Filed 9/30/15 Bergman v. JP Morgan Chase Bank, N.A. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JEFFREY BERGMAN, Plaintiff and Appellant, v. JP MORGAN CHASE BANK, N.A., Defendant and Appellant.	E060148 (Super.Ct.No. RIC10014015) OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

AlvaradoSmith, John M. Sorich, S. Christopher Yoo, Jacob M. Clark; Parker Ibrahim & Berg, John M. Sorich and Mariel Gerlt-Ferraro for Defendant and Appellant.

Burkelegal and Gregory Burke for Plaintiff and Appellant.

I

INTRODUCTION

Plaintiff and respondent Jeffrey A. Bergman (Bergman) sued defendant and appellant JPMorgan Chase Bank, N.A. (Chase) on claims involving a residential loan modification. A jury found in favor of Bergman on his causes of action for intentional misrepresentation and breach of the implied covenant of good faith and fair dealing. Chase appeals from a $250,000 judgment in favor of Bergman, and the posttrial orders denying Chase's motion for judgment notwithstanding the verdict (JNOV) and granting attorney's fees to Bergman.

Chase argues the verdict is not supported by substantial evidence because no evidence shows Chase made misrepresentations to Bergman. Additionally, Chase argues the trial court erred in evidentiary rulings and jury instructions. Finally, Chase contends the judgment's award of damages was duplicative, and the attorney's fees provision under the subject deed of trust and promissory note did not include recovery of fees. Bergman has filed a cross-appeal, raising issues of instructional and evidentiary error, and additional claims by Bergman for breach of contract and attorney's fees.

We presume the judgment is correct if it is supported by substantial evidence. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 494; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.) To warrant reversal, an error in jury instructions must result in a miscarriage of justice. (*Mize-Kurzman v. Marin Community College Dist.* (2010) 202 Cal.App.4th 832, 862; *Soule v. General Motors*

Corp. (1994) 8 Cal.4th 548, 580.) Evidentiary error must also be "arbitrary, capricious, or patently absurd . . . resulting in a manifest miscarriage of justice." (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1685.) On a motion for judgment notwithstanding the verdict, an appellate court must decide whether any substantial evidence supports the verdict unless the verdict raises purely legal questions. (*Trujilllo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284; *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.) An award of attorney's fees is reviewed de novo. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1212.)

Based on the various appropriate standards of review, we affirm the judgment: "The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

II

FACTUAL AND PROCEDURAL BACKGROUND

In 2005, Bergman purchased the subject residential real property located at 22330 Foxhall Drive in Corona, making a down payment of $250,000. Bergman proceeded to make improvements to the property costing about $291,000.

In 2007, Bergman refinanced the property with an adjustable rate mortgage of $937,500, based on a value of $1.25 million. Bergman testified he thought the loan was a conventional loan. Instead, the monthly payments in the fixed amount of $5,273.44 were interest-only for the first 10 years until 2017.

Bergman made the monthly payments from January until October 2008. Chase acquired the beneficial interest in the loan in September 2008. In December 2008, Bergman asked for a loan modification with a lower interest rate. He paid the loan modification fee of $1,582. The bank agreed to reduce the interest rate to 3 percent and the monthly payment to $4,112.74, while increasing the loan balance by an additional $9,000. In the third year, the monthly payment would increase to $5,417.64, applied to both principal and interest.

When Bergman realized how much the monthly payment would increase in the third year, he immediately contacted Chase about another modification. He testified Chase offered proposed terms for a new loan modification with a 40-year term, a fixed interest rate at 3 percent, and a $3,000 monthly payment. Bergman had the ability to pay $3,000 a month.

Bergman testified he did not make a payment on the first loan modification in January 2009 or later because the Chase bank staff[1] told him that to qualify for another loan modification he would need to be in default. Bergman did not remember making a payment that was reversed and returned in February 2009, for nonsufficient funds, or "NSF."

