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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARIA E. SILLER et al., Plaintiffs and Appellants, v. OPTION ONE MORTGAGE CORPORATION, Defendant and Respondent.	D054366 (Super. Ct. No. GIC866984)

APPEAL from a judgment of the Superior Court of San Diego County, Yuri Hofmann, Judge. Reversed and remanded with directions.

Plaintiffs Maria E. Siller and Clayton Siller, husband and wife (the Sillers), appeal a judgment entered in favor of defendant Option One Mortgage Corporation (Lender) after the trial court granted Lender's motion for summary judgment. On appeal, the Sillers contend: (1) Lender did not show they could not establish each of their causes of action; (2) their counsel's misconduct and neglect requires reversal of

the summary judgment; and (3) the trial court abused its discretion by not sua sponte providing them with an opportunity to correct their responses to Lender's separate statement of undisputed facts.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2005, Maria E. Siller (Maria) filed a complaint against MD Mortgage Group Escrow (MD Escrow) and unnamed "Doe" defendants, alleging causes of action for breach of written contract, rescission and restitution, fraud, and negligent misrepresentation. In March 2007, the Sillers filed a first amended complaint against MD Escrow, M.D. Mortgage Group, Inc. (MD Mortgage), Lender, Joyce Devera, Timothy Gray, Nicole Nelson, and unnamed "Doe" defendants. The first amended complaint alleged 15 causes of action.

In December 2007, the Sillers filed the operative second amended complaint (the Complaint) against the same defendants, alleging the same 15 causes of action, including claims for breach of contract, rescission and restitution, fraud, negligent misrepresentation, conversion, violations of the federal Truth-In-Lending Act (TILA), violations of Financial Code sections 50505 and 50701, and unfair competition. The crux of the Complaint appears to be that the Sillers received only about a $15,000 "cash-out" payment in the $460,000 refinancing of their home, rather than the $27,000 amount that MD Mortgage (their mortgage broker) allegedly told them they would receive. The Complaint further alleged the Sillers sent letters to MD Mortgage soon

afterward, demanding their mortgage be canceled, but MD Mortgage never responded to those letters.

On April 25, 2008, the trial court sustained in part and overruled in part Lender's demurrer to the Complaint, leaving only the eight causes of action listed above. On July 18, Lender filed a motion for summary judgment or, alternatively, summary adjudication as to each of the remaining eight causes of action. In support of the motion, Lender filed a supporting memorandum of points and authorities, a separate statement of undisputed facts, declarations, and lodgment of certain exhibits. The Sillers filed opposition papers, including a separate statement of undisputed facts in opposition with three exhibits attached. Lender filed a reply memorandum of points and authorities, a reply separate statement of undisputed facts, and evidentiary objections to the Sillers' three exhibits.

Following oral argument, the trial court granted Lender's motion for summary judgment, stating:

> "The Court finds that [Lender] has succeeded in meeting its burden as the moving party as to each cause of action remaining against it (causes of action 1-5, 10, 12, and 15), and [the Sillers] have failed to introduce any admissible evidence, argument, or authority that creates a triable issue of material fact. The crux of [the Sillers'] claims against all of the Defendants is [their] frustration over receiving less than the $30,000 'cash out' payment they sought when they refinanced their property. The unchallenged evidence shows that [the Sillers] executed all of the relevant and necessary loan documents, failed to make any recognizable and timely effort to cancel the loan per the terms of the loan documents with [Lender], proceeded to make use of the entirety of the loan, and made the requisite monthly payments until March 2008, thereby ratifying the loan and its terms. [The

> Sillers] have failed to refute the arguments or evidence presented by [Lender]; accordingly, the action is dismissed as to [Lender].
>
> "Any and all objections or commentary [by the Sillers] regarding the [Lender's] evidence made in the separate statement was ignored. For instance, in their opposition separate statement, [the Sillers] comment that they dispute [Lender's] Fact 3, provide no evidence to support their purported dispute, and then assert that, in effect, [Lender's] Exhibits 19 and 20 are insufficient as evidence of the assertion that 'Mrs. Siller opened a loan escrow with [MD Escrow] to handle the refinance transaction with [Lender].' Objections to evidence are to be made in a separate document. [Citations.] Further, this is not a valid objection. Most important here is that this fact, and all other similarly worded 'disputes[,]' do not establish a dispute of fact, but rather are considered undisputed . . . . [¶] . . . [¶] [Quoting language from Code of Civil Procedure section 437c, subdivision (b)(3).]
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> "The Court did not rely upon any of [the Sillers'] evidence, as each is inadmissible. No foundation has been laid for the evidence attached to [the Sillers'] Opposition separate statement, and none of the items have been authenticated. Each of [Lender's] objections is therefore sustained.
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> "Any requests for judicial notice not made in accordance with [California Rules of Court, rule] 3.1113(*l*) are denied (e.g., [the Sillers'] requests made in their opposition separate statement, page 6).) . . . Accordingly, the Court denies [the Sillers'] request for judicial notice, and grants [Lender's]."

On October 31, 2008, the trial court entered a judgment for Lender and against the Sillers, stating: "[Lender] met its burden to show that each of the remaining causes of action asserted by the Sillers in their [Complaint] against [Lender] have no merit, that the Sillers have failed to introduce any admissible evidence, argument or authority that creates a triable issue of material fact, and that [Lender] is entitled to judgment as a matter of law." The Sillers timely filed a notice of appeal.

