the borrower to actually enter into the loan agreement.

Wanger made no property tax payments directly to the taxing authority after 1992.

2. EMC’s Inferences and Legal Contentions

Based on the foregoing facts, EMC infers (1) First California did not sign the 1993 loan modification agreement; (2) the parties did not intend the 1993 modification to be a binding contract unless it was signed on behalf of First California, notarized, and recorded; and (3) assuming the 1993 modification was binding, Wanger breached its terms by not paying property taxes as required by paragraph 4 of the loan modification agreement.

EMC contends Wanger’s contract claim based on the 1993 modification must fail because there is no signed writing that satisfies the statute of frauds contained in Civil Code section 1624 and because Wanger is unable to establish an essential element of her contract claim, i.e., that she performed her obligations under the contract. (See BAJI No. 10.85.)

3. Wanger’s Inferences and Legal Contentions

In response, Wanger advocates the competing inferences that (1) First California signed and then lost the fully executed 1993 modification or, alternatively, the 1993

modification became binding when she signed it and (2) she was not required to pay the Property taxes directly to the taxing authority. Wanger infers First California signed the 1993 modification based on the following evidence.

Wanger testified in deposition that she learned First California signed the document by talking with Donna Mazzone of First California. Wanger's declaration says that she was told in a telephone conversation with First California that the modification of her loan was effective as of November 1993. In addition, First California prepared the 1993 modification by filling in blanks on a form agreement and sending the modification to Wanger. It also sent her a copy of Fannie Mae's October 7, 1993, letter approving the modification. From these statements and acts by First California, Wanger infers First California signed the modification or, alternatively, intended to be bound by its written offer once Wanger expressed her acceptance by signing it. Wanger argues these inferences are reasonable because, among other things, First California would not have forwarded her the Fannie Mae approval letter if it intended to reject the very terms it had considered and placed in the form used for the 1993 modification.

As to the payment of property taxes, Wanger claims the payment was to be made by the lender from an impound account established from part of the monthly payment and, therefore, she was not contractually obliged to pay property taxes directly to the taxing authority.

4. *Analysis of Inferences and Legal Contentions*

a. *Signature on the 1993 modification*

The issue of whether or not First California signed the 1993 modification is a question of fact. Because of the conflicting inferences that may be drawn from the evidence, the issue is triable. (Code Civ. Proc., § 437c, subd. (c).) The inability to locate a signed copy of the 1993 modification does not preclude a claim that it was breached. In *Robinson v. Thornton* (1969) 271 Cal.App.2d 605, the plaintiff was able to prove the existence and terms of an enforceable contract to repurchase land using an unsigned photocopy of the document and other parol evidence.

In addition, EMC has not established the 1993 modification is subject to the statute of frauds set forth in Civil Code section 1624. EMC does not identify, nor is it apparent, which of that statute's seven provisions may apply. First, subdivision (a)(1) of Civil Code section 1624⁵ does not apply because the 1993 modification might have been performed in a year. (See *Lacy v. Bennett* (1962) 207 Cal.App.2d 796, 800-801 [performance within a year of oral agreement for "a long-term loan" was possible though not probable; statute of frauds in Civ. Code, § 1624 did not apply].) Second, Civil Code section 1624, subdivision (a)(6)⁶ does not apply because Wanger is not a real property purchaser who *assumed* indebtedness secured by a deed of trust. Third, Civil Code section 1624, subdivision (a)(7) does not apply to contracts to extend credit secured only by a single-family residential property.

If, on remand, EMC does not show that a statute of frauds requires the 1993 modification to be signed on behalf of First California, then Wanger may be able to establish the 1993 modification is a binding contract without a signature. "Whether it was the parties' mutual intention that their oral agreement to the terms contained in a proposed written agreement should be binding immediately [or upon offeree's signature] is to be determined from the surrounding facts and circumstances of a particular case and is a question of fact for the trial court. (*Schwartz v. Shapiro* (1964) 229 Cal.App.2d 238, 248 ...; *Columbia Pictures Corp. v. DeToth* [(1948)] 87 Cal.App.2d [620,] 629.) Evidence as to the parties' understanding and intent in taking what actions they did take is admissible to ascertain when or whether a binding agreement was ever reached." (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358.)

⁵Civil Code section 1624, subdivision (a)(1) requires a writing subscribed by the party to be charged when the agreement "by its terms is not to be performed within a year from the making thereof."