A notice of default (NOD) was recorded in April 2009. Although Bergman contacted Chase about the NOD, Bergman did not realize in July 2009 that the

[1] Bergman could not name most of the bank staff to whom he spoke. Almost none of the correspondence he received from Chase included individual names.

foreclosure was proceeding. A notice of trustee's sale was mailed to Bergman, posted on the property, and recorded on August 3, 2009.

In the meantime, in August 2009, Bergman consulted with a real estate broker about a short sale. Bergman also finally received information about a HAMP[2] loan modification from Chase. Bergman submitted a HAMP hardship affidavit and financial information to Chase on August 20, 2009. Bergman had suffered financial difficulties from a divorce, a downturn in his limousine business, and two surgeries. He stated the property was worth $578,000 and the outstanding loan was $946,000. However, Bergman could not qualify for a HAMP loan because of the limit of $729,750 on loan modifications.

Bergman identified one Chase employee, Hifa Boolori, whose name appears on correspondence dated August 28, 2009, approving a trial plan agreement. A trial plan agreement was not a HAMP loan but a Chase internal loan modification program. Bergman agreed to the plan and made three trial plan payments of $2,775 in September, October, and November 2009. He provided additional information, anticipating he would receive a second loan modification.

Bergman testified he did not know the foreclosure was proceeding at the same time the second loan modification was being evaluated. He was told the foreclosure would be "frozen." In his fifth amended complaint, he alleged he was informed on November 17, 2009, that he had been denied a loan modification and a sale was

[2] Home Affordable Modification Program.

scheduled for January 5, 2010. At trial, he testified he did not know the trustee's sale was scheduled for December 2, 2009, but had been rescheduled for January 15, 2010.

On December 17, 2009, Bergman signed a listing agreement for a short sale. He drafted a letter on December 22, 2009, asking Chase to let him sell the property in a short sale.

On the same date, December 22, 2009, Chase wrote Bergman a letter asking him to provide two recent paystubs to support his loan modification request. After receiving that letter, Bergman called Chase—because he had already been told his loan modification was denied—but Chase told him the loan was still under review. Bergman provided copies of his bank statements for October and November 2009.

On January 12, 2010, Chase again wrote Bergman, stating his loan modification was being reviewed. On February 11, 2010, Bergman wrote Chase, asking to cancel the loan modifications and to proceed with a short sale. Bergman continued to receive conflicting information about his loan from Chase until July 2010.

The property was sold at a trustee's sale in July 2010 to defendant Mark Mraz, a friend of Bergman's. One appraised fair market value was $595,000. The unpaid principal balance was $1,022.265.92. Bergman continued to receive notices about loan modification after the sale.

After the property was sold, Bergman was sued for unlawful detainer. Bergman posted a cash bond of $30,000 with money borrowed from his parents. Bergman incurred additional attorney's fees defending the unlawful detainer action.

The jury completed the special verdict forms on all seven causes of action and punitive damages. The jury awarded Bergman damages of $125,000 on the cause of action for breach of the implied covenant of good faith and fair dealing and $125,000 on the cause of action for intentional misrepresentation.

III

PROPERTY IMPROVEMENTS

At trial Chase objected to Bergman's testimony about the $291,000 he spent on property improvements on the grounds that information had not been disclosed during discovery. Chase argues the trial court abused its discretion by allowing Bergman to testify. (Evid. Code, § 352.) Chase contends it was prejudiced by "surprise at the trial" because Chase could not adequately challenge Bergman's testimony regarding the property upgrades. (*Chronicle Pub. Co. v. Superior Court* (1960) 54 Cal.2d 548, 561.)

Chase's pretrial motion in limine sought to exclude any documentary evidence and witnesses not previously disclosed. Bergman was not an undisclosed witness and he did not submit documentary evidence about the property upgrades at trial. Furthermore, we have reviewed Chase's record citations to its discovery requests and those requests do not support Chase's contention that it "specifically requested all documents in support of Bergman's claims." Chase's requests for admission, form and special interrogatories, and document requests do not ask generally or particularly for any documents in support of Bergman's claim for damages based on the cost of the property improvements. Therefore, the predicate for Chase's argument—that Bergman did not comply with discovery requests—is not supported by the record. The trial court did not abuse its

discretion in allowing Bergman's testimony, which did not involve undisclosed documents or witnesses. (*Boeken v. Phillip Morris, Inc., supra,* 127 Cal.App.4th at p. 1685.)

