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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

BANK OF AMERICA, N.A., Plaintiff and Appellant, v. JOHN A. PHILLIPS, et al., Defendants and Respondents.	A152201 (City and County of San Francisco Super. Ct. No. CGC13531103)

In an action on a 2009 loan transaction, represented by a promissory note in the principal sum of $1,120,000, and a cross-complaint for negligence relating to the handling of a 2012 refinance application of the loan, plaintiff Bank of America, N.A. ("Bank") appeals from an October 19, 2017 amended judgment after a bench trial in which the trial court, in pertinent part: dismissed the Bank's cause of action for breach of contract against defendants John A. Phillips, individually and doing business as Artistotle Venture ("Phillips") and Dean A. Phillips, individually, and (2) found in favor of Phillips on his cross-complaint and awarded him $1,260,665 in damages (less an equitable offset of $1,120,000, the principal sum outstanding on the promissory note), and $560,071.25 in prevailing party attorney fees.

We find no merit to the Bank's contentions challenging the trial court's dismissal of its cause of action for breach of contract. However, we agree with the Bank that the trial court erred in finding in favor of Phillips on his cause of action for negligence based

on the Bank's handling and denial of his 2012 application to refinance the 2009 Note. We conclude that under the circumstances here the Bank owed no common law duty of care to Phillips concerning the handling and denial of his 2012 application to refinance the 2009 loan. Accordingly, we shall reverse in part the amended judgment and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Our facts are taken, in significant part, from the trial court's comprehensive 72-page statement of decision. Because the court stated the factual and legal bases for its rulings, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.) With these principles in mind, we begin with the pertinent facts and then address the Bank's contentions.

1. The 2009 Loan to Phillips

In 1998, Phillips and his brother Dean A. Phillips purchased a property in San Francisco ("the property"). At that time the property was Phillips' primary residence. Some time prior to 2009, the brothers agreed they would "swap their interests" so that Phillips would be the sole owner of the property located in San Francisco and his brother would be the sole owner of another property located in Washington D.C.

In June 2009, Phillips, solely on his own behalf, applied for a residential loan with the Bank. The application listed a loan amount of $1,120,000 and an interest rate of 5.125%. The property was described as the primary residence of Phillips and listed the title as being held by the brothers as joint tenants. The property was appraised for $1,600,000. The Bank approved a 30-year loan for $1,120,000, represented by an "Adjustable Rate Note" ("2009 Note"), which provided for monthly interest-only payments of $4,783.33 for the first 10 years commencing October 1, 2009, and thereafter, monthly payments of principal and interest in an amount to be determined by a fixed formula described in the note until the maturity date of September 1, 2039.

2. Closing of the 2009 Loan Escrow

The Bank selected the title insurance company for the closing, which was conducted through an escrow agent in Pennsylvania. Because Phillips was the sole borrower on the 2009 Note, the title insurance company required the brothers to execute a quitclaim deed transferring sole title of the property to Phillips. Although the brothers each held title on the property "as his sole and separate property, . . . it was necessary for [Dean A. Phillips] to deed his interest in the . . . property" to Phillips before the deed of trust could be recorded, evidencing that Phillips was both the sole borrower and owner of the property.

On August 10, 2009, the brothers signed the quitclaim deed, and Phillips also signed the following documents: (1) a "Uniform Residential Loan Application;" (2) the 2009 Note; (3) the deed of trust; (4) adjustable rate rider, (5) "Errors and Omissions/Compliance Agreement;" (6) "Affidavit of Title (Refinance);" (7) "Federal Truth in Lending Disclosure Statement"; and (8) a "Settlement Statement (Transaction Without Sellers)".

The Bank prepared and sent to the title insurance company "Lender's Closing Instructions" ("closing instructions"); no escrow instructions were signed by Phillips. The closing instructions recited that certain addenda documents ("Conditions Addendum," and "Document Checklist") were attached to the closing instructions, and "the language in the addenda shall prevail over any conflicting language in the body of" the closing instructions. However, the addenda documents ("Conditions Addendum" and "Document Checklist") were not attached to the closing instructions that were admitted into evidence at trial. The closing instructions stated, in pertinent part, that the Bank would not disburse funds until it had received several documents including "an executed Note, an executed Deed of Trust (Notary pages), and 'Outstanding Conditions (as listed in the Conditions Addendum).' " However, as noted, no document, titled "Conditions Addendum," was attached to the closing instructions. Instead, attached to the closing

instructions was a document titled, "Title Insurance Addendum," which stated that, "[p]rior to disbursing [the Bank's] funds, [the escrow agent] must provide evidence that a binding mortgagee's policy of title insurance in the amount of $1,120,000.00 is or will be in force and effective after or on the same day as the recording date of the [deed of trust], unless the policy expressly provides coverage for the gap period between the policy date and recording date;" and that the title insurance policy had to show the deed of trust as a first lien against the property, and that Phillips had fee simple title to the property.

On or about August 14, 2009, the escrow for the loan closed and the Pennsylvania escrow agent made the following disbursements: a payment to the title insurance company for a settlement or closing fee and for title insurance; a payment to another bank to satisfy an existing $1 million lien on the property, and a payment to Phillips. Because the escrow agent was located out of state, "there was a delay in the effort to record the documents that needed to be recorded," namely the quitclaim deed and deed of trust. The Bank hired a subagent for the purpose of recording the necessary documents to secure its lien against the property. The staff at the San Francisco County recorders' office would not record the quitclaim deed because "a Transfer Tax Affidavit" was required to be filed to determine if a transfer tax had to be paid for the transfer between the brothers. Additionally, the deed of trust was not recorded. Nonetheless, despite the lack of recording of the quitclaim deed and the deed of trust, the escrow company disbursed the loan proceeds.

3. Bank's Requests to Phillips Regarding Recording of Documents

On November 5, 2009, the Bank, via its subagent, sent a letter informing Phillips that the "Mortgage and Deed" he had signed at the closing had not been recorded. The letter requested that Phillips sign an enclosed Transfer Tax Affidavit. Because Phillips had had no prior contact with the Bank's subagent, he called and spoke to the purported author of the letter, asking for proof that the author and Bank's subagent were authorized representatives of the BANK. Phillips also called the San Francisco County recorders'

office and was told that all documents relating to the property were in order and all taxes were paid. There were no other substantive follow-up contacts between Phillips and the Bank's subagent or the author of the November 5 letter for over a year and a half.

In June 2011, Phillips' brother received a letter from a Pennsylvania lawyer. In that letter, the lawyer stated he had been engaged by the Bank and its subagent, which latter entity had been retained by the Bank to act as a settlement agent for the closing of the 2009 loan. The lawyer asserted that Phillips had signed a "Loan Agreement" and a "Document Correction Agreement," as part of the closing documents, and that those documents required Phillips to sign a Transfer Tax Affidavit so that the deed of trust could be recorded in favor of the Bank. Phillips contacted the lawyer and told him that he did not recall signing either a Loan Agreement or a Document Correction Agreement that required him to sign a Transfer Tax Affidavit, and he asked for copies of the described closing documents; no such documents were ever sent to Phillips.

4. Bank's 2011 Action against Phillips

The title insurance policy that had been issued in favor of the Bank concerning the 2009 loan authorized the title insurance company to "institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title or the lien of the Insured Mortgage, as insured, or to prevent or reduce loss or damage to the Insured." Apparently, pursuant to this title insurance policy provision, and unbeknownst to the Bank, on November 4, 2011, the Bank's title insurance company filed a complaint against Phillips for breach of contract, and sought declaratory relief and specific performance. In this complaint, it was alleged that the Bank's subagent had conducted the closing of the loan. It was further alleged that Phillips had signed certain documents at the closing, titled "Loan Agreement" and "Document Correction Agreement," which obligated him to sign a Transfer Tax Affidavit so that the Bank could record the quitclaim deed and deed of trust. The title insurance company also recorded a lis pendens to provide notice that a lawsuit was pending that

affected the property's title. The 2011 complaint was not served "right away so [Phillips] was unaware of it for many months."

At trial, the Bank's representative testified there were "no records" in the Bank's files indicating the Bank was aware of the 2011 complaint until March 2012, when the Bank received an email that its subagent had "a curative title matter" and was "looking for a contact" at the Bank. After March 2012 the Bank had direct knowledge of and prosecuted the 2011 complaint.

5. Phillips' 2012 Refinance Loan Application

In late March 2012, Phillips filed an application to refinance the 2009 loan on the property for two reasons: (1) cost - the interest rate on the 2009 loan was significantly higher than comparable interest rates for residential property loans and the high interest rate made the property unaffordable; and (2) the refinancing of the 2009 loan would provide the Bank with a deed of trust for the refinanced loan, thereby solving the issue of the failure to record the deed of trust relating to the 2009 loan. As to the latter reason, Phillips asserted that he first had knowledge of the 2011 complaint when he saw the lis pendens listed as an exception in the Preliminary Title Report dated March 29, which report the Bank had ordered when Phillips applied to refinance the loan.

In response to the refinance request, Bank staff prepared two loan applications, one in April 2012 and one on September 6, 2012, based in part on a telephone interview between Phillips and the Bank's loan originator on April 3, 2012 and documents submitted by Phillips at the Bank's request. The two applications were never seen by Phillips because it was the Bank's practice to not have borrowers sign a loan application until the loan closing.