DISCUSSION

I

Standard of Review

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334; see *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

An order granting summary judgment is, in effect, an order granting summary adjudication on each of the causes of action. A trial court's order granting or denying a motion for summary adjudication is reviewed de novo. (*Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 385.) In reviewing that order, we apply the same standards as we would apply in reviewing a trial court's order granting or denying a motion for summary judgment. (Code Civ. Proc., § 437c, subds. (c) & (f)[1]; *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24

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1 All further statutory references are to the Code of Civil Procedure unless otherwise specified.

Cal.4th 945, 972; *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1506-1507; *Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1450.) "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (§ 437, subd. (f)(2).) "A party may move for summary adjudication as to one or more causes of action within an action . . . if that party contends that the cause of action has no merit . . . . A motion for summary adjudication shall be granted only if it completely disposes of a cause of action . . . ." (§ 437, subd. (f)(1).)

Aguilar clarified the standards that apply to summary judgment motions under section 437c. (*Aguilar*, *supra*, 25 Cal.4th at pp. 843-857.) Generally, if all the papers submitted by the parties show there is no triable issue of material fact and the " 'moving party is entitled to a judgment as a matter of law,' " the court must grant the motion for summary judgment. (*Aguilar*, at p. 843, quoting § 437c, subd. (c).) Section 437c, subdivision (p)(2), states:

> "A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto."

Aguilar made the following observations:

> "First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . .
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> "Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. . . .
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> "Third, and generally, how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial. . . . [I]f a defendant moves for summary judgment against . . . a plaintiff [who would bear the burden of proof by a preponderance of the evidence at trial], [the defendant] must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not--otherwise, *he* would not be entitled to judgment *as a matter of law*, but would have to present *his* evidence to a trier of fact." (*Aguilar*, *supra*, 25 Cal.4th at pp. 850-851, fns. & citation omitted.)

Aguilar stated:

> "To speak broadly, all of the foregoing discussion of summary judgment law in this state, like that of its federal counterpart, may be reduced to, and justified by, a single proposition: *If a party moving for summary judgment in any action . . . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary*

> *judgment*. In such a case, . . . the 'court should grant' the motion 'and avoid a . . . trial' rendered 'useless' by nonsuit or directed verdict or similar device. [Citations.]" (*Aguilar*, *supra*, 25 Cal.4th at p. 855, italics added.)

"[E]ven though the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact*. . . . In so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself. [Citations.]" (*Aguilar*, *supra*, 25 Cal.4th at p. 856.) "[I]f the court determines that all of the evidence presented by the plaintiff, and all of the inferences drawn therefrom, show and imply [the ultimate fact] *only as likely as* [not] *or even less likely*, it must then grant the defendants' motion for summary judgment [or summary adjudication], even apart from any evidence presented by the defendants or any inferences drawn therefrom, because a reasonable trier of fact could not find for the plaintiff. Under such circumstances, the [factual] issue is not triable--that is, it may not be submitted to a trier of fact for determination in favor of either the plaintiff or the defendants, but must be taken from the trier of fact and resolved by the court itself in the defendants' favor and against the plaintiff." (*Id*. at p. 857, fn. omitted.)

"On appeal, we exercise 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' [Citation.] 'The appellate court must examine

only papers before the trial court when it considered the motion, and not documents filed later. [Citation.] Moreover, we construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it.' [Citations.]" (*Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1201-1202.)

II

Lender's Motion for Summary Judgment

The Sillers contend Lender did not meet its burden to show they could not establish each of their causes of action and therefore the trial court erred by granting its motion for summary judgment.

A

The Sillers initially assert the trial court did not correctly apply the law regarding motions for summary judgment. However, the record does not support their assertion that the court ignored the requirement that Lender had the initial burden to make a prima facie showing their causes of action have no merit. On the contrary, in its order granting Lender's motion for summary judgment, the court expressly stated: "To prevail on a summary judgment motion, the moving defendants have the initial burden to show the causes of action have no merit because an element of the claims cannot be established or there is a complete defense to the causes of action. [Citation.]" Accordingly, we presume the trial court was aware of and applied the correct standard for deciding Lender's motion for summary judgment. Furthermore, to

the extent the Sillers assert Lender merely *argued* they had no evidence to support their causes of action, the record shows Lender lodged numerous exhibits and other evidence that, as discussed below, supported its motion for summary judgment. Therefore, Lender's motion was not supported by mere argument, but also by documents and other evidence.

B

The Sillers assert Lender did not meet its burden to show they could not establish their cause of action for rescission based on its alleged TILA violations.[2]

Notice of Right to Cancel. The Sillers assert Lender did not meet its burden to show they could not establish their allegation that Lender violated TILA because its notice of right to cancel was defective. Under TILA and its regulations, a lender must provide a borrower with two copies of a notice of right to cancel (Notice) informing the borrower of his or her statutory right to cancel a home mortgage loan within three business days after the last to occur of: (1) the date of the consummation of the transaction (i.e., the date the loan documents were signed); (2) the date the Notice was received; or (3) the date the TILA disclosure statement was received. (15 U.S.C. § 1635(a), (b); 12 C.F.R. § 226.23.) For purposes of a borrower's TILA cancellation rights, a "[b]usiness day" includes all calendar days except Sundays and legal public

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2 To the extent the Sillers' rescission cause of action was alternatively based on Lender's alleged breach of contract and/or fraud, we separately address, and reject, those claims below.

holidays. (12 C.F.R., § 226.2(a)(6).) TILA regulations require that the Notice "shall clearly and conspicuously disclose . . . [¶] . . . [¶] [t]he date the rescission period expires." (12 C.F.R. § 226.23(b)(1)(v).) If either the Notice or TILA disclosure statement is not provided to a borrower, the borrower may rescind the loan transaction within three years. (15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3).)