⁶Civil Code section 1624, subdivision (a)(6) requires a writing subscribed by the party to be charged when a purchaser of real property agrees "to pay an indebtedness secured by a mortgage or deed of trust upon the property purchased"

Furthermore, the terms of the 1993 modification, as well as the terms of the note and deed of trust, do not prevent Wanger from proving the modification was binding without a signature on behalf of First California because those documents do not explicitly state that the proposed modification “would become operative *only* when signed by the parties” (*Banner Entertainment, Inc. v. Superior Court, supra*, 62 Cal.App.4th at p. 358) or, at least, signed by the party sought to be bound.

b. Payment of property taxes

EMC’s separate statement omits a material fact essential to its alternative position that Wanger failed to perform her obligation under the 1993 modification to pay property taxes. Specifically, EMC made no statement that (1) the 1993 modification imposed such an obligation on Wanger or (2) the parties otherwise agreed that Wanger would pay property taxes directly to the taxing authority.

Paragraph 4 of the 1993 modification simply states that “Borrower also will comply with all other covenants, agreements, and requirements of the [deed of trust], including without limitation, the Borrower’s covenants and agreements to make all payments of taxes, insurance premiums” This provision does not create any new obligations but incorporates the covenants and agreements contained in the deed of trust. Under paragraph 4 of the *deed of trust*, the borrower shall pay all taxes attributable to the Property and “Borrower shall pay these obligations in the manner provided in paragraph 2, or if not paid in that manner, Borrower shall pay them on time directly to the person owed payment.” Paragraph 2 of the deed of trust sets forth the obligations of the borrower and the lender when funds for taxes, rent, and insurance premiums are included in the monthly payments made by the borrower to the lender. Thus, paragraph 4 of the deed of trust does not definitively state how payments of property taxes will be made. It only identifies two alternatives: (1) inclusion of a portion of the taxes in each monthly payment made by the borrower to the lender and the lender paying the taxing authority

from an escrow account where the funds accumulated⁷ or (2) payment by the borrower directly to the taxing authority.

If EMC's separate statement had quoted or accurately paraphrased the provisions of the documents concerning the payment of taxes, it would have been clear to EMC that a court reading the separate statement could not possibly determine which alternative the parties chose to implement during a particular period of time. Upon recognizing this shortcoming, EMC could either have presented indisputable evidence as to which alternative was in effect for a particular time frame or recognized the existence of a triable issue of fact and not pursued its motion on those grounds. If the method for payment was put into effect by an oral agreement of the parties, then Wanger's version of that agreement differs from the version implicit in EMC's position and presents a factual dispute. Further, if EMC had assumed for purposes of summary judgment that it was to pay the Property taxes from amounts included in Wanger's monthly payment or otherwise tendered to the loan servicer, it could have addressed whether payments from Wanger, including the \$24,999.35 payment made in February 1995 and the \$7,352.75 credit referenced in the April 14, 1995, letter written by Wanger, had any impact on the amount owed to it for property taxes. Once this impact, if any, was established, then EMC could attempt to establish that Wanger did not make an appropriate tender.

In summary, EMC has failed to carry its burden of production with respect to its theory concerning the payment of property taxes and, thus, is not entitled to summary adjudication of Wanger's contract claim arising from the purported breach of the 1993 modification agreement.

⁷In the event the parties agreed to implement this alternative, the claim that Wanger did not pay the property taxes to the loan servicer is the functional equivalent of EMC's theory that she failed to perform her contractual obligation to make monthly payments. That theory is addressed in part III.B, *post*.

B. Arrearages and Tender

In paragraph 18 of the fifth amended complaint, Wanger alleges she “timely offered to tender to [EMC] all amounts due and owing so that the claimed default could be cured and [she] be reinstated to all her former rights and privileges under the 1991 Promissory Note and 1991 Trust Deed as modified. [Wanger] was, at all relevant times, ready, willing and able to tender those sums, if any.”

1. Facts from EMC’s Separate Statement

EMC’s separate statement asserts that (1) by September 4, 1997, Wanger’s total loan arrearage had grown to more than \$63,000, (2) Wanger never tendered full payment of the total loan arrearage to EMC, and (3) Wanger never tendered to EMC the \$20,000 installment contemplated in a draft loan modification agreement and release of claims.

2. Disputes Raised by Wanger

Wanger disputes each of these purported facts. Because of the factual dispute over whether the 1993 modification became effective, there is a factual dispute over whether or not the loan arrearage had grown to more than \$63,000. The undisputed facts show that Wanger never tendered \$63,000 to EMC, but because of the dispute over the amount owed, the failure to tender \$63,000 does not preclude the breach of contract claim.

As to the \$20,000 payment, Wanger contends she did tender that amount but was not willing to accept the provisions contained in the draft loan modification agreement releasing the trustee. Wanger also contends EMC has failed to show the lack of a tender, because the declaration of Annette Andersen does not establish how she, an employee located in Texas, would have personal knowledge of Wanger’s dealings with the trustee so that she could competently testify what Wanger did and did not do.

