

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 12 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DAVID EMORY BALD, individually and
on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

WELLS FARGO BANK, N.A., a national
banking association; THE LAW OFFICE OF
DAVID B. ROSEN, a law corporation, a
Hawaii professional corporation; DAVID
BRADLEY ROSEN; DOE DEFENDANTS
1-50,

Defendants-Appellees.

No. 21-16680

D.C. No.

1:13-cv-00135-SOM-RT

MEMORANDUM*

EVELYN JANE GIBO, individually and on
behalf of all others similarly situated;
PATRICK STEPHEN HEMMENS;
DEANNE DAVIDSON HEMMENS;
VINCENT LABASAN; JENNIFER
STRIKE,

Plaintiffs-Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION,
AKA U.S. Bank, N.A., a national banking

No. 21-16686

D.C. No.

1:12-cv-00514-SOM-WRP

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

association,

Defendant-Appellee.

CALVIN JON KIRBY II; DEIRDRE-
DAWN K. CABISON; JAMES C. CLAY;
TIMOTHY RYAN; DONNA RYAN;
BRIAN S. WEATHERLY,

Plaintiffs-Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST
COMPANY,

Defendant-Appellee.

No. 21-16700

D.C. No.

1:12-cv-00509-SOM-WRP

Appeal from the United States District Court
for the District of Hawaii
Susan O. Mollway, District Judge, Presiding

Submitted December 6, 2022**
San Francisco, California

Before: LUCERO,*** BRESS, and VANDYKE, Circuit Judges.

We address three cases which present identical dispositive issues: *Bald v. Wells Fargo Bank, N.A.*, Civ. No. 21-16680; *Gibo v. U.S. Bank National Ass'n*, Civ.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Carlos F. Lucero, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

No. 21-16686; and *Kirby II v. Deutsche Bank National Trust Co.*, Civ. No. 21-16700. Plaintiffs in each case appeal the grant of a singular motion for summary judgment favoring Wells Fargo Bank, N.A., U.S. Bank Nat'l Association, and Deutsche Bank Nat'l Association ("banks"). Plaintiffs allege their respective banks foreclosed secured notes signed by plaintiffs using improper procedures, such as failing to give proper notice of the foreclosure sale, failing to give a description meant to entice buyers, and postponing the foreclosure sale without notice. Plaintiffs assert these actions discouraged potential buyers and allowed defendant banks to purchase their mortgages at lower auction prices. Plaintiffs argue these actions violate Hawaii law for wrongful foreclosure, Haw. Rev. Stat. § 667-5, and Unfair, Deceptive and Abusive Practices ("UDAP"), Haw. Rev. Stat. § 480-2.¹ They claimed damages based on loss of title, possession, and investments. Plaintiffs purport to represent over 1,500 former owners of Hawaii properties sold in a similar manner by defendant banks since June 2008.²

Before the district court, defendant banks moved for summary judgment, asserting plaintiffs failed to show damages because their mortgages were underwater

¹ The district court noted that plaintiffs phrase their claim as one for both UDAP and unfair methods of competition ("UMOC") but have not made separate arguments for UDAP and UMOC. The district court and Hawaii Supreme Court construed that claim under UDAP. Plaintiffs have not challenged this construction.

² No class has been certified.

at the time of the alleged improper foreclosure procedures. The district court certified a question to the Hawaii Supreme Court, which clarified that plaintiffs' summary judgment burden was to "account[] for the effect of the mortgage in establishing the element of harm." *Lima v. Deutsche Bank Nat'l Tr. Co.*, 494 P.3d 1190, 1202 (Haw. 2021). Noting plaintiffs had identified only a component of their damages, the Hawaii Supreme Court held that "Plaintiff Borrowers consequently must still factor in their pre-nonjudicial foreclosure statuses to demonstrate their compensatory damages." *Id.* at 1199. Following the certification ruling, the district court invited the parties to file additional evidence. Plaintiffs declined to do so. Based on the requirements stated by the Hawaii Supreme Court, the district court found plaintiffs had not adequately demonstrated damages and granted defendant banks' respective motions for summary judgment.

On appeal, plaintiffs contend: (1) the district court erred in shifting the burden of proof from defendant banks; (2) the district court erred in finding plaintiffs did not meet their burden on summary judgment; and (3) the district court erred in not delineating a method of damages calculation. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's grant of defendant banks' motions for summary judgment.