The April 2012 application listed the loan amount as $1,120,000, reflecting the outstanding principal sum owed on the 2009 Note. The purpose of the loan was listed as "a term and rate reduction." The documents submitted by Phillips showed his financial circumstances were the same or better than when he had applied for the 2009 loan, and

that he had over $310,000 in a retirement account. The application further indicated the property continued to be Phillips' "primary residence." Based on the April 2012 application, the Bank provided Phillips with (1) a Good Faith Estimate ("GFE") for the refinancing of the 2009 loan, indicating a loan amount of $1,120,000, an initial interest rate of 3.375%, an initial monthly payment of $3,150, and estimated settlement charges of $20,402.40, to be paid by Phillips; and (2) a "Notice of Conditional Approval and Loan Conditions," stating, among other things, that Phillips had to provide proof of liquid assets in an amount not less than $16,761.

On July 2, 2012, the Bank appraised the property as having a fair market value of $1,750,000, and noted the occupant of the property was "a tenant." Nonetheless, at that time only the upper floors were occupied by tenants, and the property remained Phillips' primary residence until its later sale further discussed, *post*. The next day, and without informing Phillips, the Bank internally reduced the loan amount to $1,050,000; however, no GFE showing the reduction was sent to Phillips at that time. Instead, still on July 3, the Bank sent Phillips a revised GFE and revised estimated settlement charge summary in which the Bank again listed the loan amount at $1,120,000, the initial interest rate as 3.375%, initial monthly payments of $3,150, but the settlement charges were revised to show $18,682.40, was to be paid by Phillips. The Bank also recorded another lis pendens against the property. Throughout late July and August 2012, the BANK informed Phillips that his refinance application was in progress, and he continued to respond to the Bank's requests for additional documents, submitting, among other things, an updated printout showing $324,153.02 in his retirement account. On August 28, 2012, the Bank sent to Phillips a revised GFE and estimated settlement charge summary in which the Bank indicated, for the first time, the revised lower loan amount of $1,050,000, revised increased initial monthly payments of $4,642, and revised increased settlement charges of $87,226.09, to be paid by Phillips.

With a printed date of September 6, 2012, the Bank staff prepared another residential loan application. This application now indicated the lower loan amount of $1,050,000, the purpose of the loan was listed as "a refinance," and continued to indicate that the property would be Phillips' "Primary Residence." The application indicated the sum of $194,491.81 was in Phillips' retirement account, even though Phillips had provided the Bank with documents that showed the account had a net value of over $320,000. The application also indicated revised decreased settlement charges of $74,314.09, to be paid by Phillips.

On September 6, 2012, the Bank sent Phillips a "Notice of Action Taken" informing him that his refinance application had been denied for the following reasons: "INSUFFICIENT CASH; INSUFFICIENT LIQUID ASSETS TO CLOSE THE LOAN. LACK OF ANTICIPATED CASH RESERVES AFTER CLOSING." However, "[a]t no point during the refinance application process did the [Bank] ask [Phillips] if he had more liquid assets than those contained in his [retirement] account . . . [or] if he had additional cash reserves available. [Phillips], through his business, had more than $200,000 in liquid assets in addition to his funds [in his retirement account] plus other cash reserves available to him."

6. Phillips' Sale of the Property

After the Bank denied his 2012 refinance application, Phillips and his counsel "believed that the lis pendens the [Bank] had recorded . . . would prevent [Phillips] from selling the . . . property or refinancing with another lender. [Phillips] did not believe that he could afford the carrying costs of the . . . property when he also had to take into account the expenses he was going to incur in defending against the [Bank's 2011 complaint]. . . . He therefore decided that he had to sell the . . . property." Phillips also believed he could not list the property for sale "as a normal property would typically be listed, marketed, and sold," because of his past dealings and difficulties with the Bank, the filing of the 2011 complaint and the recorded lis pendens. He therefore contacted his

neighbors who lived "next door" who had previously expressed an interest in purchasing the property.

In early December 2012, Phillips and his neighbors discussed the purchase of the property, with both parties expressing a desire to complete the sale prior to December 31, 2012. If the sale occurred after that date, Phillips would have to pay an additional tax of three (3) percent of the sales price for a tax imposed by the Affordable Care Act. Phillips' counsel approached the Bank to try to reach a settlement or to otherwise obtain its consent to the sale necessitated by the recording of the lis pendens. Phillips' counsel received no substantive response from the Bank's counsel to "any of his overtures."

Thereafter, Phillips and his neighbors entered into a Purchase and Sale Agreement for the sale of the property, with an initial "closing date" of January 31, 2013, later extended to March 3, 2013. The sale prices was $2,100,000. The Preliminary Title Report listed the Bank's two lis pendens that had been recorded as exceptions to the title; and the neighbors' contingencies were removed effective January 31. After the 2011 complaint was dismissed, and the Bank filed a new complaint in May 2013 and recorded a new lis pendens (further discussed *post*), Phillips filed a motion to expunge the lis pendens, which request was granted on August 19, 2013. As a condition of the expungement order, the court directed that during the pendency of the new action, Phillips was to give notice of any sale of the property to the Bank. After Phillips gave the court-ordered notice of his intent to sell the property, the sale of the property closed on September 13, 2013. Because the 2009 quitclaim deed had not been recorded, Phillips and his brother executed another grant deed in which Phillips again acquired sole ownership of the property. After payment of the costs of the sale, Phillips received net proceeds of $2,071,590.89, which were deposited in his account at another bank; he paid nothing to the Bank.

7. Bank's 2013 Action against Phillips

On May 2, 2013, two weeks before the trial was scheduled to start on the 2011 complaint, the Bank dismissed that complaint without prejudice, filed a new complaint ("2013 complaint") that same day, and again recorded a lis pendens so as to give notice that this new action affected the property's title.

In the 2013 complaint, the Bank alleged a cause of action to quiet title, and sought a declaration that it had a first lien on the property as of August 10, 2009. The Bank also sought specific performance directing Phillips to sign duplicate originals of the 2009 quitclaim deed and deed of trust, "along with all other collateral documents required by law or custom," or as otherwise requested by the San Francisco County recorders' office, including a preliminary change of ownership report and a Transfer Tax Affidavit, to facilitate the recording of the quitclaim deed and deed of trust. The Bank alleged Phillips' failure to sign the described "collateral documents" constituted a breach of the terms of the 2009 loan, and specific performance was appropriate because money damages would be impossible to determine and were otherwise inadequate.

On September 3, 2013, Phillips filed a cross-complaint alleging the circumstances under which he had been requested to sign "additional documents related to the loan" three months after the closing in August 2009, and again in June 2011. He asserted that, in mid-2012, he first learned the Bank had filed a complaint against him in November 2011, which pleading had never been served on him. Under the title, "FOURTH CAUSE OF ACTION [¶] (Negligence)," Phillips asserted the Bank breached its duties and obligations by claiming he was required to sign additional documents based on "False Documents that did not exist, including without limitation, a purported 'Loan Agreement' and 'Document Correction Agreement' "; by filing two lawsuits and recording two lis pendens against the property; by tying up the property for several years through its dilatory conduct; by negligently hiring the title insurance company's subagent and not monitoring its actions; by failing to properly maintain and losing records relating to the

2009 loan; by failing to properly supervise its employees' handling of the 2009 loan and subsequent attempts to obtain additional documents from Phillips; and by failing to communicate among its various departments and personnel. As a direct and proximate result of the Bank's negligent actions and omissions, it was alleged that Phillips had suffered and continued to suffer damages consisting of being forced to pay significantly higher interest on the 2009 Note, having his property tied up for several years, and being forced to incur substantial attorneys' fees and costs to defend against the 2011 and 2013 complaints.

8. Phillips' Attempts to Make Payments on 2009 Note

In September 2013, at approximately "the same time that the sale [of the property to the neighbors of Phillips] was being consummated," Phillips received a solicitation from the Bank to change the date his monthly interest-only payment was due, from the 5th of the month to the 15th of each month. The Bank called this new payment plan PayPlan 12. Phillips signed up for PayPlan 12. When he received a September 4, 2013 notice of his enrollment he saw that his enrollment was to take effect as of October 5, 2013. He called the number listed on the notice and spoke with a Bank representative. This telephone call and all subsequent calls were recorded. The Bank representative stated she would change the start date of his payments under PayPlan 12 to September 15, 2013. Phillips monitored his bank account from which the monthly payment was to be withdrawn and saw that the monthly payment was not withdrawn on September 15, as he had been told it would be done. He again called the Bank, and told the Bank representative that he had not seen a debit for the September payment and was concerned that the Bank did not have his new bank account number. Phillips told the Bank representative that his old bank account had been closed due to fraudulent activity and he gave the Bank representative his new bank account number and routing number. The Bank representative confirmed and assured Phillips that the Bank would withdraw the September 15 payment from the new bank account.