In support of its motion for summary judgment, Lender lodged with the court a copy of the Notice it delivered to Maria on January 25, 2006, informing her of her "legal right under federal law to cancel this transaction, without cost, within three business days from whichever of the following events occurs last: [¶] (1) the date of the transaction, which is *01-25-2006* [italicized to reflect handwritten date] (i.e., the date you signed your loan documents)[;] or [¶] (2) the date you received your Truth in Lending disclosures; or [¶] (3) the date you received this notice of your right to cancel." That Notice further instructed Maria on how to cancel her loan transaction, stating:

> "If you decide to cancel this transaction, you may do so by notifying us in writing.
>
> "Name of Creditor[:] Option One Mortgage Corporation at 9171 Towne Center Drive, Suite 400[,] San Diego, CA 92122[.] [¶] . . . [¶]
>
> "If you cancel by mail or telegram, you must send the notice no later than midnight of *01-29-2006* [italicized to reflect handwritten date] (or midnight of the third business day following the latest of three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time."

The Sillers argue that the Notice was defective on its face because it stated Maria could cancel her loan transaction by January 29, 2006, which was four days, and not three business days, after the date on which she signed the loan documents (i.e., January 25, 2006). Interestingly, they argue that had Maria sent a notice to cancel to Lender on January 29, 2006, it would have been untimely because the statutory three-business-day period would have expired on January 28, 2006, which was a Saturday. They further argue that because of the purported date defect in the Notice, Maria had a three-year period in which to rescind the loan transaction. However, the Sillers have not cited, and we have not found, any cases supporting their argument. The cases cited by the Sillers are inapposite to this case. (See, e.g., *Semar v. Platte Valley Federal S & L Ass'n* (9th Cir. 1986) 791 F.2d 699; *Taylor v. Domestic Remodeling, Inc.* (5th Cir. 1996) 97 F.3d 96; *Williamson v. Lafferty* (5th Cir. 1983) 698 F.2d 767.) In those cases, the notices of right to cancel either included an erroneous premature date (i.e., less than three business days) or entirely omitted the date by which notification of cancellation must be given.

Assuming arguendo "technical" violations of TILA or its regulations entitles a borrower to rescind a loan transaction as the Sillers argue, we nevertheless conclude the Notice delivered by Lender to Maria did not violate, either materially or technically, TILA or its regulations.[3] The fact that the Notice gave Maria one

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[3] Because we conclude the Notice did not either materially or technically violate TILA or its regulations, we need not address the Sillers' assertion that Lender

additional day beyond the statutorily required three-business-day period in which to cancel the loan transaction could only have benefited her and cannot reasonably be interpreted as a violation of TILA or its regulations. (*Hawaii Community Federal Credit Union v. Keka* (Hawaii 2000) 11 P.3d 1, 14 ["Inasmuch as a disclosure that recites a date *later* than the third business day following the date of the transaction as being 'the date the rescission period expires' does not *prejudice* the consumer's statutory right of rescission, but actually *benefits* the consumer by extending the rescission period, we hold that such a disclosure materially complies with 12 C.F.R. § 226.23(b)(v). Accordingly, we reject [borrowers'] argument that the [lender's] notice of right to cancel violated TILA on the grounds of nondisclosure of the expiration of the rescission period."] [Fns. omitted.].)

We also reject the Sillers' apparent argument that the Notice's erroneous date violated TILA or its regulations, the same as if the Notice had omitted any date, because the Notice was likely to confuse a typical borrower regarding the exact date by which he or she had the right to cancel the loan transaction. They apparently argue that a typical borrower might assume Saturday is not considered a "business day" and therefore the third business day after January 25, 2006, was January 30, 2006, which was a Monday. However, as discussed above, Saturday is considered a business day under TILA for purposes of the Notice and therefore the borrower's lack of

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erroneously argued below that a wrong date for cancellation in the Notice would not violate TILA or its regulations unless that date constituted a material violation.

understanding of TILA's provisions, and not the Notice's statement of January 29, 2006, as the last day for cancellation, would be the cause of any confusion by a typical borrower. The Notice delivered by Lender to Maria could not have violated TILA or its regulations by confusing or misleading her.[4]

Clayton's Right to Receive the Notice and TILA Disclosures. The Sillers also assert Lender violated TILA and its regulations because it did not deliver to Clayton Siller (Clayton) either a copy of the Notice or TILA material disclosures. However, because the Sillers did not argue that purported violation (with accompanying citations to admissible evidence) in opposing Lender's motion for summary judgment, we conclude they waived that argument for purposes of appeal. Assuming arguendo they did not waive that argument, we nevertheless conclude they did not present evidence below showing Clayton was a consumer under TILA entitled to delivery of those documents. Under TILA's regulations, a consumer who must be given those documents in a home mortgage loan transaction for purposes of rescission rights includes "a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest." (12 C.F.R. § 226.2(a)(11).) However, assuming arguendo the Sillers can now raise this argument on appeal, the record shows Lender submitted evidence showing that at the time of the loan Maria held the property to be