We conclude (1) a factual dispute exists over whether the amount owed was at least \$63,000 and (2) Andersen’s declaration is insufficient to establish that Wanger did not tender a lesser amount. Consequently, EMC’s separate statement does not establish

sufficient undisputed facts to eliminate Wanger's breach of contract claim on the grounds that Wanger failed to make a tender.

In summary, the breach of contract cause or causes of action set forth in the "First Cause of Action" of the fifth amended complaint survives the motion for summary adjudication because of issues of fact concerning the 1993 modification. EMC's notice of motion and separate statement are too general to permit summary adjudication of the more narrow question of whether, assuming the 1993 modification was not effective, Wanger's failure to perform under the original note and the deed of trust preclude her breach of contract claim. (See part II.B.1., *ante*.)

IV. Violation of the Notice of Transfer Requirements of RESPA

A. Statutory and Regulatory Background

RESPA⁸ originally was enacted to (1) produce more effective advance disclosure of settlement costs to home buyers and sellers; (2) eliminate kickbacks and referral fees that tended to increase the cost of real estate settlement services; (3) reduce the sums homeowners were required by lenders to place in escrow accounts to ensure payment of real estate taxes and insurance; and (4) reform and modernize local recordkeeping of land title information. (§ 2601(b)(1)-(4); Annot., Construction and Application of Real Estate Settlement Procedures Act of 1974 (1997) 142 A.L.R.Fed. 511.) Regulation X (24 C.F.R. § 3500.1 et seq. (2002)) was promulgated by the Secretary of the United States Department of Housing and Urban Development (HUD) as the implementing regulation for RESPA.

In 1989, "the United States General Accounting Office ... conducted a major study of mortgage loan servicing practices ... and uncovered a substantial number of consumer complaints on abusive lender practices. These complaints involved such wide-ranging concerns as mistakes in calculating escrow account payments, unresponsiveness

⁸All further undesignated statutory references are to title 12 of the United States Code unless otherwise indicated.

to inquiries, failure to make timely property tax and hazard insurance premium payments, and failure to provide adequate notice of a mortgage loan servicing transfer. The complaints also pointed out that these errors can potentially result in the imposition of late payment charges and payments to the wrong parties.” (Lee & Mancuso, *Housing Finance: Major Developments in 1989* (1990) 45 Bus. Law. 1863, 1870-1871, fn. omitted.)

As a result, section 941 of the voluminous Cranston-Gonzalez National Affordable Housing Act of 1990 (Pub.L. No. 101-625 (Nov. 28, 1990) 104 Stat. 4079, 4405) amended RESPA by adding a new section 2605 requiring the servicer⁹ of certain real estate loans¹⁰ to (1) notify the borrower when the loan is transferred to another servicer and (2) respond to written inquiries¹¹ from the borrower. (Maurer, *Using RESPA to Remedy Erroneous ARM Adjustments* (1995) 49 Consumer Fin. L.Q. Rep. 115.)

The notification provision in section 2605(b)(1) states “[e]ach servicer of any federally related mortgage loan *shall notify* the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.” (Italics added.) Regulation X provides that “each transferor servicer and transferee servicer of any mortgage servicing loan *shall deliver* to the borrower a written Notice of Transfer, containing” the required information about the servicer and the transfer. (24 C.F.R. § 3500.21(d)(1)(i) (2002), italics added.)

In this case, the specific issue presented is whether the notice of transfer requirements contained in RESPA and Regulation X (§ 2605; 24 C.F.R. § 3500.21 (2002)) were violated when EMC mailed the notice of transfer to the address shown on

⁹“Servicer” is defined as the person responsible for servicing the loan and may include the person who made or holds the loan if that person also services the loan. (§ 2605(i)(2).)

¹⁰RESPA covers “federally related mortgage loans,” a very broad concept defined in section 2602(1).

¹¹A servicer’s duty to respond is triggered by receipt of a “qualified written request,” a term defined in section 2605(e)(1)(B).

the note and the deed of trust. The briefs filed by the parties did not cite any published case, regulation or treatise construing section 2605(b)(1) to determine what is adequate delivery of a notice of servicing transfer. Pursuant to Government Code section 68081, we requested supplemental letter briefs from the parties addressing whether the language of RESPA and Regulation X governing notice of servicing transfers requires “(a) actual receipt by the borrower, (b) delivery based on the servicer’s constructive knowledge of borrower’s address, (c) delivery based on the servicer’s actual knowledge of borrower’s address or (d) some other standard.” After receipt of the supplemental letter briefs, it still appears we are faced with an issue of first impression.¹²

B. Facts

1. Undisputed Facts from EMC’s Separate Statement

On March 22, 1995, First California mailed a letter addressed to Wanger at the Property address advising her that the servicing of her loan would be transferred to EMC. Effective April 17, 1995, EMC acquired Wanger’s loan from First California and began servicing the loan. On May 2, 1995, EMC mailed a letter to Wanger at the Property address stating that the servicing of the loan had been transferred to EMC.