Thereafter, Phillips received three notices from the Bank in September 2013. The first notice, dated September 18, stated his request to make a change to the PayPlan 12 services was received and would take effect on October 15, 2013; the Bank had made the "switch" from Phillips' old bank account to his new bank account, and the October 15 payment would be taken from Phillips' new bank account. The second notice, dated September 19, stated the September 15 payment had been returned because his bank account had been closed, and that he now owed $5,047.49 for his September monthly payment and that this amount included a return item fee of $25. The third notice, dated September 30, stated his PayPlan 12 service had been discontinued. Each notice requested that Phillips call a specific telephone number if he had questions or concerns.

In response to the September notices, Phillips called the Bank at the specified telephone number listed in the notices. Phillips said he wanted to make the payment that was due but he should not have to pay the return item fee. When he was not able to make a payment through the Bank's website due to a bank holiday, he was told to call back the next day. When Phillips called back the next day, he was transferred to the "Escalations Department." The Bank representative who responded to the call said Phillips had been transferred to that department because his account was "in litigation," and the representative could not speak to him until she spoke with the Bank's legal department and got clarification on "servicing instructions." Phillips gave the Bank's representative his cell phone number and requested a call back, but he never received a return call.

On October 15, 2013, Phillips' counsel wrote to the Bank's attorney concerning the Bank's refusal to accept payments from Phillips. Counsel recounted the conversations between Phillips and the various Bank representatives, and requested that the Bank refrain from making any negative report to any credit bureau. Thereafter, Phillips received a Bank statement, dated October 30, indicating that the amount that was due on the 2009 Note included outstanding late charges and fees of $503.32.

On November 15, 2013, Phillips sent a letter to the Bank, again stating the difficulties he was having in making arrangements for the correct monthly payment to be withdrawn from the correct bank account. On November 20, Phillips' counsel sent a second letter to the Bank's counsel, stating that the Bank's counsel had "promised to look into the matter," and Phillips "has been ready, willing and able to make each monthly payment, but has not been able to do so because [the Bank] has refused the payments."

On December 9, 2013, the Bank sent a notice to Phillips indicating it had completed its inquiry and the Bank was cancelling Phillips' PayPlan 12 service because the monthly payments were then delinquent for three months. At that point, Phillips ceased making efforts to pay the monthly payments due on the 2009 Loan.

9. Bank's 2014 First Amended Complaint

On October 3, 2014, the Bank filed its first amended complaint, in which it added a breach of contract cause of action against Phillips. The Bank alleged, in pertinent part, that it had agreed to provide the 2009 loan to Phillips subject to the following conditions: Phillips held full and exclusive ownership of the property by a quitclaim deed that could be recorded in the San Francisco County recorders' office; the deed of trust would be recorded evidencing the Bank's security interest in the property; and Phillips would sign certain collateral documents to facilitate recording of the deed of trust, including a preliminary change of ownership report and a Transfer Tax Affidavit. The Bank further alleged that, after the closing and through no fault of its own, it was unable to record the quitclaim deed and deed of trust "for various reasons," including that the original quitclaim deed and deed of trust were "missing, lost, or destroyed," and the collateral documents had never been signed or delivered or were otherwise "missing, lost, destroyed, or never executed." Under the title "SIXTH CAUSE OF ACTION" for "Breach of Contract," the Bank asserted Phillips had breached his contractual obligations under the terms of the 2009 loan by failing to sign originals or duplicate originals of the documents necessary to record the deed of trust.

10. Bank's 2015 Third Amended Complaint and Phillips' Answer

The Bank's first amended complaint was superseded by the filing of a second amended complaint on May 13, 2015. Thereafter, the second amended complaint was voluntarily dismissed by the Bank and superseded by the December 7, 2015 filing of a third amended complaint, the operative pleading at the time of the trial.

In the third amended complaint, the Bank amended its breach of contract cause of action by adding that Phillips, in addition to failing to sign certain documents to allow for the recording of the deed of trust, had breached his obligations under the 2009 Loan by (1) selling the property without the Bank's prior written consent; (2) failing to repay the 2009 Note from the sale proceeds; and (3) stopping all monthly interest-only payments on the 2009 Note as of September 2013, further alleging that "[i]mmediate repayment of the amount remaining" on the loan was due on the sale of the property in 2013 per the acceleration clause in section 18 of the deed of trust. The BANK sought damages in the amount of the original principal sum of $1,120,000, plus interest and late charges from September 2013.

Phillips filed an answer in which he specifically denied the allegations in the amended pleading, and further denied the Bank had been damaged in any way. He also set forth several affirmative defenses, including that the Bank and its employees and agents, were "careless, negligent or otherwise at fault" with respect to the matters alleged in the amended complaint and such fault proximately caused and contributed to the Bank's purported losses and damages, completely barring or proportionately reducing the Bank's right to recover for any losses or damages (4th); the Bank failed to provide proper written notice of Phillips' alleged defaults, including, but not limited to, failure to give him proper notice of acceleration of the payment of the 2009 Note (6th); Phillips' duties and obligations owed to the Bank were excused by the Bank's breaches (14th); the Bank refused Phillips' reasonable attempts to refinance the 2009 loan, which would have rendered moot the alleged problems with the existing loan documents (15th); the Bank

prevented Phillips from performing his duties owed to the Bank, thereby relieving him of any liability, and any breach by Phillips was waived by the Bank's subsequent conduct and actions (19th); the Bank's claims should be reduced and setoff by sums owed to Phillips as damages incurred by him due to the acts and omissions of the Bank and its representatives and agents (22th); Phillips had not breached the 2009 Note in that he made payments when due prior to 2013 and thereafter attempted to make payments, but the Bank refused to accept the offered payments (24th); Phillips had the absolute right to sell the property after the court expunged the lis pendens in August 2013, he had no obligation to pay the sale proceeds to the Bank, and he had no restrictions on the right to receive and use the sale proceeds (25th); the Bank's option to require immediate payment in full upon transfer of the property was prohibited by applicable California law (26th); and if the Bank lost the security set forth in the deed of trust, it did so through its own neglect (27th).

11. February 2017 Bench Trial and Judgment

At the bench trial held in February 2017, the court considered both testimonial and documentary evidence centered on the breach of contract and implied covenant of good faith and fair dealing claims as alleged in the third amended complaint and the answer to that pleading, and Phillips' allegations of negligence in his cross-complaint concerning the Bank's handling of his 2012 refinance application.

The court found, in pertinent part, as follows: (1) the Bank had failed to prove that Phillips breached his contractual obligations by either failing to execute all documents necessary for the recording of the deed of trust, stopping his monthly interest-only payments on the 2009 Note in September 2013, or failing to repay the principal sum owed on the 2009 Note when the property was sold in 2013; (2) the Bank had failed to prove that Phillips breached any implied promises to the Bank or any implied covenant of good faith and fair dealing; (3) under the circumstances of this case, Phillips had proven that the Bank had a duty to reasonably consider his 2012 refinance application, the

Bank's conduct in handling the 2012 refinance application fell below the applicable standard of care for a financial institution in such a situation, and the Bank was negligent in its handling, processing, and denial of the 2012 refinance application; (5) Phillips was entitled to recover damages for the Bank's negligent conduct in the aggregate sum of $1,260,665, which was subject to an equitable offset of $1,120,000 (the principal sum owed on the 2009 Note), [1] resulting in "a net judgment" of $140,665 in Phillips' favor; and (6) Phillips was "entitled to apply for attorneys' fees and costs as the prevailing party." On May 31, 2017, the court entered a judgment reflecting its rulings made at the bench trial. In our discussion we recite additional facts, as necessary, to resolve the Bank's challenges to the statement of decision.

12. Phillips' Motion for Prevailing Party Attorney Fees

Phillips filed a motion to recover the attorney fees he incurred in the litigation as the prevailing party,[2] which was opposed by the Bank. Following a hearing on the motion, the trial court awarded attorney fees in the requested sum of $568,071 to Phillips as the prevailing party.

13. October 2017 Amended Judgment

On October 19, 2017, the court filed an amended judgment reflecting its rulings made following the bench trial and in its order awarding attorney fees. The Bank's timely appeal ensued. [3]

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[1] In a post-trial order, the trial court found "it would be extremely unjust" and "unfair" to allow Phillips to "collect" the entire amount owed on the 2009 Note from the sale of the property, and then to allow him to make interest only payments and pay the balance at some time in the future.

[2] Phillips also sought an award for discretionary costs, which was denied by the trial court and is not at issue on this appeal.