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4 Maria apparently does not assert that she was, in fact, confused or misled by the cancellation date set forth in the Notice.

encumbered as her sole and separate property and Clayton had no ownership interest in it for purposes of TILA's provisions. Furthermore, although Maria's loan application (prepared by MD Mortgage) dated January 25, 2006, shows Maria and Clayton held title to the property, the escrow instructions provided for issuance of a title insurance policy showing title in Maria's name as her sole and separate property. Furthermore, Lender submitted a copy of a grant deed signed by Clayton and Maria, whose signatures were acknowledged by a notary on January 25, 2006, pursuant to which Clayton and Maria, as trustees of their family trust, granted title of the property to: "Maria E. Siller, a Married Woman as her sole and separate property."[5] That grant deed was subsequently recorded on February 2, 2006, apparently on closing of the loan transaction. In moving for summary judgment, Lender also submitted a copy of the transcript of Clayton's deposition in which he admitted he signed the grant deed transferring title to Maria as her sole and separate property. Also on closing of the loan, a deed of trust securing the loan to Maria was recorded, stating the trustor was Maria, as her sole and separate property, and she represented therein that she was "lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property . . . ." Accordingly, Lender submitted evidence showing Clayton did not

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5 To the extent the Sillers argue Maria soon thereafter signed a grant deed transferring title back to both of them as trustees for their family trust, they do not cite any admissible evidence in the record showing the transfer or that Lender was aware of that subsequent deed when it was required to deliver the Notice and TILA disclosures.

have an ownership interest in the property and therefore was not a consumer entitled to delivery of the Notice and TILA disclosures for purposes of TILA rescission rights. In opposing Lender's motion for summary judgment, the Sillers did not produce any admissible evidence, or cite to Lender's evidence, supporting a contrary conclusion. The Sillers have not cited any admissible evidence or case law showing Clayton was entitled to delivery of the Notice and TILA disclosures.

TILA Material Disclosures. The Sillers also assert Lender's TILA material disclosures violated TILA because they were not clear and conspicuous. They argue the adjustable rate note signed by Maria was deceptive because it stated that its interest rate "may" change. The Sillers argue that statement was deceptive because the note's interest was *certain* to change and therefore should have instead stated that its interest *would* change. However, it was possible the note's initial interest rate of 7.6 percent would not change if its balance were paid in full within two years *or* if thereafter the "LIBOR" rate were 1.1 percent (or less) at the time(s) the interest rate was to be recalculated (i.e., the note provides the adjusted rate is to be equal to 6.5 percent plus the then applicable six-month London market interbank deposit, or LIBOR, rate), thereby retaining its original rate of 7.6 percent.[6] We conclude the note was not

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6 The note provided that its interest rate could not be adjusted below 7.6 percent.

deceptive or unclear in stating that its interest rate "may" change in accordance with the note's provisions.[7]

The Sillers' Notification of Rescission. The Sillers assert they timely notified Lender of their rescission of the loan transaction when on February 9, 2006, they notified *MD Mortgage* of their wish to do so. However, as discussed above, the Notice stated Maria had until January 29, 2006, by which to notify *Lender* of her intent to cancel the loan transaction. Accordingly, their February 9, 2006, notice was untimely and ineffective under TILA and the Notice to cancel the loan transaction. Furthermore, because they sent their cancellation notice to their mortgage broker (i.e., MD Mortgage), it did not comply with the Notice's requirement that the notice of cancellation be delivered to Lender (i.e., "Option One Mortgage Corporation"). As discussed further below, the Sillers did not present any admissible evidence below showing MD Mortgage was acting as Lender's agent in addition to acting as the Sillers' agent. The Sillers' cancellation notice was ineffective to cancel or rescind Maria's loan

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[7] The fact that Lender's TILA disclosure statement dated January 25, 2006, calculated the annual percentage rate (APR) as 10.832 percent does not show otherwise. To the extent the Sillers also argue Lender's "itemization of amount financed" omitted certain required material information (e.g., amount of proceeds distributed directly to the consumer), they do not cite to the record on appeal. Similarly, they do not cite to admissible evidence in the record showing Lender failed to provide them with specific variable rate program disclosures or a consumer booklet on adjustable rate mortgages. Absent citations to the record on appeal, it is not our burden to independently search an extensive record for evidence to support their appellate contentions. We conclude the Sillers have not carried their burden on appeal to show Lender failed to disclose to them certain material information required by TILA.

transaction. In opposing Lender's motion for summary judgment, they did not produce any admissible evidence showing there was any triable issue of material fact regarding the untimely and ineffective nature of their cancellation notice.[8]

The Sillers alternatively argue that the period during which they could rescind the loan transaction for fraud is governed by section 337, subdivision (3), and therefore began on their discovery of the alleged fraud on February 6, 2006, when they received only $15,344 instead of the $27,000 cash-out payment they were expecting. To the extent the fraud statute of limitations applies, we address that cause of action below. To the extent the Sillers argue the fraud statute of limitations alters the TILA three-business-day period for cancellation of a loan transaction, they do not cite, and we are unaware of, any case or other authority to support that argument. We conclude the Sillers' notice of rescission dated February 9, 2006, was untimely and ineffective under TILA.