EMC’s separate statement refers to a letter dated April 14, 1995, that Wanger sent to First California. In the letter, Wanger confirmed her purported agreement with Bill Berrong of First California to settle her damages claim and stated she would commence regular loan payments on June 1, 1995, in the amount of \$1,470.55. The body of the letter also contains Wanger’s new mailing address in Seattle, Washington.

The promissory note and the deed of trust executed by Wanger on December 24, 1991, are included in the exhibits referenced as supporting evidence in EMC’s separate statement. Paragraph 7 of the December 24, 1991, promissory note provides:

¹²Our letter requesting supplemental briefs suggested counsel might find it helpful to discuss the legal questions with RESPA attorneys at the Office of General Counsel of HUD. This suggestion did not lead to the identification of controlling legal authority.

“Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

“Any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given notice of that different address.”

Similarly, paragraph 14 of the deed of trust provides:

“Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender’s address stated herein or any other address Lender designates by notice to Borrower.”

2. *Undisputed Facts From Wanger’s Separate Statement*

Wanger did not receive the notice of transfer letter from First California or the notice of transfer letter from EMC.

Wanger contends EMC knew its notice of transfer was not delivered because the United States Postal Service returned the envelope containing the notice. However, the superior court sustained EMC’s evidentiary objection to a photocopy of that envelope, exhibit G to the declaration of Wanger’s former attorney.¹³ The envelope bore the notation “forwarding order expired” and a return postmark of May 8, 1995.

C. *Legal Contentions of Wanger and EMC*

Wanger’s supplemental letter brief contends her letter dated April 14, 1995, provided First California with a “revised address” as that term is used in section

¹³Because our analysis is not dependent upon whether or not the envelope containing the notice of transfer was returned to EMC, we do not address whether the superior court abused its discretion in sustaining the objection. The declaration of Wanger’s former attorney did not explain how he obtained a copy of the envelope.

3500.11¹⁴ of Regulation X and that EMC, as First California's successor-in-interest, either had actual knowledge of the revised address or, at least, had constructive knowledge of the revised address. As a result of this actual or constructive knowledge, Wanger asserts EMC was required to use her revised address in Washington when mailing the notice of transfer.

In contrast, EMC's supplemental letter brief contends mailing the notice to the Property's address was adequate delivery because (1) it was in accordance with the procedures for giving notice set forth in the written agreement of the parties, (2) the notice of servicing transfer in this instance is of no importance because Wanger deeded away the Property four months later, and (3) Wanger had ample notice of the foreclosure sale conducted in January of 1998. EMC asserts the provisions of the written agreements regarding notice are consistent with the notice requirements of Civil Code section 2937 concerning transfers of loan servicing that states that notices "shall be sent by first-class mail, postage prepaid, to the borrower's or subsequent obligor's address designated for loan payment billings" (*Id.*, subd. (d).)

D. Determination of the Legal Rule

Statutes should be construed in accordance with the plain meaning of the statutory language. The phrase "shall notify" does not have a plain meaning. The provisions of RESPA do not make its meaning plain by defining notify or notice. Nor are those terms defined by the provisions of Regulation X that address mortgage servicing transfers. (24 C.F.R. § 3500.21 (2002).)

¹⁴Section 3500.11 of Regulation X relates to mailing and provides: "The provisions of this part requiring or permitting mailing of documents shall be deemed to be satisfied by placing the document in the mail (whether or not received by the addressee) addressed to the addresses stated in the loan application or in other information submitted to or obtained by the lender at the time of loan application or submitted or obtained by the lender or settlement agent, except that a revised address shall be used where the lender or settlement agent has been expressly informed in writing of a change in address." (24 C.F.R. § 3500.11 (2002).)

Notwithstanding the lack of definitions for these terms, the language that a servicer “shall notify the borrower in writing” does exclude the statutory construction requiring actual receipt by the borrower. Had Congress intended actual receipt by the borrower, it would have said so. For example, under section 2605(e)(1)(A), a servicer’s duty to respond to a borrower inquiry arises when the servicer “receives a qualified written request.” Similarly, under the Truth in Lending Act (TILA), 15 United States Code section 1601 et seq., a credit card company’s obligation to respond to a customer’s written inquiry about a billing error is triggered if it *receives* the inquiry within 60 days after transmitting the account statement to the customer. (15 U.S.C. § 1666(a).) Thus, when Congress intends to require receipt, it uses language that plainly expresses that intent.