First, the district court did not err in shifting the burden of proof from defendant banks on the motions for summary judgment. The banks' respective

motions for summary judgment uniformly pointed to an absence of evidence to support plaintiffs' damages claims. Because they do not bear the burden of proof at trial, defendant banks need only show an absence of evidence to support an essential element of the non-moving party's case to move the burden to the non-moving party to show a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324–25 (1986). In the certification decision, the Hawaii Supreme Court clarified that plaintiffs must “be able to establish a prima facie case for compensatory damages, factoring in their pre-nonjudicial foreclosure positions.” *Lima*, 494 P.3d at 1197. Defendant banks sufficiently pointed to the missing information. We have held that for summary judgment motions, “the moving defendant need provide nothing more than a reference to those materials on file in the case which support the movant’s belief that there is an absence of any genuine issues of material fact.” *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990). Thus, the district court did not err in shifting the burden of proof to plaintiffs on defendant banks’ motions for summary judgment.

Second, the district court’s conclusion that plaintiffs failed to meet the requirements of Hawaii law was not error. Plaintiffs argue that the district court erred in granting summary judgment when plaintiffs declined to “account[] for the effect of the mortgage.” *Lima*, 494 P.3d at 1202. When the burden on a motion for summary judgment shifts back to the non-movant to show that a fact is genuinely

disputed, they must “support the assertion by citing to particular parts of materials in the record.” Fed. R. Civ. P. 56(c). The nonmoving party may not rely on mere allegations in pleadings, *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289 & n.19 (1968), nor state that it will discredit the moving party’s evidence at trial, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256–57 (1986). Rather, the non-movant plaintiff must produce some “significant probative evidence tending to support the complaint.” *Id.* at 249 (quotation omitted).

Plaintiffs contend defendant banks failed to demonstrate a lack of damages because there are gaps in the record regarding many plaintiffs’ purchase price, investment incurred, and debt forgiven. However, it is plaintiffs who must make out a prima facie case of compensatory damages. *Lima*, 494 P.3d at 1197. But plaintiffs’ mortgages were underwater. And when plaintiffs cannot point to evidence in the record to support their damages assertions under *Lima*, plaintiffs have failed to produce significant probative evidence tending to support the complaint. *Anderson*, 477 U.S. at 249.

Plaintiffs’ required showing was made evident under *Lima*. The Hawaii Supreme Court declared that “the items that Plaintiff Borrowers identified constitute, at best, pecuniary losses that form a mere component of their compensatory damages. . . . Plaintiff Borrowers consequently must still factor in their pre-nonjudicial foreclosure statuses to demonstrate their compensatory damages.” *Lima*,

494 P.3d at 1199. Though the district court invited plaintiffs to submit additional information to address damages, plaintiffs declined to add more evidence or clarify their assertions, stating “the Court now should have all the facts and law that it needs to rule on all the pending motions.”

Plaintiffs argue the district court also erred because the record “permitted the reasonable inference that the total of [plaintiffs’] invested funds was greater than the total debt that was forgiven or satisfied through [each] plaintiff’s foreclosure sale.” Plaintiffs misplace the burden of accounting for damages. We have noted that “[i]t is not our task, or that of the district court, to scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quotation omitted). Plaintiffs cannot assert the district court erred in not searching for and finding these allegedly plausible damages. Nor have plaintiffs on appeal sufficiently explained how they have satisfied the minimum requirements under *Lima*. Thus, the district court did not err granting summary judgment when plaintiffs did not meet their burden to respond with evidence tending to support their damages claim.

Third, the district court did not err by not clarifying how plaintiffs could calculate damages. Plaintiffs suggest the panel certify a question to the Hawaii Supreme Court on proper accounting procedures for damages in this case. But the

Hawaii Supreme Court already clarified the damages calculation structure. That court confirmed plaintiffs must “make a prima facie case that their requested damages will restore them to their pre-tort position” which includes that “their property interests were encumbered by standard-form mortgages that they could not repay.” *Lima*, 494 P.3d at 1199, 1200 (internal quotation omitted). The Hawaii Supreme Court specifically understood Hawaii law to require plaintiffs to assert damages of mortgage payments and special damages, set off by their forgiven mortgage debts. *Id.* at 1201–02.

To be clear, we do not hold that plaintiffs *could not* have asserted damages. They simply *have not* provided sufficient evidence of damages to survive a motion for summary judgment. Plaintiffs bore the burden of presenting a damages model that complied with Hawaii law. Plaintiffs were free to provide evidence that would meet the Hawaii Supreme Court’s requirements. In their brief, plaintiffs present possible theories but fail to present record evidence showing any theory supports their claim for damages. Because plaintiffs have failed to “account[] for the effect of the mortgage in establishing the element of harm,” it is irrelevant what other components of damages plaintiffs might also have alleged. *Id.* at 1202. If any of plaintiffs’ theories had accounted for the effect of plaintiffs’ mortgages and had been presented fully formed, together with record evidence demonstrating they applied to

plaintiffs, the district court could have evaluated them. Because plaintiffs failed to do so, the judgment of the district court is

AFFIRMED.³

³ We deny U.S. Bank's motions for judicial notice. Dkt. Nos. 22, 25.