C

The Sillers assert Lender did not meet its burden to show they could not establish their cause of action for breach of contract. The crux of that cause of action

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8 Because we conclude the Sillers did not timely and effectively cancel the loan transaction, we need not address their additional assertion that the trial court erred by concluding they ratified the loan transaction during TILA's alternative three-year period for defective Notices by accepting the benefits of that transaction and making regular loan payments thereafter until March 2008.

was that Lender allegedly breached its promise to make a $27,000 cash-out payment as a result of the loan refinance by paying them only $15,344.

We conclude Lender met its initial burden of production by presenting evidence showing a prima facie case that it did not owe the Sillers a contractual duty to make any specific cash-out payment from the $460,000 loan amount. Lender presented copies of the note, trust deed, and escrow instructions, none of which included any promise for any particular cash-out payment. Lender's separate statement of undisputed facts stated: "4. Mrs. Siller acknowledged escrow instructions . . . which instructed Escrow to use [Lender's] loan proceeds to pay off the Sillers' existing mortgages on the Property, including any prepayment penalties." In the Sillers' separate statement of undisputed facts in opposition to Lender's motion for summary judgment, they conceded that particular statement of fact was "[u]ndisputed." Therefore, none of Lender's documents promised that the Sillers would receive any specific amount of a cash-out payment.

Although the Sillers attached to the Complaint a copy of an "estimated" buyer/borrower statement, dated January 25, 2006, prepared by MD Escrow and showing Maria would receive a cash-out payment of $26,481.14, that statement did *not* constitute a promise *by Lender* to pay Maria that amount. First, that statement was only an estimate and expressly stated: "THIS IS AN ESTIMATED CLOSING STATEMENT[.] FIGURES ARE SUBJECT TO CHANGE." Therefore, the amount of the cash-out payment, like other itemized amounts, was subject to change. In fact,

the estimated statement's cash-out payment amount changed thereafter primarily because of a prepayment penalty of $6,649.82 owed to one of the existing mortgagees, recalculation of accrued interest owed to existing mortgagees ($2,489.00), and payment of $1,448.98 in property taxes due on the property. Furthermore, the escrow instructions signed by Maria expressly authorized and instructed MD Escrow "to obtain demand from lender(s) of record, in order to place title in the condition as provided herein, and pay for same from [Maria's] proceeds at the close of escrow, *including prepayment penalties, interest* and such other costs, if applicable." It further authorized and instructed MD Escrow to pay any "taxes, . . . any encumbrances of record, plus accrued interest . . . ." In his deposition, Clayton admitted he was aware of the prepayment penalty owed to the existing mortgagee and had, in fact, discussed that penalty with MD Mortgage in the middle of January 2006. He further admitted MD Mortgage never told him the existing mortgagee would waive the prepayment penalty in connection with the new loan transaction with Lender. In her deposition, Maria stated she thought the prepayment penalty set forth in the existing mortgagee's note was consistent with her recollection of its terms, but then stated she could not remember.

Furthermore, the estimated statement was prepared by *MD Escrow* and not Lender. In opposing Lender's motion for summary judgment, the Sillers did not present any admissible evidence showing either that Lender received and ratified that estimated statement *or* that MD Mortgage (or MD Escrow) acted as Lender's agent in

preparing that statement or otherwise in the loan transaction. On the contrary, the summary judgment papers support the conclusion that neither MD Mortgage nor MD Escrow acted as Lender's agent in the nature alleged by the Sillers. The Sillers did not dispute Lender's statement of undisputed fact that in December 2005 the Sillers engaged MD Mortgage to provide " 'services as their mortgage broker, to represent their interests in the . . . processing of a refinance of [their] home' . . . ." In his deposition, Clayton admitted neither Lender nor MD Mortgage represented to him that MD Mortgage had the authority to speak on Lender's behalf. Furthermore, the Sillers did not dispute Lender's statement of undisputed fact that they did not have any conversations with Lender before it funded the loan.[9] In Clayton's deposition, he admitted he did not have any contact with Lender prior to the funding of the loan. More importantly, he admitted that Lender never made any promises to him before funding the loan and he did not know of any promises Lender made to Maria. In Maria's deposition, she admitted she could not recall any conversations she or her husband had with Lender prior to funding the loan.

The cases cited by the Sillers to support their argument that MD Mortgage (or MD Escrow) acted as Lender's agent are inapposite to this case. (See, e.g., *Gibbo v. Berger* (2004) 123 Cal.App.4th 396; *Montoya v. McLeod* (1985) 176 Cal.App.3d 57.)

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9 Although the Sillers qualified that response by asserting their cash-out purpose was communicated to Lender, they did not cite to any admissible evidence in support of that assertion.

Rather, relevant case law supports the conclusion, based on the admissible evidence presented below, that MD Mortgage (or MD Escrow) did *not* act as Lender's agent. "A mortgage loan broker is customarily retained by a borrower to act as the *borrower's agent* in negotiating an acceptable loan." (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 782; see also *Florence v. Carr* (Ala. 1933) 148 So.2d 148, 149 ["[W]here one desiring a loan makes known that desire to another who applies to the lender and consummates the loan, the intermediary is prima facie the agent of the borrower and not of the lender."].) Furthermore, "an agency cannot be created by the conduct of the agent alone; rather, *conduct by the principal* is essential to create the agency." (*Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 587-588.) Finally, "[t]he burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority. [Citation.]" (*Vista Verde Farms v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307, 336.) Based on the record on appeal, we conclude Lender met its burden to show the Sillers could not establish that MD Mortgage (or MD Escrow) acted as its agent in the loan transaction.[10]

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10 To the extent the Sillers argue parol evidence may be admissible to show the existence and nature of an agency relationship, we need not address that argument because they did not present any admissible evidence, whether parol or otherwise, in opposing Lender's motion for summary judgment. The Sillers did not refute Lender's prima facie case showing they could not establish that MD Mortgage (or MD Escrow) acted as its agent in the loan transaction.