IV

JURY INSTRUCTION ON CORPORATE FRAUD

The trial court gave the jury a standard instruction based on CACI No. 1900, concerning intentional misrepresentation: "Jeffrey Bergman claims that [Chase] made a false representation that harmed him." Chase contends the court erred by not giving its proposed Special Instruction No. 11: "To assert a fraud action against a corporation, a plaintiff must also allege [the] names of the person or persons who allegedly made the fraudulent representation, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written."

The special instruction requested by Chase is based on heightened pleading requirements for corporate fraud, requiring a plaintiff to allege specifically the name of the person who made the alleged misrepresentations, his authority to speak, and what he said or wrote, and when it was said or written. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157; *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469.) However, "[l]ess specificity in pleading fraud is required 'when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy . . . ."' (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 217.)" (*Cansino*, at p. 1469.)

In the present case, Bergman specifically alleged and testified that he knew the name of one Chase employee in particular, Hifa Boloori, who made representations to him, although he spoke to many Chase employees during many phone calls between 2008 and 2010. Additionally, Chase had extensive records of contacts and conversations with Bergman which included information about which Chase employees contacted him, including the period between October 2008 and February 2009. Under the category of "USR," the Chase delinquency notes identified the Chase employee by his or her initials, allowing Chase to determine who contacted Bergman far more easily than Bergman could do so. Even if Chase's records do not expressly document an oral promise for a 40-year loan at 3 percent interest with $3,000 monthly payments, the records still include information about the employees who talked to Bergman.

Under these circumstances, it was not error or prejudicial for the trial court to instruct the jury according to the standard jury instruction and not to use Chase's proposed special instruction. The instruction to the jury was not required to be as specific as the pleading. Nevertheless, Bergman identified one person by name and Chase had to know its own employees based on its own records. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793.) There was no error causing a miscarriage of justice and no prejudice in refusing Chase's special instruction. (*Mize-Kurzman v. Mann Community College Dist., supra,* 202 Cal.App.4th at p. 862, citing *Soule v. General Motors Corp., supra,* 8 Cal.4th at p. 580.)

V

SUBSTANTIAL EVIDENCE

Chase argues there is not substantial evidence to support the jury's verdict on the causes of action for fraud by intentional misrepresentation and breach of the covenant of good faith and fair dealing. In our review, we are guided by well-established principles: "It is for the trier of fact to determine the weight of the evidence and the credibility of the witnesses and resolve all conflicts. Where disputed facts are presented to and resolved by the trial judge, unless clearly erroneous his findings will not be disturbed by the reviewing court; it is not the province of this court to substitute its judgment for that of the trier of fact. On appeal the evidence and all reasonable inferences to be drawn therefrom must be viewed in a light most favorable to the findings and judgment. [Citations.] 'Such a judgment, when attacked on evidentiary grounds, must be affirmed when there is any evidence, direct or circumstantial, to support the findings of the trial court. Stated negatively, such a judgment cannot be reversed unless there is no evidence, direct or circumstantial, to support the findings. These rules are elementary.' [Citations.]" (*Ach v. Finkelstein* (1968) 264 Cal.App.2d 667, 674.)

A. Intentional Misrepresentation

Chase contends there is not substantial evidence of the elements of intentional misrepresentation: 1) a false representation of a material fact; 2) knowledge of the falsity; 3) intent to induce another to rely on the misrepresentation; 4) reliance on the misrepresentation; and 5) resulting damage. (*Ach v. Finkelstein, supra*, 264 Cal.App.2d at p. 674; *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1111.) Chase argues substantial

evidence does not show that Chase made any misrepresentation to Bergman or that Bergman was induced to default on a loan as a result of a misrepresentation by Chase.