[3] By its amended notice of appeal filed on December 12, 2017, the Bank also seeks to appeal from other orders and judgments. Those appeals are dismissed for the following reasons: (1) the appeal from an August 19, 2013 order (granting defendants' motion to expunge lis pendens) is dismissed as abandoned (see *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538 [failure to brief "issue constitutes a waiver or abandonment of

DISCUSSION

I. Trial Court's Dismissal of the Bank's Breach of Contract Cause of Action

We began our analysis of the Bank's contention with the appropriate standard of review. "In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. [Citation.]" (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.) As to questions of fact, " '[w]e generally apply the familiar substantial evidence test when the sufficiency of the evidence is at issue on appeal. Under this test, " 'we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment. . . . "In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing.*" [Citation.] All conflicts, therefore, must be resolved in favor of the respondent.' " [Citation.] [¶] 'But this test is typically implicated when a defendant contends that the plaintiff succeeded at trial in spite of insufficient evidence. In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. This follows because such a characterization is conceptually one that allows an attack on (1) the evidence

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the issue on appeal"]); (2) the appeal from a February 27, 2014 order (denying the Bank's Anti-SLAPP motion to dismiss defendants' cross-complaint pursuant to Code of Civil Procedure section 425.16) is dismissed as untimely (Code Civ. Proc., §§ 904.1, 1025, subd. (j); see Code Civ. Prac., § 906; *Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 509 [" '[a] party who fails to take a timely appeal from a decision or order from which an appeal might previously have been taken cannot obtain review of it on appeal from a subsequent judgment or order' "]); and (3) the appeals from the May 31, 2017 judgment and the October 19, 2017 order, which, in pertinent part, awarded attorney fees to Phillips, are dismissed as superseded by the appeal from the October 19, 2017 amended judgment. The issues raised on the dismissed appeals from the May 31, 2017 judgment and the October 19, 2017 order are considered on the appeal from the October 19, 2017 amended judgment. (Code Civ. Proc., § 906.)

supporting the party who had no burden of proof, and (2) the trier of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case [citations]. [¶] 'Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." ' [Citation.]" (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc*. (2011) 196 Cal.App.4th 456, 465–466 (*Sonic Manufacturing Technologies*).) With these principles in mind, we now discuss the Bank's contentions.

A. Phillips' Failure to Record or Facilitate Recording of Loan Documents

1. Trial Court's Ruling

The trial court found the Bank failed to demonstrate that Phillips breached the written terms of the 2009 agreement or any implied covenant of good faith and fair dealing by his failure to record or facilitate the recording of the quitclaim deed and deed of trust by signing additional documents as requested by the Bank. In so concluding, the trial court found the following:

"[T]erms of the agreement between the parties for the 2009 loan transaction are set forth in the 2009 Note (Exhibit 32), the deed of trust (Exhibit 33), the Adjustable Rate Rider (Exhibit 35) and the Errors and Omissions Agreement (Exhibit 36). The Residential Loan Application (Exhibit 17) and Affidavit of Title (Exhibit 39) contain representations by J. PHILLIPS regarding the matters set forth therein but neither is incorporated into any parts of the integrated contract that constitutes the 2009 loan transaction. The Federal Truth in Lending Disclosure (Exhibit 31) is a disclosure by the BANK to J. PHILLIPS of the terms of the 2009 loan transaction that is required by federal law, but it is not incorporated into any parts of the integrated contract that constitutes the 2009 loan transaction. The Quit Claim deed (Exhibit 52), while a part of

the closing documents necessary to place record title in the name of J. PHILLIPS, is not incorporated into any of the integrated contract that constitutes the 2009 loan transaction. The Lender's Closing Instructions (Exhibit 26) are incomplete instructions by the BANK to the escrow company that conducted the escrow and were neither incorporated into any parts of the integrated contract that constitutes the 2009 loan transaction nor is there evidence that the terms contained therein were agreed to by J. PHILLIPS. The Settlement Statement (Transaction Without Sellers) (Exhibit 30) contains J. PHILLIPS acknowledgement and agreement to disbursements and charges relating to the escrow for the 2009 loan transaction but is not incorporated into any parts of the integrated contract that constitutes the 2009 loan transaction. As set forth above and below, J. PHILLIPS did not materially breach any of his obligations in the documents that constitute the integrated contract for the 2009 loan transaction. Also as set forth above and below, J. PHILLIPS did not materially breach any of his representations to the BANK in either the Residential Loan Application or the Affidavit of Title. Any breach by J. PHILLIPS of his contractual obligations or representations was immaterial.

"A contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. [(Civ. Code, § 1636.)] The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity. [(Civ. Code, § 1638.)] Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together. [(Civ. Code, § 1642.)] The mutual intent of the parties, the language of the documents and their relationship to the 2009 loan transaction establish that the terms of the agreement between the parties for the 2009 loan transaction are set forth in the 2009 Note (Exhibit 32), the deed of trust (Exhibit 33), the Adjustable Rate Rider (Exhibit 35) and the Errors and Omissions Agreement (Exhibit 36). In cases of uncertainty, the language of a contract should be interpreted most strongly against the party who caused the uncertainty

to exist. [(Civ. Code, § 1654.)] Under these relatively unique circumstances none of the documents that constitute the agreement for the 2009 loan transaction, all of which were drafted by the BANK, can be interpreted to obligate J. PHILLIPS to execute any and all documents necessary so that the BANK's deed of trust could be recorded. This finding is expressly applicable to the obligations of J. PHILLIPS set forth in the Errors and Omissions Agreement (Exhibit 36) as it is ambiguous as to the type of 'clerical errors' that he is obligated to 'adjust' and whether or not his obligations arise in any situations other than a circumstance where the BANK is seeking to 'sell, convey, seek guaranty, or market the loan . . . .' Under these relatively unique circumstances, the ambiguous terms of the Errors and Omissions Agreement do not obligate J. PHILLIPS to execute any and all documents necessary so that the BANK's deed of trust could be recorded.

"The Court further finds, based on a preponderance of the evidence, that under these relatively unique circumstances, J. PHILLIPS acted in good faith throughout his dealings with the BANK and did not breach any covenant of good faith and fair dealing owed to the BANK."

2. Analysis

The Bank initially argues the trial court erroneously determined the scope of the parties' 2009 loan agreement. According to the Bank, while the court properly found the parties' agreement was governed by the terms of the 2009 Note, the deed of trust, the adjustable rate rider, and the provisions of the errors and omissions agreement, it erred in failing to consider, as part of the agreement, "the lender's closing instructions, . . . even though these documents collectively encompass[ed] the scope of the transaction and the intent of the parties." However, " '[w]hile it is the rule that several contracts relating to the same matters are to be construed together (Civ. Code, § 1642), it does not follow that for all purposes they constitute one contract.' (*Malmstedt v. Stillwell* (1930) 110 Cal. App. 393, 398 [294 P. 41].) " ' "[J]oint execution would require the court to construe the two agreements in light of one another; it would not merge them into a single written

contract." ' (*Pankow Construction Co. v. Advance Mortgage Corp*. (9th Cir. 1980) 618 F.2d 611, 616.)" (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 759.)

We also see no merit to the Bank's challenge to the trial court's finding that none of the loan documents "can be interpreted to obligate" Phillips to execute any and all documents necessary so that the Bank's deed of trust could be recorded. The Bank contends that, under the unambiguous language of the deed of trust, Phillips, as the borrower, covenanted he "is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property," as sole owner. However, the trial court found, quite reasonably, that Phillips fulfilled his representations made in the deed of trust by acceding to the title company's request that he and his brother sign a quitclaim deed that immediately transferred the property to Phillips' sole ownership. (See Civ. Code, § 1039 ["[t]ransfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another"]; *Perry v. Wallner* (1962) 206 Cal.App.2d 218, 221 [transfer of property is effected by "delivery of the conveyance with intent to transfer the title"].) Moreover, Phillips' failure to immediately record the deed did not "destroy the validity of the conveyance as between the parties." (*Mecchi v. Picchi* (1966) 245 Cal.App.2d 470, 485; see *Blackburn v. Drake* (1963) 211 Cal.App.2d 806, 814 ["recordation is not essential to the validity of a deed and . . . failure to record in and of itself does not vitiate delivery or the intent to make a present transfer"].)

Nor do we see any merit to the Bank's argument that the unambiguous language in the deed of trust (in which Phillips "expressly warrants" he would "defend generally the title to the Property against all claims and demands") "translates to" an obligation on Phillips' part to execute "all documents required to effectuate the purpose of the loan and providing [the Bank] with a recordable, first position deed of trust," and therefore his "failure to cooperate in the attempts to record the [quitclaim deed] and [deed of trust] are a breach of the express terms of the" deed of trust. As the trial court properly found, the

Bank's assertions fail at the outset because there is no provision in any of the documents cited by the Bank that obligates Phillips to either record or facilitate the recording of the quitclaim deed or the deed of trust. "In construing a contract, it is not a court's prerogative to alter it, to rewrite its clear terms, or to make a new contract for the parties [and][c]ourts will not add a term to a contract about which the agreement is silent." (*Moss Dev. Co. v. Geary* (1974) 41 Cal.App.3d 1, 9; see also *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 809) [" '[t]he law refuses to read into contracts anything by way of implication except upon grounds of obvious necessity' "].)

We are not persuaded by the Bank's arguments that the covenant of good faith and fair dealing imposed an implied duty on Phillips to either record or facilitate the recording of the quitclaim deed or the deed of trust. "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made.* [Citations.] The covenant . . . cannot ' "be endowed with an existence independent of its contractual underpinnings." ' [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 349–350.) While the Bank asks us to consider certain portions of the testimony offered by both defendants concerning their understanding of the effect of the signing of the quitclaim deed on the ownership of the property, we see nothing to support the Bank's contention that Phillips intended to assume the obligation of recording or facilitating the recording of the quitclaim deed or the deed of trust.