D

The Sillers assert Lender did not meet its burden to show they could not establish their fraud cause of action. The elements of a cause of action for fraud are: " '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citations.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) The Complaint's fraud cause of action alleged Lender prepared deficient or misleading loan documents and misrepresented the amount of the funds (i.e., the cash-out payment) the Sillers would receive in the loan transaction, knew of the falsity of those misrepresentations, and intended the Sillers to rely on those misrepresentations. In moving for summary judgment, Lender argued there were no triable issues of fact and the Sillers could not establish their fraud cause of action. Lender argued the Sillers could not present any evidence showing it made any misrepresentation to them. Its separate statement of undisputed facts on the fraud cause of action restated most of the statements of fact asserted regarding the breach of contract cause of action discussed above. Lender's separate statement asserts that none of the loan documents prepared by it and presented to Maria recited any obligation by it to make a cash-out payment to her. It further asserted the Sillers had no conversations with it before the loan was funded.

The Sillers argue on appeal it is "beyond dispute" that MD Mortgage was acting as Lender's agent in the loan transaction. However, as we discussed in part II.C., *ante*

(which discussion we incorporate here), Lender carried its burden to show the Sillers could not establish either MD Mortgage or MD Escrow acted as Lender's agent in the loan transaction. In opposing Lender's motion for summary judgment, the Sillers did not present any admissible evidence showing that MD Mortgage or MD Escrow acted as Lender's agent in the loan transaction. Lender made a prima facie showing that the Sillers could not establish it made any misrepresentation to them and the Sillers did not present any admissible evidence below showing otherwise. Because Lender showed the Sillers could not establish the element of misrepresentation, the trial court correctly concluded they could not prove their fraud cause of action.

E

The Sillers assert Lender did not meet its burden to show they could not establish their cause of action for negligent misrepresentation. Like a fraud cause of action, the elements of a cause of action for negligent misrepresentation include a *misrepresentation* of a material fact. (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.) For the same reasons discussed above regarding the Sillers' fraud cause of action, we conclude Lender made a prima facie showing that the Sillers could not establish it made any misrepresentation to them and the Sillers did not present any admissible evidence below showing otherwise. Because Lender showed the Sillers could not establish the element of misrepresentation, the trial court correctly concluded they could not prove their cause of action for negligent misrepresentation.

F

The Sillers assert Lender did not meet its burden to show they could not establish their cause of action for violation of TILA. We incorporate herein our discussion in part II.B., *ante*, and conclude, as we did above, that Lender made a prima facie showing the Sillers could not establish Lender violated TILA or its regulations and the Sillers did not present any admissible evidence showing otherwise. The trial court correctly concluded the Sillers could not prove their cause of action for violation of TILA.

G

The Sillers assert Lender did not meet its burden to show they could not establish their cause of action for violation of Financial Code section 50505. The Complaint alleged Lender violated Financial Code section 50505 based on its various alleged violations of the Real Estate Settlement Procedures Act (12 U.S.C. § 2601 et seq.) (RESPA) and its regulations. In moving for summary judgment or, alternatively, summary adjudication, Lender argued the Sillers could not establish that it violated RESPA by failing to: (1) disclose the yield spread premium (YSP); (2) disclose the "true" terms of the loan transaction; (3) use the HUD-1 settlement statement at closing (12 U.S.C. § 2603); and (4) provide information required by 12 U.S.C. § 2604.

First, Lender argued Maria bargained for payment of the YSP to reduce her out-of-pocket brokerage fees and the YSP was disclosed when she signed the loan documents. In its separate statement of undisputed facts, Lender asserted the

undisputed fact that Maria "received and signed the Broker Compensation (YSP) And The Fees In Your Transaction ('Yield Spread Premium Disclosure')." In support of that asserted fact, Lender lodged a copy of a document entitled "BROKER COMPENSATION (YSP) AND THE FEES IN YOUR TRANSACTION," dated January 25, 2006, and signed by Maria. It also cited an excerpt from Maria's deposition in which she admitted she signed that document. In the Sillers' separate statement of undisputed facts in opposition to Lender's motion for summary judgment, they stated it was "[u]ndisputed that [Maria] signed [that] disclosure, but it is unclear if a copy was left with them for their records and review." However, the Sillers did not cite to any evidence in support of their assertion that it was unclear whether a copy was left with them. Lender made a prima facie showing that the Sillers could not establish Maria did not receive a copy of the YSP disclosure document and the Sillers did not present any admissible evidence showing otherwise. Although the Sillers also argue that YSP document was not timely provided within three days of their loan application, the record shows that document was signed by Maria on the same date (i.e., January 25, 2006) on which she signed her loan application. We reject their assertion that document was not timely provided under RESPA.

In moving for summary judgment, Lender also argued the Sillers' claim that it failed to disclose the "true" terms of the loan transaction was actually a claim for violation of TILA and not RESPA. The Sillers did not argue or show otherwise below and apparently do not refute that argument on appeal. We conclude the Sillers have

not carried their burden on appeal to show the trial court erred in concluding they could not establish a violation of RESPA (and therefore Financial Code section 50505) based on Lender's failure to disclose the "true" terms of the loan transaction.

