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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Michael S. Neminsky, et al.,
10 Plaintiffs,

No. CV-14-01196-PHX-GMS

ORDER

11 v.

12 Bank of America Corporation, et al.,
13 Defendants.
14

15 Pending before the Court is the Motion for Summary Judgment by Plaintiffs
16 Arlene C. Neminsky and Michael S. Neminsky. (Doc. 62.) Also pending before the
17 Court is the Motion for Summary Judgment by Defendants BAC Home Loans Servicing
18 LP, Bank of America Corporation, and Bank of America NA (collectively “Bank of
19 America”). (Doc. 66.) For the following reasons, the Court denies Plaintiffs’ motion and
20 grants defendants’ motion.

21 **BACKGROUND**

22 In 2009, Plaintiffs Michael and Arlene Neminsky were struggling to make their
23 loan payments, and requested a loan modification under the federal Home Affordable
24 Modification Program (“HAMP”) from Bank of America. A representative of Bank of
25 America instructed Plaintiffs to stop making their mortgage payments in order to obtain a
26 modification. Based on this information, Plaintiffs became over ninety days delinquent
27 in payments. In October 2009, Plaintiffs entered into a Loan Modification Agreement
28 with Defendants. (Doc. 63 at PDF 26-28.)

1 evidence “in a light most favorable to the non-moving party.” *Warren v. City of*
2 *Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995). Where the parties have filed cross-motions
3 for summary judgment, the Court “evaluate[s] each motion independently, ‘giving the
4 nonmoving party in each instance the benefit of all reasonable inferences.’” *Lenz v.*
5 *Universal Music Corp.*, 2015 WL 5315388, at *2 (9th Cir. Sept. 14, 2015) (quoting
6 *ACLU v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir.2003)). “[A] party seeking
7 summary judgment always bears the initial responsibility of informing the district court
8 of the basis for its motion, and identifying those portions of [the record] which it believes
9 demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*,
10 477 U.S. 317, 323 (1986).

11 The party opposing summary judgment “may not rest upon the mere allegations or
12 denials of [the party’s] pleadings, but . . . must set forth specific facts showing that there
13 is a genuine issue for trial.” Fed. R. Civ. P. 56(e); see *Matsushita Elec. Indus. Co. v.*
14 *Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Brinson v. Linda Rose Joint Venture*,
15 53 F.3d 1044, 1049 (9th Cir. 1995). Substantive law determines which facts are material,
16 and “[o]nly disputes over facts that might affect the outcome of the suit under the
17 governing law will properly preclude the entry of summary judgment.” *Anderson v.*
18 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A fact issue is genuine ‘if the evidence is
19 such that a reasonable jury could return a verdict for the nonmoving party.’” *Villiarimo v.*
20 *Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson*, 477 U.S.
21 at 248). Thus, the nonmoving party must show that the genuine factual issues “can be
22 resolved only by a finder of fact because they may reasonably be resolved in favor of
23 either party.” *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818
24 F.2d 1466, 1468 (9th Cir. 1987) (quoting *Anderson*, 477 U.S. at 250).

25 **II. Analysis**

26 Arizona has adopted the “Good Samaritan Doctrine,” which provides that when a
27 person voluntarily undertakes to render services to another, even when there is no legal
28 duty to do so, that person is liable for any lack of due care in performing it. Restatement

1 (Second) of Torts § 323; *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 176 Ariz. 247, 250, 860
2 P.2d 1300, 1303 (Ct. App. 1992). The Good Samaritan Doctrine applies to economic
3 harm and lenders are not excepted from liability. *Steinberger v. McVey ex rel. County of*
4 *Maricopa*, 234 Ariz. 125, 137, 318 P.3d. 419, 430–31 (App. 2014); *accord Silving v.*
5 *Am.’s Servicing Co.*, 552 F. App’x 684, 684–85 (9th Cir. 2014). Under Arizona law, to
6 succeed on a claim for increased risk of economic harm under the Good Samaritan
7 Doctrine, a plaintiff must prove that: (1) defendants undertook to render services to the
8 plaintiff that they should have recognized were necessary for the protection of the
9 plaintiff’s property, (2) the defendants’ failure to exercise reasonable care while doing so
10 increased the risk of harm to the plaintiff, and (3) the plaintiff was in fact harmed because
11 of the defendants’ actions. *Steinberger*, 234 Ariz. at 137, 318 P.3d at 431.

12 Here, there is no evidence that Bank of America failed to exercise reasonable care,
13 or that the Neminskys were harmed. In 2009, a Bank of America representative advised
14 the Neminskys that they must default on their loan before applying for a loan
15 modification. The Neminskys did default on their loan in 2009 and did receive a loan
16 modification in 2009.¹ In 2011, the Neminskys defaulted on their modified loan in hopes
17 of receiving another loan modification, relying again on the information given by a Bank
18 of America representative in 2009.² They had the opportunity to apply for a loan
19 modification, but their application was denied. The Neminskys have failed to provide
20 evidence suggesting that their application was denied due to any negligence on the part of
21 Bank of America. The loan application was processed by SLS, not Bank of America.
22 Moreover, the Neminskys’ financial information did not qualify them for a loan.

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25 ¹ The Neminskys have cited to nothing in the record to support their contention that the
26 October 2009 loan modification agreement signed by the Neminskys (Doc. 63 at PDF 26-
27 28) “never resulted in a ‘permanent modification’ per FDIC guidelines.” (Doc. 71 at 2.)

27 ² In considering Bank of America’s motion for summary judgment, the Court assumes the
28 truth of Mr. Neminsky’s testimony that a Bank of America representative told him in
2009 that he could later default a second time to pursue a second, more desirable loan
modification, and that he acted upon that advise two years later, in 2011. (Doc. 76-1 at
PDF 34, p. 81.)

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CONCLUSION


For the reasons stated above, the Court concludes that there is no genuine issue of material fact to support Plaintiff’s claim under the Good Samaritan doctrine.

IT IS THEREFORE ORDERED that the Motion for Summary Judgment by Plaintiffs Arlene C. Neminsky and Michael S. Neminsky (Doc. 62) is **DENIED**.

IT IS FURTHER ORDERED that the Motion for Summary Judgment by Defendants BAC Home Loans Servicing LP, Bank of America Corporation, and Bank of America NA (Doc. 66) is **GRANTED**.

IT IS FURTHER ORDERED that the Complaint is **DISMISSED** and the Clerk of Court is directed to enter judgment accordingly.

Dated this 5th day of February, 2016.



Honorable G. Murray Snow
United States District Judge