In Regulation X, HUD has interpreted the statutory notification provision to mean that a servicer “shall deliver to the borrower a written Notice of Transfer.” (24 C.F.R. § 3500.21(d)(1)(i) (2002).) Neither RESPA nor section 3500.21 of Regulation X defines deliver or delivery. (24 C.F.R. § 3500.21 (2002).) Also, section 3500.11 of Regulation X concerning mailing did not become effective until April 25, 1996. (61 Fed.Reg. 13232, 13239 (Mar. 26, 1996).) However, HUD has defined “delivery” in the regulation concerning the requirements RESPA places on escrow accounts established or controlled by a servicer. In that context, delivery means “the placing of a document in the United States mail, first-class postage paid, addressed to the last known address of the recipient” or hand delivery. (24 C.F.R. § 3500.17(b) (2002).) Under Regulation X, a servicer that maintains an escrow account in connection with a federally related mortgage must deliver initial and annual escrow account disclosure statements to the borrower. (See 24 C.F.R. § 3500.17(m)(1) (2002).)

In the absence of direct authority, we interpret the requirement for delivery of a notice of the transfer of mortgage servicing by analogy to the delivery requirements in section 3500.17 of Regulation X. (24 C.F.R. § 3500.17 (2002).) The regulations governing escrow account disclosure statements provides some insight into what HUD

regards as adequate notice in a related area. Thus, we conclude the notice of transfer requirements of section 2605 and Regulation X (24 C.F.R. § 3500.21(d)(1)(i) (2002)) required EMC to place the notice “in the United States mail, first-class postage paid, addressed to the last known address of” Wanger. (*Id.*, § 3500.17(b).)

This construction of the statute and regulation does not end our inquiry because Regulation X does not define the concept of a “last known address” or otherwise indicate whether the determination of the address is limited to the actual knowledge of the loan servicer or includes constructive knowledge.¹⁵ To answer this question, we look to the purposes underlying RESPA generally and the notice of transfer provisions of section 2605.

If RESPA and section 2605 are remedial consumer protection statutes, they should be construed liberally to best serve Congress’s intent. (*Ellis v. General Motors Acceptance Corp.* (11th Cir. 1998) 160 F.3d 703, 707 [liberally construing TILA, a remedial consumer protection statute]; *Jackson v. Grant* (9th Cir. 1989) 890 F.2d 118, 120 [9th Cir. liberally construes TILA].)

As to RESPA generally, we conclude it is a remedial consumer protection statute. The analysis of the district court in *Rawlings v. Dovenmuehle Mortg., Inc.* (M.D.Ala. 1999) 64 F.Supp.2d 1156 is convincing. The district court concluded RESPA was remedial and protective based on (1) the language of the statute, (2) the legislative history and (3) the decisions of other courts construing RESPA as a consumer protection statute. (*Rawlings*, at pp. 1165-1166; see *Patton v. Triad Guar. Ins. Corp.* (11th Cir. 2002) 277 F.3d 1294, 1299.) An additional basis for this conclusion is that HUD, the agency responsible for implementing RESPA, often refers to RESPA as a consumer protection statute. (E.g., 61 Fed.Reg. 69055, 69056 (Dec. 31, 1996) [disclosures required should be

¹⁵Some statutes specifically address whether the concept of last known address includes actual or constructive knowledge. For instance, Civil Code section 2924b, subdivision (b)(3) states “‘last known address’ ... means the last business or residence address actually known by the ... person authorized to record the notice of default.”

designed to meet consumer protection goals of RESPA]; 61 Fed.Reg. 29238, 29241 (June 7, 1996) [refers to “RESPA’s core objective of consumer protection”].)

As to section 2605, we agree with those courts that conclude it is a remedial consumer protection statute. (Cf. *Ploog v. HomeSide Lending, Inc.* (N.D.Ill. 2002) 209 F.Supp.2d 863, 870 [“actual damages” under § 2605(f)(1) include recovery for emotional distress]; *Johnstone v. Bank of America, N.A.* (N.D.Ill. 2001) 173 F.Supp.2d 809, 815 [same]; *Rawlings v. Dovenmuehle Mortg., Inc.*, *supra*, 64 F.Supp.2d 1156 [same] with *Katz v. Dime Sav. Bank, FSB* (W.D.N.Y. 1997) 992 F.Supp. 250, 255-256 [§ 2605 not a consumer protection statute and, therefore, emotional distress not recoverable as actual damages].)¹⁶

The concept of consumer protection has many facets. Consumers may be protected by receipt of information that allows them to make decisions that are better informed. (See § 2601(a), (b)(1).) Consumers also are protected by measures that reduce the cost of credit. (See § 2601(a), (b)(2).) We recognize there is some tension between providing information to facilitate consumer decisionmaking and reducing the cost of credit because construing section 2605 in a manner that increases the burden on loan servicers may result in that burden being passed on to consumers in the form of higher credit costs.