The Complaint also alleged Lender violated RESPA by "[f]ailing to use official HUD-1 forms at closing." In moving for summary judgment, Lender argued the Sillers could not establish that it failed to use the HUD-1 settlement statement required by title 12 United States Code section 2603. In support of that argument, it lodged a copy of the HUD-1 disclosure statement dated January 30, 2006, the date of the loan closing. However, in opposing the motion for summary judgment, the Sillers neither argued that HUD-1 disclosure statement was noncompliant with title 12 United States Code section 2603 nor presented any admissible evidence supporting a reasonable inference that it was noncompliant or that they did not receive a copy of it. On appeal, the Sillers argue the HUD-1 settlement statement was dated five days after the closing of the loan. However, the record shows that although Maria signed the loan application, note, deed of trust, and related documents on January 25, 2006, the loan did not "close" until MD Escrow distributed all of the loan proceeds and completed the other actions required under the escrow instructions, which did not occur before January 30, 2006. Therefore, the Sillers do not show the HUD-1 settlement statement was prepared on an incorrect date. We conclude the Sillers have not carried their burden on appeal to show the trial court erred in concluding they could not establish a

violation of RESPA (and therefore Fin. Code, § 50505) based on Lender's failure to use and/or provide them with a compliant HUD-1 settlement statement.

Finally, the Complaint alleged Lender violated RESPA by failing to timely provide Maria with the required special information booklet and a good faith estimate (GFE) of the loan's settlement terms (see 12 U.S.C. § 2604(c), (d).). In moving for summary judgment, Lender did *not* assert it provided Maria with those documents, but instead *argued* the Sillers could not show the failure of MD Mortgage or MD Escrow to provide her with those documents was an act of bad faith for which Lender was responsible. Lender cited title 12 United States Code section 2617(b), which provides: "No provision of this chapter or the laws of any State imposing liability shall apply to any act done or omitted in good faith . . . ." However, Lender did *not* submit any evidence (e.g., declaration of an officer of Lender) stating its apparent failure to provide Maria with those documents was done in good faith. Rather, Lender merely *argued* the Sillers could not establish a claim for independent relief against Lender under Financial Code section 50505 *without* presenting any admissible *evidence* in support of that argument. In opposing the motion for summary judgment, the Sillers did not address Lender's legal argument that it could not be held liable unless the failure to provide those documents was in bad faith. However, on appeal the Sillers argue Lender did not produce any evidence showing that its failure to provide those documents was in good faith.

Independently reviewing the record on appeal, we conclude, as a matter of law, that Lender did not carry its burden to show the Sillers could not establish it violated Financial Code section 50505 by failing to timely provide Maria with the required special information booklet and GFE as required by RESPA pursuant to title 12 United States Code section 2604(c) and (d). Because Lender did not present any evidence making a prima facie case that it delivered those documents to Maria or that the failure was done in good faith (assuming arguendo there is such a good faith exception for purposes of Fin. Code, § 50505 rather than RESPA), Lender did not carry its burden of persuasion. Furthermore, absent the presentation of any admissible evidence, Lender did not carry its initial burden of production. (*Aguilar*, *supra*, 25 Cal.4th at p. 850 ["the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact"].) The burden of production did not shift to the Sillers to refute Lender's unsupported argument that it did not violate Financial Code section 50505 by failing to deliver the information booklet and GFE. Because Lender did not meet its burdens of production and persuasion on that alleged violation of Financial Code section 50505, the trial court erred by impliedly finding otherwise.

H

As a result of the error described above, we must reverse the summary judgment and order impliedly granting summary adjudication on that specific Financial Code section 50505 cause of action based on Lender's failure to provide

Maria with the information booklet and GFE required by RESPA (12 U.S.C. § 2604). Because, as discussed above, Lender carried its burden to show the Sillers could not establish the other Financial Code 50505 causes of action, as well as the other non-Financial Code causes of action, we uphold the trial court's implied grant of Lender's motion for summary adjudication on those other causes of action. We uphold the court's implied grant of summary adjudication on the Sillers' Financial Code section 50505 causes of action that are based on separate acts of Lender allegedly in violation of RESPA (i.e., its failure to: (1) disclose the YSP; (2) disclose the "true" terms of the loan transaction; and (3) use and/or provide the Sillers with the HUD-1 settlement statement at closing). Although the Sillers combined all four acts that allegedly violated RESPA, and thus Financial Code section 50505, under the title of a Financial Code section 50505 count or "cause of action," we must separate each alleged act in determining whether Lender was entitled to summary adjudication as to the cause of action based on that act. "*For summary adjudication purposes*, separate wrongful acts give rise to *separate* causes of action. Whether they are pleaded in the same or single counts is not determinative. [Citations.]" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) [¶] 10:39.2, p. 10-14 (rev. #1 2009).) One court explained:

> "[T]he clearly articulated legislative intent of section 437c, subdivision (f), is effectuated by applying the section in a manner which would provide for the determination on the merits of summary adjudication motions involving separate and distinct wrongful acts which are combined in the same cause of action. To rule otherwise would defeat the time and cost saving purposes

> of the amendment and allow a cause of action in its entirety to proceed to trial even where, as here, a separate and distinct alleged obligation or claim may be summarily defeated by summary adjudication. Accordingly, we hold that under subdivision (f) of section 437c, a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action." (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854-1855, fn. omitted; see also *Edward Fineman Co. v. Superior Court* (1998) 66 Cal.App.4th 1110, 1115-1118 [upholding summary adjudication on 23 of 83 separate alleged acts of forging checks even though plaintiff combined them in a "cause of action"].)