Bergman asserts that Chase was liable for two separate misrepresentations: 1) that, if his loan was in default, he could obtain a loan modification; and 2) if Bergman made three trial plan payments he could obtain a loan modification. The jury found the former was true and the latter was not.

"'In its broad, general sense the concept of fraud embraces anything which is intended to deceive, including all statements, acts, concealments and omissions involving a breach of legal or equitable duty, trust or confidence which results in injury to one who justifiably relies thereon. . . . There is no absolute or fixed rule for determining what facts will constitute fraud; whether or not it is found depends upon the particular facts of the case under inquiry. Fraud may be proved by direct evidence or it may be inferred from all of the circumstances in the case. [Citation.] "Actual fraud is always a question of fact." (Civ. Code, § 1574.)' [Citations.]" (*Ach v. Finkelstein, supra,* 264 Cal.App.2d at p. 675.)

Chase's argument is primarily that Bergman is inconsistent in his testimony about exactly what he was told and when. However, Bergman's testimony and other evidence certainly supports his contention that Chase informed him that in order to qualify for a second loan modification, he would have to be in default. Based on the evidence, the jury could have reasonably found that, beginning in December 2008 and continuing through 2010, Bergman had many conversations with Chase about modifying his loan. Although Chase wants to pin Bergman down to precise dates and times, the general tenor

of the evidence was consistent. Because Bergman hoped to obtain a second loan modification, he defaulted on payments under the first modification. His default continued as he waited to complete the second modification, including making the additional three trial payments in late 2009, and investigating a short sale as an alternative if the second loan modification was not completed. We conclude substantial evidence supported the jury verdict that Chase made intentional misrepresentations to Bergman. (*Ach v. Finkelstein, supra,* 264 Cal.App.2d at pp. 673-676.)

B. Breach of Covenant of Good Faith and Fair Dealing

Chase also argues there was not substantial evidence of breach of the covenant of good faith and fair dealing and the special jury verdicts were inconsistent. We disagree.

The court gave the jury the following instructions on breach of contract: 1) Bergman claims that he and Chase "entered into an oral contract for a loan modification at fixed payments under $3,000.00"; 2) Chase "breached this contract by not providing him a permanent loan modification after he made the three trial plan payments"; and 3) to prove breach of contract, Bergman must prove Chase "failed to do something that the contract required it to do." The court gave the jury additional instructions on the breach of the covenant of good faith and fair dealing: 4) Bergman must prove the parties entered into a valid contract; and 5) Chase "interfered with" Bergman's "right to receive the benefits of the contract."

The instructions are confusing but the jury apparently reconciled any conflicts by finding that Bergman and Chase had a binding oral contract for a loan modification with $3,000 payments. However, the jury did not find the oral contract was conditioned on

defendant making three trial plan payments. Therefore, the jury found Chase did not "fail to do something that the oral contract required it to do," namely provide a loan modification after Bergman made the three payments. Nevertheless, the jury also found Chase interfered with "Bergman's right to receive benefits of the contract," i.e. the promise of a loan modification.

In other words, the jury did not find Chase was required to give Bergman a loan modification if he made the three trial plan payments; Chase did not breach the contract for that reason. But Chase did interfere with Bergman's benefits under the contract by not giving him the promised loan modification. Therefore, as already discussed, sufficient evidence showed that there was a contract for a loan with $3,000 payments and that Chase interfered with the contractual benefit to Bergman.

VI

DUPLICATIVE DAMAGES

Bergman testified that his damages included his original down payment of $250,000 and the property improvements of $291,000. Chase argues the damages award was duplicative and the intent of the jury was not to award $250,000 but to award a total of only $125,000 for both causes of action found in his favor.