The level of responsibility imposed upon a servicer to provide notice of a transfer must reflect these general, sometimes conflicting, consumer protection purposes of RESPA as well as address the particular evils the notice of transfer provisions of section 2605 were designed to ameliorate, i.e., late charges being incurred and loan payments being made to the wrong party because the borrower is unaware the servicing of the loan has been transferred. Requiring the servicer to determine the last address of the borrower based on the servicer’s actual knowledge would minimize cost. However, requiring a

¹⁶We express no view on the underlying question of whether emotional distress is included in actual damages recoverable by a borrower under section 2605(f)(1)(A).

servicer to exercise reasonable care and diligence in determining the correct address of the borrower would decrease the number of notices of transfer sent to the wrong address. In balancing these considerations, we conclude the last known address of the borrower shall be determined with reference to the servicer's actual and constructive knowledge. In other words, a servicer must exercise reasonable care and diligence in determining the correct address of the borrower when mailing a notice of transfer.

This view of the concept of a last known address is not unique. Other courts, in different contexts, have ruled a last known address may be determined based on constructive knowledge. (E.g., *In re Smith* (3d Cir. 1989) 866 F.2d 576, 586 [Pa. foreclosure statute requires notice to last known address which courts construe as requiring a good faith effort to ascertain the current address of the mortgage debtor]; *U.S. West Properties, Inc. v. AOI Compwise Worker's Compensation Program* (1998) 156 Or.App. 411 [965 P.2d 467] [statute requires notice of cancellation of insurance to be sent to last known address of employer-insured; notice could be sent to address listed in policy unless insurer "knew or had constructive knowledge of [insured's] new address".])

E. Application of Legal Rule to the Undisputed Facts

EMC has failed to establish that it had no actual knowledge of Wanger's Seattle, Washington address and that it would not have obtained this knowledge through the exercise of reasonable care and diligence. The letter dated April 14, 1995, which contains the new address, is among the evidence referenced by EMC in its separate statement, but we cannot determine when EMC knew or should have known the contents of the letter.

First, with respect to actual knowledge, an issue of fact exists as to the contents of the loan file in EMC's physical possession. The undisputed facts do not establish whether or not Wanger's Washington address was in the file in EMC's physical possession before it mailed the notice of transfer. (See *In re Smith, supra*, 866 F.2d at p. 586 [Pa. foreclosure statute required notice to last known address; lender's files definitely contained information that borrower was not residing at the property].)

Second, with respect to the constructive knowledge, underlying factual issues exist as to (1) the scope of what EMC should have searched and (2) the information that would have been learned by conducting a search within that scope. As to the scope of the inquiry required by reasonable care and diligence, a reasonable trier of fact might find the scope of inquiry is limited to a search for a written notice of change of address because of the notice provisions in the deed of trust. However, a broader scope of inquiry might be warranted by the surrounding facts and circumstances. For example, a servicer might be found to have knowledge of a new address received by e-mail or orally in a telephone conversation, particularly if the servicer caused the borrower to believe such a notice was adequate.

Furthermore, even if the scope of a reasonable inquiry was limited to a search for a written change of address notice, the undisputed facts do not show that EMC would not have found Wanger's new address. Wanger may be able to show that, in light of the risk that a change in address notice received by a servicer transferring a loan around the time of the transfer might not be included in materials physically transferred to a servicer acquiring the loan, reasonable care and diligence requires a servicer acquiring the loan to implement a procedure to cause such a notice of change in address to reach it. If Wanger is able to show reasonable care and diligence would have led to EMC reviewing First California's files for such a notice, then she may also be able to show EMC would have discovered her new address contained in the April 14, 1995, letter.

In light of the foregoing, the undisputed facts do not support finding as a matter of law that the last address of Wanger actually known by EMC, or that should have been known by EMC through the exercise of reasonable care and diligence, was the Property address. Accordingly, EMC's attempt to provide Wanger with the notice of transfer may have failed to comply with RESPA. Thus, Wanger's RESPA cause of action survives the motion for summary adjudication.