We also see no basis to reverse based on the Bank's argument that the trial court erred "to the extent it ruled in favor of Phillips on the breach of contract cause of action arising from the negligence of the escrow agent in not causing the [quitclaim deed] to record so that the [deed of trust] could record." According to the Bank, it cannot be held liable for the negligence of the escrow agent or the escrow agent's subagent, and

therefore, "to the extent the trial court attributed this breach to [the Bank] to absolve Phillips of any wrongdoing, the ruling is contrary to existing law." However, the court's fault finding, even if erroneous, has no legal impact on its dispositive ruling that Phillips was not at fault because he had no contractual obligations concerning the recordation of the loan documents. Stated differently, even if the Bank was not at fault, such a finding would not support a finding that Phillips was at fault for the nonrecording of the loan documents.

B. Phillips' Failure to Make Monthly Interest-Only Payments from September 15, 2013 through Entry of Judgment

1. Trial Court's Ruling

Addressing the Bank's contentions concerning Phillips' failure to make monthly interest-only payments from September 15, 2013 through entry of judgment, the trial court found, "based on a preponderance of the evidence" the following:

"J. PHILLIPS made all monthly interest-only payments on the 2009 Note from its inception through August 2013 on a timely basis. The monthly payments were made through automatic electronic transfers from his account [at another bank]. In August 2013 he received a solicitation from the BANK for a payment program the BANK called 'PayPlan 12.' He agreed to have his payments made through the PayPlan 12 program, which would result in his monthly payments then being due on the 15th of each month. When J. PHILLIPS received notice that his payments under the PayPlan 12 program would not start until October 15, 2013 he called the BANK, at the number stated in the notices he had received regarding PayPlan 12 program, and was assured that the BANK would start his payments under PayPlan 12 program on September 15, 2013. When J. PHILLIPS had to close [his bank account] he had been using [for the automatic electronic transfers] due to fraudulent activity on that account and open a new [bank] account he informed the BANK of that change and was again assured that payments under PayPlan

12 program would be made beginning with the September 15, 2013 payment and thereafter. When the BANK did not use [J. PHILLIPS' new] account information provided and did not comply with its assurances that payment under the PayPlan 12 program would commence September 15, 2013, J. PHILLIPS followed up with more telephone calls to the BANK and with a letter documenting the assurances he had been given. J. PHILLIPS' counsel also wrote to the BANK documenting the assurances that had been given to J. PHILLIPS. Both J. PHILLIPS and his counsel stated that J. PHILLIPS was ready, willing and able to make all monthly payments to the BANK. The BANK breached the assurances of its representatives that the PayPlan 12 program would be set up so that payments could be made under it beginning September 15, 2013 and its assurances that the failure to use [J. PHILLIPS'] correct [bank] account for the payments would be cured by the BANK so that payments could be made on a timely basis through that program. J. PHILLIPS has proven that he was ready, willing and able to make all monthly payments to the BANK, did properly tender those payments to the BANK beginning in September 2013 and continuing through December 2013, and that further tendering of payments thereafter would have been fruitless and would not have been accepted by the BANK. An obligation is extinguished by an offer of performance and with intent to extinguish the obligation. [(Civ. Code, § 1485.)] An offer of performance must be made to the creditor and at the time fixed for performance. [(Civ. Code, §§ 1488, 1490.)] An offer of performance must be made in good faith and be unconditional. [(Civ. Code, §§ 1493, 1494.)] The person tendering performance must be able and willing to perform according to the offer. [(Civ. Code, § 1495.)] 'A tender must be of full performance, at a proper time and place, made by the debtor or by some person on his or her behalf and with the debtor's consent, to the creditor or some person authorized to receive and collect what is due, at a place appointed by the creditor or a place where the person authorized can be found.' [(1 Witkin, *Summary of California Law* 10th Ed., Contracts § 771.)] Compliance with the following requirements is

essential to a valid tender: (1) the tender must be timely; (2) the tender must be unconditional; (3) the tender must be in good faith; and (4) the party must be able to fulfill the offer of tender. [*Id*., see also, 1 Miller & Starr, *California Real Estate* 4th Ed., Contract Law Applicable to Real Estate Transactions § 1:109.)] The actions of J. PHILLIPS described above meet all requirements of a proper tender in that he unconditionally offered to make his monthly payments on the 2009 Note, he did so within the time payments were due, his tender of payment was made in good faith, and he was fully able to make the payments that were tendered. The Court further finds that as a result of the tender by J. PHILLIPS and the BANK's refusal of that tender J. PHILLIPS is legally excused for all monthly interest-only payments from September 15, 2013 through entry of judgment in this case. An offer of payment or performance, duly made, stops the running of interest on the obligation and has the same effect as if the payment was made. [(Civ. Code, § 1504.)] 'A proper tender stops the running of interest on the debt[.] . . .' [(1 Miller & Starr, *California Real Estate* 4th Ed., Contract Law Applicable to Real Estate Transactions § 1:109[;] See also, 1 Witkin, *Summary of California Law* 10th Ed., Contracts § 770.)] The Court finds that the principal balance owing on the note as of September 15, 2013 to be $1,120,000.

". . . When [J. PHILLIPS] received notice that his payments under the PayPlan 12 program were not made, [he] called the BANK and was assured that the BANK would fix and reinstitute his PayPlan 12 payment program. Under these circumstances, J. PHILLIPS was not required to send payment in another form to the BANK. There is also no evidence that the BANK would have accepted payments by mail, phone or the web that did not include the late charges and the imposition of late charges, under these circumstances, would not have been proper. Civil Code § 1501 provides that all objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could then be obviated by him, are waived by the creditor, if not then stated. Under these circumstances, the letters

the BANK sent to J. PHILLIPS (including Exhibits 152, 153, 154, 368, and 369) were not proper objections to the tender by J. PHILLIPS that result in J. PHILLIPS being obligated to make payments in any manner other than he had been, i.e., electronically through electronic payment programs set up by the BANK. . . . The BANK contends that, for there to be a proper tender, J. PHILLIPS was required to deposit the amount owed to extinguish the obligation, citing Civil Code § 1500 and *Gaffney v. Downey Savings & Loan Assn*. (1988) 200 Cal.App.3d 1154. Civil Code § 1500 states that an obligation is extinguished by a due offer of payment if the amount is immediately deposited in the name of the creditor with some bank or savings and loan association. 'This section [Civil Code § 1500] states a special rule where money is due, but it is not a rule of tender, it is rather a rule of complete performance. It is still possible to tender money called for under a contract without depositing it in the bank, and this tender will have the usual effect of placing the other party in default, discharging any lien or secondary liability, and stopping the running of interest[.] . . . In such a case, however, the ultimate obligation to pay the debt will still remain. In order to completely extinguish that obligation, it is necessary to deposit the money in a bank in accordance with the provisions of Civil Code § 1500.' [(1 Witkin, *Summary of California Law* 10th Ed., Contracts § 775; see also, *Hunt v. Mahoney* (1947) 82 Cal.App.2d 540.)] " ['Tender' is an offer of performance, and the effect of such an offer is governed by statutory provisions, both in the Civil Code as to obligations generally and in the Uniform Commercial Code as to negotiable instruments specifically." [(10 Cal.Jur.3d Bills and Notes § 267.)] California [Uniform Commercial Code] § 3603(b) provides as follow: 'If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of [the] amount of the tender, of the obligation of an indorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates. . . .' [California Uniform] Commercial Code § 3603(c) provides as follows: 'If tender of

payment of an amount due on an instrument is made to a person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged.' J. PHILLIPS' tender of monthly payments for the 2009 Note was proper and effective and he was not required to deposit those payments in a bank or savings and loan association for the tender to be effective. The tender of monthly payments for the 2009 Note did not extinguish the principal amount owed on the 2009 Note. J. PHILLIPS was not required to deposit the amount owed with a bank in compliance with Civil Code § 1500 for his tender to result in the interest owed on the 2009 Note to be extinguished. *Gaffney, supra*, is distinguishable in part because, in that case, the borrower contended that his conditional payments of past due monthly obligations extinguished the entire debt, not just the amounts tendered or interest accruing on the obligation. Compliance with Civil Code § 1500 is not necessary to extinguish, as here, the accrual of interest after monthly payments were tendered and rejected. (Bolded language eliminated.)

" ' "Section 1500 of the Civil Code provides: 'An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank or savings and loan association within this state, of good repute, and notice thereof is given to the creditor.' The mere fact that such a deposit is made does not extinguish the obligation if the requirements for offer and notice are not satisfied. . . . A proper deposit extinguishes the obligation and terminates the running of interest because a deposit that is in compliance with § 1500 constitutes actual performance of the obligation, not a mere tender of performance. As an alternative to the procedure in § 1500, a second form of offer of payment will also stop interest but will not extinguish the underlying obligation. Section 1504 of the Civil Code provides: 'An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof.' A tender of

payment that will stop interest running but will not affect the obligation need not be kept good by a deposit of money in a bank in the name of the creditor. [(3 Cal. Affirmative Def. § 69:4. (Emphasis added.); see also *Rose v. Hecht* (1949) 94 Cal.App.2d 662, 666 ['[w]hile tender of monthly rentals by personal checks without depositing in a bank the amount thereof to the lessor's credit does not extinguish the obligation, such tenders are sufficient to stop the running of interest].')]