The court gave the jury multiple, somewhat contradictory, instructions on damages. Ultimately, the jury awarded damages of $125,000 for breach of the implied covenant and $125,000 for intentional misrepresentation. The trial court entered a judgment of $250,000. The trial court reasoned:

"It's the Court's opinion that the jury did intend to award separate damages to the plaintiff for the improvements that the plaintiff testified that he made to his home . . . and the down payment which he made for the home. [¶] So my interpretation of the jury verdict was they intended to award damages for both of those injuries incurred by the plaintiff and not just one sum of the $125,000. So, in other words, I agree . . . as to how the jury reached its verdict on these two separate causes of action, which were based upon different losses incurred by the plaintiff."

There is no evidence in the record of the "intent" of the jury. Instead, the record shows the jury was given special verdict forms for each of the seven causes of action and the claim for punitive damages. The jury was instructed to award separate damages for each cause of action. It was not instructed to award damages collectively. The amount of damages claimed by Bergman was at least $541,000, the combined amount of his down payment and the property improvements. The jury's verdict awarding him damages of $125,000 each on two causes of action is within the realm of damages.

Chase's argument that the jury meant to award only $125,000 is speculative and the cases relied upon by Chase are distinguishable. *Shell v. Schmidt* (1954) 126 Cal.App.2d 279, 291, involved a single cause of action, not two causes of action as here. In *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 564, the court acknowledged a plaintiff could be entitled to recover separate damages on two causes of action: "They do involve, after all, alleged invasions of different rights." *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158, held that a party "is not entitled to more than a single recovery for each distinct item of compensable damage

supported by the evidence." However, "[i]n contrast where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories." (*Id.* at p. 1159.)

The present case involves two separate causes of action, different theories, and two distinct items of compensable damages. Under these circumstances, no duplicative damages were awarded by the jury.

VII

CHASE'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Chase contends the trial court should have granted its motion for JNOV for two reasons. Chase repeats the argument that Bergman did not identify the employee who made the misrepresentation—an argument we have already rejected.

Second, Chase argues Bergman was not damaged because the proper measure of damages for the wrongful foreclosure of real property is the value of the equity in the property at the time of the foreclosure. (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 11; Civ. Code, § 3333.) At the time of the foreclosure sale in July 2010, the unpaid principal balance, along with costs, totaled $1,022,256.92, leaving no equity.

Chase's argument about wrongful foreclosure is not pertinent, however, because the jury rejected the wrongful foreclosure claim and did not award damages on that cause of action. Instead, the jury awarded damages for intentional misrepresentation and breach of the covenant of good faith and fair dealing. The jury was instructed Bergman

could prove damages for breach of contract based on what would reasonably compensate for the breach. (CACI No. 350.) The jury was also instructed it could award Bergman reasonable compensation for harm. (CACI No. 1923.) The instructions to the jury, as reasonably construed did not prohibit the jury from awarding damages for the original down payment or for the property improvements, even if the losses for those items of damage were not sustained until after Chase committed its breach or made its misrepresentations. The damages awarded were not for wrongful foreclosure and the measure of such damages is not relevant.

VIII

ATTORNEY'S FEES

The trial court awarded Bergman attorney's fees—reduced from $454,772.23 to $188,100—finding that he could recover fees under both contract and tort based on the attorney's fees provision in the original note and trust deed under which the foreclosure was conducted. The same result occurred in *Smith v. Home Loan Funding, Inc.* (2011) 192 Cal.App.4th 1331, 1337-1338. (Civ. Code, § 1717; Code Civ. Proc., § 1021.)

The subject note provides: ". . . the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note [including] reasonable attorneys' fees." The subject trust deed provides: "Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided . . . including, but not limited to, reasonable attorneys' fees . . . ."

The *Smith* court construed the very same language and found that that "breach of the implied covenant can sometimes support an award of fees under section 1717."

(*Smith v. Home Loan Funding, Inc.*, *supra*, 192 Cal.App.4th at p. 1337.) *Smith* distinguished *Sawyer v. Bank of America* (1978) 83 Cal.App.3d 135, 140, 145, and held that, where one party had a fiduciary obligation and made an express oral promise, it was justifiable to treat the oral agreement and the loan documents as a single agreement because they were all part of the same transaction. (*Smith*, at pp. 1337-1338, citing Civ. Code, § 1642 ["Several contracts relating to the same matters, between the same parties, . . . are to be taken together"].)