F. Actual Damages Recoverable Under RESPA Are Not Limited to the Foreclosure

EMC presents three straw man arguments in an attempt to convince us it has knocked down Wanger's RESPA cause of action. The straw man, i.e., erroneous premise, is that the RESPA cause of action is solely a claim for wrongful foreclosure. First, EMC argues that the RESPA cause of action cannot survive unless the foreclosure was wrongful. Second, EMC argues any failure to give notice of transfer of servicing is of no importance because Wanger deeded the Property away four months later. Third, EMC argues it is not liable under RESPA because Wanger had ample notice of the foreclosure sale conducted in January of 1998.

We reject these arguments because one reason the alleged violation of RESPA is a separate cause of action is that it is based upon separate and distinct wrongful acts, i.e., the alleged failure give the statutorily required notice of transfer. (See 6 Witkin, Cal. Procedure, *supra*, Proceedings Without Trial, § 242, p. 657.) Wanger's recovery of actual damages under section 2605(f)(1) and attorney fees under section 2605(f)(3) are not dependent upon proving the foreclosure was wrongful, although the foreclosure might be among the actual damages.

Actual damages may include, but are not limited to, (1) out-of-pocket expenses incurred dealing with the RESPA violation, (2) lost time and inconvenience to the extent it resulted in actual pecuniary loss, and (3) late fees. (See *Johnstone v. Bank of America, N.A.*, *supra*, 173 F.Supp.2d at pp. 813-814, 816; *Rawlings v. Dovenmuehle Mortg., Inc.*, *supra*, 64 F.Supp.2d at p. 1164 [\$115 spent on photocopies, secretarial work, and travel to post office recoverable under § 2605(f)(1)].) Also, Wanger might be able to show the monthly payments made to First California after the effective date of the transfer are actual damages.

The issue of whether or not the foreclosure is included in the actual damages suffered by Wanger will depend upon her showing that the foreclosure occurred "as a result of the failure" (§ 2605(f)(1)(A)) to deliver the notice of transfer. (See *Johnstone v.*

Bank of America, N.A., supra, 173 F.Supp.2d at pp. 813-814 [complaint alleged sufficient causal connection between RESPA violation and foreclosure to withstand a motion to dismiss].) The issue of causation was never addressed in EMC’s separate statement and, therefore, cannot provide an undisputed factual basis for eliminating Wanger’s RESPA theory of liability.

Lastly, we reject EMC’s argument that the remedy envisioned by section 2605 for a failure to provide a notice of transfer is sending the servicer a qualified written request under section 2605(e) because it is contrary to the plain language of the statute. Section 2605(f) provides that “[w]hoever fails to comply with any provision of this section shall be liable to the borrower” for actual damages. The phrase “any provision of this section” plainly includes the provisions contained in section 2605(c) concerning notices by transferees of loan servicing.

V. Breach of Statutory Duties Concerning Nonjudicial Foreclosure*

In paragraph 28 of the fifth amended complaint, Wanger alleges EMC “violated the provisions of Civil Code Sections 2924(b), (f) and (h) [*sic*].” EMC’s reply brief sets forth two reasons why Wanger’s claims under Civil Code sections 2924b, 2924f, and 2924h must fail. First, EMC relies on the recital in the trustee’s deed regarding compliance with applicable procedures and the prima facie presumption arising from such a recital under Civil Code section 2924.¹⁷ EMC asserts Wanger has not presented any evidence to defeat the prima facie presumption. Second, EMC asserts that “[t]o the

*See footnote, *ante*, page 1.

¹⁷Civil Code section 2924 provides in part: “A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof *shall constitute prima facie evidence of compliance with these requirements* and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.” (Italics added.)

extent [Wanger's] claim is based on the alleged 1993 modification changing the amount of her arrearage, that argument has already been addressed.”

EMC's separate statement establishes the following facts are undisputed. At the January 13, 1998, foreclosure sale, EMC purchased the subject property with a credit bid and was given a trustee's deed upon sale. The trustee's deed upon sale contained the standard recital that the sale process complied with the statutory requirements. EMC's separate statement does not address whether it acted to restrain bidding at the foreclosure sale in violation of Civil Code section 2924h, subdivision (g).¹⁸

We conclude EMC's motion fails in its effort to eliminate Wanger's claim based on California's nonjudicial foreclosure statutes. First, EMC's attempt is premised on prevailing in its arguments concerning the 1993 modification agreement. Because EMC did not prevail in that argument, it follows that “[t]o the extent [Wanger's] claim is based on the alleged 1993 modification changing the amount of her arrearage,” the claim survives.

Second, Wanger's claim based on restraint of bidding survives because the presumption created by Civil Code section 2924 is not relevant to such a claim. Bidding may be restrained even though all procedural requirements concerning notice, the matter addressed by the presumption, have been fulfilled.