Accordingly, on remand the only remaining cause of action in the Complaint is the Sillers' allegation that Lender violated Financial Code section 50505 based on its alleged failure to provide Maria with the information booklet and GFE required by RESPA (12 U.S.C. § 2604). The trial court correctly granted summary adjudication on all of the other causes of action.

III

Conduct of the Sillers' Counsel

The Sillers contend their counsel's misconduct and neglect requires reversal of the summary judgment (and presumably summary adjudication of all causes of action as discussed above). They argue their counsel's conduct constituted "positive misconduct" by which they were effectually and unknowingly deprived of representation and therefore his negligence should not be imputed to them. (See, e.g., *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 391; *Buckert v. Briggs* (1971) 15 Cal.App.3d 296, 301.) However, the cases cited by the Sillers pertain only to motions

for relief under section 473, subdivision (b), based on mistake, inadvertence, surprise, or excusable neglect, which motions must be made within six months after the adverse judgment or other action is taken. Because the Sillers do not show that they timely filed such a motion in the trial court, we conclude they are not entitled to section 473, subdivision (b), relief.[11]

Assuming arguendo the Sillers can nevertheless contend on appeal that the summary judgment (and summary adjudications) should be reversed based on their counsel's misconduct, we conclude they have not carried their burden on appeal to cite to admissible evidence in the record showing their counsel engaged in purported "positive misconduct" or such other misconduct that effectively deprived them of representation. The California Supreme Court stated:

> "[A]n exception to this general rule [i.e., a client's redress for counsel's inexcusable neglect is an action for malpractice] has developed. '[E]xcepted from the rule are those instances where the attorney's neglect is of that extreme degree amounting to *positive misconduct*, and the person seeking relief is relatively free from negligence. [Citations.] The exception is premised upon the concept the attorney's conduct, in effect, *obliterates the existence of the attorney-client relationship*, and for this reason his negligence should not be imputed to the client.' [Citations.]" (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898, italics added, quoting *Buckert v. Briggs*, *supra*, 15 Cal.App.3d at p. 301.)

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11 In any event, the Sillers do not show on appeal that their counsel's purported negligence or other misconduct (e.g., not adequately presenting evidence or argument in opposition to Lender's motion for summary judgment) was excusable neglect under section 473, subdivision (b). (See *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259; *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.)

The question in this case is whether the Sillers have shown their counsel's conduct amounted to "positive misconduct" by which they were effectually and unknowingly deprived of representation. (*Carroll v. Abbott Laboratories, Inc.*, *supra*, at pp. 898-899.) However, the Sillers do not cite to any evidence in the record that shows they qualify for that "positive misconduct" exception. On the contrary, their argument is primarily based on matters outside the record. Therefore, we cannot conclude the Sillers have shown there was a "total failure on the part of [their] counsel to represent" them or that they otherwise are entitled to the "positive misconduct" exception. (*Carroll*, at p. 900.)

IV

Opportunity to Correct Separate Statement Responses

The Sillers contend the summary judgment (and presumably summary adjudications) should be reversed because the trial court abused its discretion by not sua sponte granting them an opportunity to correct their responses to Lender's separate statement of undisputed facts. As noted above, the trial court's order found that the Sillers' objections to Lender's evidence in support of its separate statement were improperly made in their opposing separate statement and should, instead, have been made in a separate document. The court also stated that each fact disputed by the Sillers should have been supported by reference to supporting evidence. (§ 437c, subd. (b)(3).)

The Sillers argue the trial court should have first given them an opportunity to correct their separate statement by adding citations to the evidence supporting their dispute of Lender's separate statement facts before granting Lender's motion for summary judgment. (See, e.g., *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316; *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1211.) However, as Lender asserts, even had the trial court allowed the Sillers to correct that error, the court nevertheless sustained Lender's objections to the Sillers' evidence and stated it "did not rely upon any of [the Sillers'] evidence, as each is inadmissible. No foundation has been laid for the evidence attached to [the Sillers'] Opposition separate statement, and none of the items have been authenticated." Accordingly, the trial court did not base its order granting Lender's motion for summary judgment (and implied grant of summary adjudications) on the Sillers' procedural failure to comply with section 437c, subdivision (b)(3), but rather their failure to present any admissible evidence disputing Lender's evidence and showing in support of its motion. Because the Sillers do not contend on appeal that the court erred by sustaining Lender's evidentiary objections, they do not show that the court's failure to sua sponte allow them to correct their separate statement responses was prejudicial and requires reversal of the summary adjudications we uphold in this opinion.

DISPOSITION

The judgment is reversed and the matter is remanded with directions that the trial court vacate its October 29, 2008, order to the extent it granted Lender's motion for summary judgment and enter a new order denying Lender's motion for summary judgment but granting Lender's alternative motion for summary adjudication of all of the Sillers' causes of action except for their Financial Code section 50505 cause of action based solely on Lender's failure to provide Maria with the information booklet and GFE required by RESPA (12 U.S.C. § 2604). The parties shall bear their own costs on appeal.

McDONALD, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.