The oral contract between Bergen and Chase was part of a single agreement, including the note and deed of trust; the trial court found the oral contract was intended to effect a modification of the original obligation. Therefore, the trial court's award of attorney's fees was proper, allowing the prevailing party to recoup attorney's fees under the intertwined tort and contract claims. (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1341-1343.)

IX

BERGMAN'S CROSS-APPEAL

A. Special Verdict on Wrong Foreclosure

The special verdict on the cause of action for wrongful foreclosure asked: Did Chase "violate any law or regulation governing foreclosure?" Bergman contends the special verdict should have read: Did Chase Bank "cause an illegal, fraudulent or oppressive sale of the real property located at 22330 Foxhall Drive, Corona, CA 92883?" Bergman argues his claim is not for wrongful foreclosure based on a statutory violation but "Chase's fraudulent practice of inducing borrowers into default with the promise of a

loan modification." The basis for this instruction is thus exactly the same as Bergman's causes of action for intentional misrepresentation and breach of the covenant of good faith and fair dealing, for which he recovered damages. Under these circumstances, there was no miscarriage of justice in refusing Bergman's alternative instruction. (*Mize-Kurzman v. Marin Community College Dist., supra,* 202 Cal.App.4th at p. 862, citing *Soule v. General Motors Corp., supra,* 8 Cal.4th at p. 580.)

B. Special Verdict on Punitive Damages

Bergman claims the jury should have been instructed that Chase could be directly liable for fraud and punitive damages. A corporate employer may only be liable for punitive damages as a result of its employees' acts where it somehow ratified the behavior. (Civ. Code, § 3294, subd. (b); *Weeks v. Baker & McKenzie* (1978) 63 Cal.App.4th 1128, 1153.) The special verdict on punitive damages was based on CACI No.VF-3904: "Did an agent or employee of [Chase] engage in the conduct of malice, oppression, or fraud against Plaintiff?" The jury was also given an instruction based on CACI No. 3936 about liability for punitive damages for a corporate entity based on the acts of its agents. Chase could not be found directly liable for punitive damages for its own conduct. (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 365.) The jury was properly instructed on punitive damages.

C. Motion to Amend

At the end of trial, the court denied Bergman's request for leave to amend to add a claim for breach of a written contract under HAMP or the Chase trial payment plan. An appeal from a trial court's decision in granting or denying a request to amend the

pleadings is reviewed for a clear showing of an abuse of discretion. (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909.) The guiding principles are: "(1) whether facts or legal theories are being changed and (2) whether the opposing party will be prejudiced by the proposed amendment." (*City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1563.)

Throughout the trial, Bergman had relied on a theory of an oral promise, not a written contract. The trial court properly denied Bergman's oral motion to amend, and subsequent motion for JNOV, because the introduction of new facts and theories would cause prejudice to Chase. There was no reason for Bergman to wait years to amend his claims. We reject Bergman's contentions on this issue.

D. Attorney's Fees

Bergman argues he should have been allowed to offer evidence of the attorney's fees he incurred in the unlawful detainer action and he was entitled to recover those fees under the note and trust deed. We conduct a de novo review on whether there is a legal basis for a fee award. (*Conservatorship of Whitley, supra,* 50 Cal.4th at p. 1212.)

After Chase objected to the submission of evidence on attorney's fees for the unlawful detainer action, Bergman's counsel stated he would raise it later. Bergman's counsel did not raise the issue again. The record shows Bergman waived this issue. (*Estate of Odian* (2006) 145 Cal.App.4th 152, 168.) Furthermore, Bergman's claim was for attorney's fees sustained in a separate unlawful detainer action by Mraz, the third party who purchased the property at trustee's sale. Bergman cites no authority for the recovery of attorney's fees under these circumstances. In fact, he concedes there is no

authority but asks this court to resolve the issue in a published opinion. We decline to do so.

X

DISPOSITION

We reject both appeals and affirm the judgment. In the interests of justice, we order the parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.