Either reason defeats the request for an adjudication that Wanger's claim based on California's nonjudicial foreclosure statutes does not have merit. (See part II.B.1., *ante*.) We do not consider whether a more narrow issue could have been summarily adjudicated on the record before us because the party opposing the request was not put on notice of a narrower request.

¹⁸Civil Code section 2924h, subdivision (g) provides in part: “It shall be unlawful for any person, acting alone or in concert with others, ... to fix or restrain bidding in any manner, at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage...”

VI. Negligence Cause of Action*

EMC argues that the rights and responsibilities of the parties were governed by their contract and the applicable statutes and, accordingly, this is not a tort action and Wanger's count for negligence must fail.

Given the all or nothing way in which EMC framed the issue to be adjudicated with respect to each count in the fifth amended complaint, if there is one triable issue of on any theory of negligence, the entire negligence count will survive the motion for summary adjudication.

We conclude EMC owed a duty to Wanger and a triable issue of fact exists with respect to whether EMC negligently performed that duty. The legal duty is imposed upon EMC by section 2605. (See *Rawlings v. Dovenmuehle Mortg., Inc.*, *supra*, 64 F.Supp.2d at p. 1167 [summary judgment on negligence claim denied; loan servicer owed borrower a legal duty under § 2605].) Whether EMC violated that duty presents triable issues of fact. (See part IV.E., *ante*.)

VII. Interference With Prospective Economic Advantage*

In paragraph 32 of the fifth amended complaint, Wanger alleges,

“After September 1, 1995, when [Wanger] conveyed title to the ... [P]roperty to Lisa Marie Keller, and notwithstanding any language or inference to the contrary in the instrument of conveyance, [Wanger] continued to and did in fact retain all legal and beneficial rights and uses of and to the ... [P]roperty, including, but not limited to, the rights to: lease, sell, encumber, occupy, maintain, manage, repair and enjoy and retain any and all rents, sales proceeds and profits resulting therefrom. ... [EMC] ... knew that [Wanger] owned and retained such beneficial rights and uses of and to the ... [P]roperty and [EMC's] conduct alleged herein was undertaken and carried out with said knowledge.”

Fact No. 12 in EMC's separate statement provides: “EMC ... did nothing to interfere with [Wanger's] efforts to sell or lease the property prior to the foreclosure sale.

*See footnote, *ante*, page 1.

*See footnote, *ante*, page 1.

After September 15, 1995, [Wanger] did not even own the property, having deeded it to her daughter, Lisa Marie Keller.” The superior court ruled that Wanger “has failed to show how she was damaged by any action of [EMC] when she no longer owned the property after September 1, 1995.”

Wanger’s argument against the position of the superior court and EMC can be stated in two ways. First, Wanger asserts, in effect, that EMC’s motion does not survive the first step in the three-step analysis set forth in *Brantley v. Pisaro*, *supra*, 42 Cal.App.4th at page 1602 because it does not respond to the allegations of the complaint. In particular, the motion for summary judgment did not address Wanger’s allegations of her beneficial interest in the Property and her right to sell the Property and retain all sale proceeds.

Second, Wanger asserts EMC has failed to carry its burden under the second step of the three-step analysis. In particular, EMC’s separate statement is inadequate because it omits a material fact, namely, that Wanger did not retain any interest in the Property after she deeded it to her daughter. (See Code Civ. Proc., § 437c, subd. (b).) Furthermore, even if one could go beyond the material facts set forth in the moving party’s separate statement in order to uphold a summary judgment, one cannot view the record in the light most favorable to Wanger and indisputably infer the essential fact that she does not hold any right to sue for interferences with the sale or lease of the Property from the fact that she deeded the Property to her daughter.

Accordingly, we hold that EMC has failed to carry its burden of showing that Wanger is unable to establish an essential element of her cause of action, i.e., that Wanger owned no interest that would be damaged by interferences with her attempts to sell the Property. Because EMC failed to meet its burden, we do not reach the third step

of the analysis and examine whether Wanger presented evidence sufficient to create a dispute over a material fact.¹⁹

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to vacate its order granting summary judgment in favor of EMC. Wanger shall recover her costs on appeal.

GOMES, J.

WE CONCUR:

ARDAIZ, P.J.

CORNELL, J.

¹⁹Wanger had attempted to meet her burden, in part, by stating she got an assignment of all claims from her daughter and citing to the November 1, 1999, order of the superior court overruling and sustaining demurrers to her fourth amended complaint. In overruling a demurrer to Wanger's causes of action for breach of contract, negligence, and breach of statutory duties, the superior court stated: "The transfer of the real property described in the Fourth Amended Complaint does not automatically transfer [Wanger]'s personal causes of action (Cf. *Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144, 148-149)." To support its ruling, the superior court took judicial notice of the recorded assignment of rights.