". . . J. PHILLIPS[']s efforts to make monthly payments through the BANK's offered PayPlan 12 program were proper tenders of the monthly payments due on the 2009 Loan. No late fees were owed on the monthly payments tendered by J. PHILLIPS because the payments were tendered timely and any failure to accept or credit those payments was the fault of the BANK in not doing what its representatives told J. PHILLIPS they would do when he called the BANK about the payments. A tender must be made . . . 'at a place appointed by the creditor or a place the person authorized can be found.' [(1 Witkin, *Summary of California Law*, 10th Ed., Contracts § 771.)] 'If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance.' [Civ. Code, § 1476.)] J. PHILLIPS[']s tender of monthly payments through the PayPlan 12 program was proper under the circumstances and in light of both the letters he received and what he was told by BANK representatives when he called about the payments. Under these circumstances, J. PHILLIPS was not obligated to tender payments to the BANK in any other way (such as by separate check, money order or cashier's check) for his tender to be effective."

2. Analysis

In challenging the trial court's ruling, the Bank asks us to consider evidence, not cited by the trial court, in support of its contention that there was no proper tender of the monthly interest-only payments and there was no excuse for nonpayment. According to

the Bank, the evidence "confirmed" that Phillips' payments did not conform to any of the specified methods of payoff payment; that the Bank had told Phillips that his September 2013 payment could not be processed through the PayPlan 12 account and further advised him in December 2013 that he was three months' delinquent in payments on the loan; that the Bank told Phillips to make up the delinquent payments by mail, phone or the web in order to reinstate PayPlan 12; and Phillips' representation that he was "ready, willing, and able to make all monthly payments to the BANK," did not satisfy the legal definition of tender set forth in Civil Code section 1500. The Bank further argues that Phillips' attempted payments under the PayPlan 12 did not result in the extinguishment of his obligation to pay interest under the loan because he did not tender the full amount due under the loan at any point in time. In its reply brief, the Bank restates its arguments as follow: "There is no evidence that Phillips attempted to tender the full amount due on the Loan. Rather the evidence is that Phillips attempted to make three *interest-only* payments via the PayPlan 12 account, despite the fact that [the Bank] advised him to make the payments by mail, phone, or the web. [Record Citation.] Phillips unilaterally attempted to alter the manner of payment specified by [the BANK] and, in doing so, did not make a good faith offer of tender in such a manner as was most likely to benefit [the Bank]. [Citation.] Phillips knew that his attempts to pay via PayPlan 12 [were] rejected, knew that he was delinquent on the Loan, and knew that he was required to make his payments by mail, phone, or the web. [Citation.]. He declined to do so and, therefore, it was legal error to hold that a valid tender occurred. Thus, the trial court's ruling relieving Phillips of his obligation to pay interest in the amount of $135,200.92 was in error and should be overturned."

We conclude there is no merit to the Bank's arguments, which were appropriately rejected by the trial court in its well-reasoned and comprehensive discussion of this issue. The trial court accurately set forth the governing law on the issues of tender of payment and excuse for performance. It was for the trial court, as the trier of fact, to determine

whether the evidence demonstrated Phillips had made a proper tender of the monthly interest-only payments, and whether his failure to make the monthly interest-only payments should be excused based on the Bank's conduct. The court here found that the Bank had agreed to accept monthly interest-only payments by automatically withdrawing the payments from Phillips' bank account. However, the Bank failed to timely withdraw the September 2013 payment from the correct bank account. As a consequence, the Bank deemed the payment late and added late charges. When Phillips complained that the late fees should be rescinded, the Bank refused to do so, and, thereafter failed to withdraw the subsequent monthly payments unless Phillips agreed to pay the late fees. While Phillips continued to inform the Bank that he was ready, willing, and able, to make the payments, the Bank refused to accept such payments without payment of the late fees. After three months, Phillips stopped attempting to make the payments. Under these circumstances, the trial court found the Bank had failed to prove that Phillips had breached the loan agreement by failing to timely pay his monthly interest-only payments. In so ruling, the trial court was free to reject the Bank's evidence on the issue. "We decline [the Bank's] invitation to examine whether substantial evidence supports [its] position. It is not our function to retry the case." (*Sonic Manufacturing Technologies*, *supra*, 196 Cal.App.4th at p. 466.)

II. Phillips' Negligence Cause of Action

A. Trial Court's Ruling

The trial court found Phillips was entitled to recover damages on his negligence cause of action because the Bank had a duty to reasonably consider his 2012 refinance application and breached its duty by negligently handling, processing, and denying that application.

Addressing the Bank's duty of care, the trial court found, "based on a preponderance of the evidence" the following:

"Under the circumstances of this case, J. PHILLIPS has proven that the BANK had a duty to reasonably consider his refinance application. The duty arose because J. PHILLIPS was already a borrower from the BANK by reason of the 2009 Loan, the refinance only sought to refinance the amount owing under the 2009 Note, the BANK accepted, processed and considered the refinance application, the BANK told him his refinance application was conditionally approved, and the refinance application would have solved the BANK's lack of a deed of trust for the 2009 Note. J PHILLIPS' situation is similar to a borrower seeking a loan modification from a bank because he was already a borrower from the BANK and he was not seeking any additional money from the BANK; only a payoff and refinance of his existing debt. His motivation for the refinance was, in part, to seek a lower interest rate to lower his monthly payments. As a result of the *lis pendens* the BANK had recorded he was limited in the financial institutions which would consider his refinance application. As a result, it is appropriate and proper for the Court to apply the balancing test known as the '*Biakanja* Factors' [(*Biakanja v. Irving* (1958) 49 Cal.2d 647)] in determining if the Bank owed a duty to reasonably consider his refinance application in this circumstance.

" . . . Balancing the '*Biakanja* Factors' favors the imposition of a duty on the BANK. The first element . . . is the extent to which the transaction was intended to affect the borrower. The refinance application was intended to benefit J. PHILLIPS. The second element . . . is the foreseeability of the harm to J. PHILLIPS. It was foreseeable to the BANK that J. PHILLIPS would be harmed because the interest-only payments he was making on the 2009 Note were based on an interest rate that was almost 2 % more than was available for the refinance loan. As set out in the Good Faith Estimate prepared by the BANK at the outset of the refinance application, J. PHILLIPS['] monthly payments under the refinance loan were going to be $3,150 per month (Exhibit 319) in comparison to $4,783.33 under the 2009 Note (Exhibit 32). The third element . . . is the degree of certainty that the borrower suffered injury. J. PHILLIPS did suffer injury by

paying higher monthly payments under the 2009 Note than he would have had to pay if the refinance had been approved. J. PHILLIPS also paid attorneys' fees to defend against the claims of the BANK in the First Action and those fees would not have been incurred if the refinance was approved because the refinance would have paid off all amounts owing on the 2009 Note. The fourth element . . . is the closeness of the connection between the BANK's conduct and the injury suffered. The denial of the refinance application led directly to J. PHILLIPS paying more interest to the BANK than he would have had to pay if the refinance was approved and to J. PHILLIPS incurring attorneys' fees in defending against the BANK's claims in the First Action that would not have been incurred if his refinance application was approved. The fifth element . . . is the moral blame attached to the BANK's conduct. The Court need not attribute 'moral blame' to the BANK's conduct in this circumstance. However, there does not appear to be any reasonable reason for the BANK taking five months to consider J. PHILLIPS' refinance application and then denying the application on grounds that the BANK never even asked him about (any other available liquid assets or cash reserves). The BANK also failed to follow its own procedures in not promptly providing J. PHILLIPS with a revised Good Faith Estimate after it internally reduced the loan amount being sought and changed the terms of the loan. (Exhibits 329, 332, and 344[.]) The sixth element . . . takes into account preventing future harm. The BANK did not provide J. PHILLIPS with sufficient information or communicate clearly with him regarding the refinance process and this should be improved. The BANK contends that imposing a duty would have drastic consequences of imposing an affirmative duty on banks, acting only in their role as conventional lenders, to make new loans (refinance) simply because the lender and borrower are involved in litigation and a *lis pendens* has been recorded on the property. The Court's finding that the BANK had a duty to reasonably consider J. PHILLIPS' refinance application in 2012, under the relatively unique circumstances stated herein, does not constitute a drastic consequence that require[s] a lending institution, in all

situations to 'make new loans (refinance) simply because the lender and borrower are involved in litigation and a *lis pendens* has been recorded.' Weighing and balancing the '*Biakanja* Factors' tilts in favor of the BANK owing a duty to reasonably consider J. PHILLIPS' refinance application.

". . . "[U]nder these relatively unique circumstances, J. PHILLIPS' 2012 refinance application was not a typical or ordinary refinance application. The 2012 refinance application was not typical because the loan being refinanced, the 2009 Note, was supposed to be secured by a deed of trust on the . . . property and, through no fault of J. PHILLIPS, the deed of trust was not recorded. The 2012 refinance application was not typical because there was a lawsuit pending between the parties and the BANK had recorded a *lis pendens* that encumbered the . . . property and the *lis pendens* impeded J. PHILLIPS from being able to sell the property or refinance the 2009 Loan with another lender. As a result, J. PHILLIPS' 2012 refinance application was similar to the borrowers in loan modification cases such as *Alvarez* and the cases following its holding."

Addressing the Bank's negligence in its handling, processing and denial of Phillips' 2012 refinance application, the trial court found, "based on a preponderance of the evidence" the following:

"J. PHILLIPS' financial condition as of 2012 was better than it was at the time of the 2009 Loan. His income was approximately the same or better, his expenses were approximately the same or less, his credit rating was approximately the same, the . . . property was worth more, and he had significantly more in liquid cash reserves. The BANK during its consideration of his refinance application failed to provide J. PHILLIPS with a timely Good Faith Estimate showing that it had changed the loan amount and the type of loan (which resulted in an increased initial monthly payment from what was first disclosed). The BANK changed both the loan amount and the type of the loan during its consideration of his refinance application without his knowledge or consent. The BANK

unreasonably delayed in informing J. PHILLIPS of its decision on the refinance application. The BANK decreased the amount of liquid assets stated to be available to J. PHILLIPS by reducing the amount stated to be in his [retirement account] below the net assets that were available . . . . The BANK failed to inquire of J. PHILLIPS if he had other liquid assets or other available funds to satisfy the guidelines of the BANK for approval of the refinance application. The BANK unreasonably denied J. PHILLIPS' refinance application. These actions by the BANK were below the normal and accepted standards of care for a lending institution.

" . . . The BANK did not consider J. PHILLIPS' refinance application as anything other than a refinance application of his primary residence. The . . . property was J. PHILLIPS' primary residence throughout the applicable time period for his refinance application so there was no basis for considering it as anything but a refinance application of J. PHILLIPS' primary residence. J. PHILLIPS always considered the . . . property his primary residence. He owned no other real property. While his wife and daughter moved to New York City sometime in about 2009 . . . and lived in a rented apartment and while he rented out the upper floors of the . . . property to tenants, J. PHILLIPS stayed in the lower floor of the . . . property when he was in California. J. PHILLIPS stayed at the . . . property a majority of the time in 2011 and 2012. J. PHILLIPS always, through 2012, filed a California tax return stating that he had resided in the . . . property a majority of the time. During that same time period he filed a New York state tax return as a 'nonresident and part-year resident.' (Exhibit 378[.]) J. PHILLIPS was registered to vote in California and had a California driver's license. The reference in the appraisal of the . . . property to it being occupied by a tenant (Exhibit 82) is not sufficient evidence to overcome the testimony of J. PHILLIPS, supported by his tax returns (including Exhibit 378), that the . . . property remained his primary residence. The rental of portions of the . . . property by both tenants and by J. PHILLIPS' company is not sufficient evidence to overcome the testimony that the . . . property was J. PHILLIPS' primary residence. No

underwriting guidelines for properties that are not a borrower's primary residence were provided so the BANK has not proven that the refinance application should have or would have been denied even if the . . . property was considered a type of property different than J. PHILLIPS' primary residence.

" . . . [U]nder the circumstances of this case the BANK's conduct in the handling of J. PHILLIPS' refinance application fell below applicable standards of care for a financial institution in such a situation and the BANK's conduct was negligent in its handling, processing and denial of J. PHILLIPS' refinance application. If the BANK had properly handled, considered and processed J. PHILLIPS' refinance application, the refinance application would have and should have been granted."

B. Analysis

The Bank argues the trial court erred in ruling that it owed a duty of care in the handling, processing, and approval of Phillips' 2012 refinance application. We agree.

"The elements of a cause of action for negligence are well established. They are '(a) a *legal duty* to use due care; (b) a *breach* of such legal duty; [and] (c) the breach as the *proximate or legal cause* of the resulting injury.' " (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 834.) " ' "Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability." [Citation.]' [Citation.] Because the consequences of a negligent act must be limited to avoid an intolerable burden on society [citation], the determination of duty 'recognizes that policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk.' [Citation.] '[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury.' [Citation.] In short, foreseeability is not synonymous with duty; nor is it a substitute." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552.) In determining whether a

defendant owes a duty of care to a plaintiff not in privity of contract or by statute, the courts have applied certain factors set forth in *Biakanja, supra*, 49 Cal.2d 647 (hereinafter referred to as the *Biakanja* factors). Those factors include (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm. (*Id.* at p. 650.) Nonetheless, as our Supreme Court has cautioned, " '[c]ourts should be careful to apply tort remedies only when the conduct in question is so clear in its deviation from socially useful business practices that the effect of enforcing such tort duties will be . . . to aid rather than discourage commerce.' [Citation.]" (*Erlich v. Menezes, supra*, at p. 554.)

We acknowledge a split of authority in our courts regarding whether a lender owes a duty of care to a borrower seeking a loan modification. Our colleagues in Division Three of the Fourth Appellate District (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 67 (*Lueras*)), and Division Eight of the Second Appellate District (*Sheen v. Wells Fargo Bank, N.A.* (2019) 38 Cal.App.5th 346, 352–358 (*Sheen*), pet. for review filed Sept. 16, 2019, S258019), have dismissed potential borrowers' negligence causes of action on the ground the lending bank had no common law duty of care to offer, consider, or approve a loan modification under various factual circumstances. This court, as well as our colleagues in the Sixth Appellate District (*Daniels v. Select Portfolio Servicing, Inc*. (2016) 246 Cal.App.4th 1150, 1180–1183 (*Daniels*)) and the Third Appellate District (*Rossetta v. CitiMortgage, Inc.* (2017) 18 Cal.App.5th 628, 637–643 (*Rossetta*)), with the latter court distinguishing its earlier decision in *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089 (*Nymark*), have determined that a lending bank may owe a borrower a duty of care to offer, consider or approve a loan modification under various factual circumstances.

At trial, Phillips contended that his negligence claim was based on the Bank's handling of his 2012 refinance application, which he asserted should be considered as a loan modification for which a duty of care had been found to be owed by the courts, relying on our decision in *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941 (*Alvarez*) and *Daniels*, *supra*, 246 Cal.App.4th at pp. 1180–1183. The Bank argued that *Alvarez* and *Daniels* should be limited to their unique circumstances, and that the court should follow the general rule that a financial institution owed no duty of care to a borrower when the lender's involvement in the loan transaction did not exceed the scope of its conventional role as a lender of money, citing to *Nymark*, *supra*, 231 Cal.App.3d at pp. 1095–1096. We agree with the Bank, and conclude that our decision in *Alvarez*, and cases that have relied on its rationale to impose a duty of care under various factual circumstances (*Daniels*, *supra*, 246 Cal.App.4th 1150; *Rossetta*, *supra*, 18 Cal.App.5th 628), are inapposite and distinguishable from the circumstances concerning Phillips' 2012 refinance application in this case.

In *Alvarez*, *supra*, 228 Cal.App.4th 941, the plaintiff borrowers filed a complaint alleging that defendants lenders had breached their duty to exercise reasonable care in processing and reviewing their applications for loan modifications in accordance with the federal Home Affordable Mortgage Program (HAMP) guidelines by (1) failing to review the plaintiffs' applications in a timely manner, (2) foreclosing on the plaintiffs' properties while they were under consideration for a HAMP modification, and (3) mishandling plaintiffs' applications by relying on incorrect information. "With respect to the mishandling of the applications, the complaint alleges that between February and April 2011, Alvarez was told by an employee of defendants named in the complaint that his application for modification of the loan secured by his primary residence had been rejected because his monthly gross income of $2,554.75 was inadequate, whereas his paystubs showed that his monthly gross income was $6,075. With respect to the loan on one of his rental properties, he was told that his application showed a $6,318.98 deficit in

monthly income, while Alvarez alleges that there was no such deficit. With respect to the loan on his second rental property, the complaint alleges that defendants falsely advised him that no documents had been submitted for review when in fact documents were sent to and received by defendants. [One borrower] alleges that after working with defendants for over two years to obtain a loan modification, defendants advised him 'that the second lien holder prevented the modification from taking place,' which was false." (228 Cal.App.4th at pp. 944–945.)

Under those circumstances, we concluded the *Alvarez* plaintiffs could pursue a cause of action for negligence for the failure of the lenders to exercise reasonable care in the review of the loan modification applications. (228 Cal.App.4th at p. 946.) Applying the *Biakanja* factors, we found in *Alvarez* as follows:

"[B]ecause defendants allegedly agreed to consider modification of the plaintiffs' loans, the *Biakanja* factors clearly weigh in favor of a duty. The transaction was intended to affect the plaintiffs and it was entirely foreseeable that failing to timely and carefully process the loan modification applications could result in significant harm to the applicants. Plaintiffs allege that the mishandling of their applications 'caus[ed] them to lose title to their home, deterrence from seeking other remedies to address their default and/or unaffordable mortgage payments, damage to their credit, additional income tax liability, costs and expenses incurred to prevent or fight foreclosure, and other damages.' . . . 'Although there was no guarantee the modification would be granted had the loan been properly processed, the mishandling of the documents deprived Plaintiff of the possibility of obtaining the requested relief.' [Citations.] Should plaintiffs fail to prove that they would have obtained a loan modification absent defendants' negligence, damages will be affected accordingly, but not necessarily eliminated. With respect to whether defendants' conduct was blameworthy—the fifth *Biakanja* factor—it is highly relevant that the borrowers 'ability to protect his own interests in the loan modification process [is] practically nil' and the bank holds 'all the cards.' [Citation.] [¶] The

borrower's lack of bargaining power, coupled with conflicts of interest that exist in the modern loan servicing industry, provide a moral imperative that those with the controlling hand be required to exercise reasonable care in their dealings with borrowers seeking a loan modification. Moreover, the allegation in the complaint that defendants engaged in 'dual tracking,' which has now been prohibited (see Civ. Code, § § 2923.6, 2924.18) increases the blame that may properly be assigned to the conduct alleged in the complaint. [Citation.]

"The policy of preventing future harm also strongly favors imposing a duty of care on defendants. As noted in [(*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872 (*Jolley*)] at page 903, '[T]he California Legislature has expressed a strong preference for fostering more cooperative relations between lenders and borrowers who are at risk of foreclosure, so that homes will not be lost.' The 'California Homeowner Bill of Rights' (HBOR) (Assem. Bill No. 278 (2011–2012 Reg. Sess.); Sen. Bill No. 900 (2011–2012 Reg. Sess.)), which became effective January 1, 2013, demonstrates 'a rising trend to require lenders to deal reasonably with borrowers in default to try to effectuate a workable loan modification.' (*Jolley* at p. 903.) . . .

"Although the provisions of the HBOR had not yet become effective at the dates relevant to the present action, the legislation nonetheless 'sets forth policy considerations that should affect the assessment whether a duty of care was owed to [plaintiffs] at that time.' (*Jolley, supra,* 213 Cal.App.4th at p. 905.) Much of the conduct that plaintiffs allege breached a duty of care in this case—failing to process the applications in a timely manner, dual tracking and losing documents—is conduct now regulated by the HBOR. While the explicit articulation of the lender's duties was not available when plaintiffs applied for loan modification, these obligations fall well within the duty to use reasonable care in the processing of a loan modification. Recognizing this general duty will not place an undue burden on mortgage banks and servicers, nor will it have a chilling effect

on borrowers' ability to obtain loan modifications." (*Alvarez, supra,* 218 Cal.App.4th at pp. 948–951.)

We have set forth the factual circumstances and the pertinent portions of our analysis in *Alvarez* to demonstrate that the case should be limited to its factual circumstances and how that case is otherwise inapposite to the circumstances we confront here. In applying the *Biakanja* factors, we consider that, at the time of the refinancing, the Bank and Phillips were in an established relationship and the Bank had commenced litigation against Phillips and recorded a lis pendens against the property. Balanced against those factors, and more significant, are the circumstances that at the time Phillips filed his 2012 refinance application he was not in default or even in danger of defaulting on his monthly interest-only payments (as he concededly was in a better financial position in 2012 than in 2009). Relatedly, any decision on the 2012 refinance application would not likely determine whether or not Phillips kept his property. (Cf. *Rossetta, supra,* 18 Cal.App.5th at pp. 628–629 [while borrower and lender had entered a new phase of relationship when they voluntarily undertook to renegotiate a loan, the court found significant that the bank allegedly refused to consider the loan modification application until the borrower was three months behind in her mortgage payments, making default a condition of being considered for loan modification, and the lender's decision on the application for a modification plan would likely determine whether or not the borrower could keep her house].)

While Phillips believed the refinanced loan would eliminate the problem with the unrecorded deed of trust on the 2009 note, that circumstance does not factor into our analysis because, at a minimum, that circumstance would plainly be an incentive for the Bank to handle the refinance application in a timely and responsible manner so as to end its litigation with Phillips. As to the harm suffered by Phillips as a result of the denial of his refinance application, he was required to pay a higher interest rate than he wanted to pay, a typical outcome when a bank denies a loan refinance or modification application.

(See, e.g., *Sheen, supra*, 38 Cal.App.5th at p. 357 [" 'it is strange to impose a negligence duty on lenders to carefully review modification applications when there is no such tort duty to *approve* applications as a result of that review' "]; see *id*. at p. 358 [court upheld dismissal of borrower's negligence claim because "a lender does not owe a borrower a common law duty to offer, consider, or approve a loan modification," despite the fact that lender's responses to loan modification requests "may have been confusing, confused, tardy, or flat wrong"].) As to the other *Biakanja* factors, no "moral blame" can attach to the Bank's denial of the 2012 refinance application as there was no showing that the Bank had placed Phillips in a position where he needed to refinance the loan application (see *Lueras, supra*, 221 Cal.App.4th at p. 67 ["[i]f the lender did not place the borrower in a position creating a need for a loan modification, then no moral blame would be attached to the lender's conduct"]). Again, while the 2012 refinance application was made while the Bank's litigation and recorded lis pendens were extant, there was no showing that Phillips' financial circumstances required him to refinance or otherwise was in danger of losing the property. Hence, imposing a duty of care in this case would not further any policy of preventing future harm to borrowers.

Accordingly, we conclude Phillips' cause of action for negligence does not lie as a matter of law because the Bank owed no duty to Phillips regarding the handling and denial of the 2012 refinance application. In light of our determination, we reverse that portion of the amended judgment concerning the court's finding in favor of Phillips on his cause of action for negligence, as well as those portions of the amended judgment awarding Phillips damages in the sum of $1,260,665, subject to an equitable setoff for the outstanding principal sum of $1,120,000 owing on the 2009 promissory note, and awarding Phillips prevailing party attorney fees. The matter is remanded to the trial court for further proceedings on the issues of the Bank's request for the immediate payment of

the outstanding principal sum owing on the 2009 Note,[4] the award of contractual attorney fees to the prevailing party, and any other outstanding issues in light of our decision.

DISPOSITION

The appeals from the orders filed on August 19, 2013, February 27, 2014, October 19, 2017, and the judgment filed on May 31, 2017 are dismissed. The amended judgment, filed on October 19, 2017, is reversed as to those portions concerning the trial court's findings in favor of Phillips on his cause of action for negligence, awarding Phillips damages in the sum of $1,260,665, subject to an equitable setoff for the outstanding principal sum of $1,120,000 owing on the 2009 promissory note, and awarding Phillips prevailing party attorney fees. The amended judgment is otherwise affirmed.

The matter is remanded to the trial court for further proceedings on the issues of the Bank's request for the immediate payment of the outstanding principal sum owing on the 2009 Note, the award of contractual attorney fees to the prevailing party, and any other outstanding issues in light of our decision. Each side shall bear their own costs on appeal.

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[4] Because we are remanding the matter on the issue of the Bank's request for the immediate payment of the outstanding principal sum due on the 2009 Note, we do not need to address its contentions challenging (1) the trial court's rulings that the Bank failed to prove that Phillips had breached his contractual obligations by selling the property without the Bank's prior written consent and by failing to pay the principal sum owing on the 2009 promissory note after the sale, or (2) the trial court's finding that the Bank's filing of the first amended complaint was not adequate notice to Phillips of the Bank's election to accelerate the payment of the 2009 Note.

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Petrou, J.

WE CONCUR:

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Siggins, P.J.

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Fujisaki, J.

A152201/Bank of America v. Phillips

SIGGINS, P. J.:

I concur fully in Justice Petrou's majority opinion and the result we reach in this case. I am writing separately to express my current view on the rationale and application of *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941 (*Alvarez*), where we held a lender may be liable to a borrower for negligence in the processing of an application for modification of a loan on the borrower's home.

In short, I agree with Justice Wiley's opinion for the court in *Sheen v. Wells Fargo Bank, N.A.* (2019) 38 Cal.App.5th 346, petition for review pending, petition filed September 16, 2019, in which our colleagues in Division Eight of the Second Appellate District disagree with *Alvarez* and dismiss a negligence count on the basis that a lender does not owe a buyer a common law duty to offer, consider or approve a loan modification. I would reverse the trial court's award of damages on Phillips' cross-complaint solely on this basis without further analysis of the factors identified in *Biakanja v. Irving* (1958) 49 Cal.2d 647.

As a member of the panel that decided *Alvarez*, I take this opportunity to express my change of view. " 'Precedent . . . is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. See Chief Justice Taney, *License Cases*, 5 How. (U.S.) 504, recanting views he had pressed upon the Court as Attorney General of Maryland in *Brown v. Maryland*, 12 Wheat. (U.S.) 419. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." *Andrews v. Styrap* (Eng.) 26 L.T. N.S. 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: "My own error, however, can furnish no ground for its being adopted by this Court. . . ." *United States v. Gooding*, 12 Wheat. (U.S.) 460, 478. Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary—"Ignorance, sir, ignorance." But an escape less self-depreciating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his

Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are other ways of gracefully and good naturedly surrendering former views to a better considered position, I invoke them all.' [¶] I also find appropriate the quotation employed by Mr. Justice Rutledge in *Wolf v. Colorado* (1949) 338 U.S. 25, 47, 69 S.Ct. 1359, 1368: 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.' " (*Smith v. Anderson* (1967) 67 Cal.2d 635, 646 (conc. opn. of Mosk, J.), quoting *McGrath v. Kristensen* (1950) 340 U.S. 162, 177 (conc. opn. of Jackson, J.)

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Siggins, P. J.