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Court of Appeal, Second District, Division 5, California.

Paul JANOSSY et al., Plaintiffs and Appellants,
v.
WASHINGTON MUTUAL BANK, Defendant and Respondent.

No. B157252.
(Super.Ct.No. LC47973).

Sept. 12, 2002.

Borrowers brought action against lender to recover for intentional infliction of emotional distress, libel, false light invasion of privacy, and nuisance in connection with efforts to collect payment on loan secured by deed of trust. The Superior Court, Los Angeles County, No. LC47973, John D. Harris, J., entered summary judgment in favor of lender. Borrowers appealed. The Court of Appeal, Grignon, Acting P.J., held that: (1) lender did not engage in outrageous conduct by paying real estate taxes and charging borrowers under deed of trust, even though they participated in a tax postponement program; (2) its allegedly libelous statements to credit reporting agencies to report late payments and default were privileged; (3) they were not actionable as false light invasion of privacy; and (4) lender's collection practices were not private nuisance.

Affirmed.

Lender did not engage in outrageous conduct and commit intentional infliction of emotional distress by paying real estate taxes and charging borrowers under deed of trust, even though they participated in a tax postponement program; they did not inform the lender of their arrangement, did not submit the certificate to postpone their property taxes for a tax year, and did not continue to reapply, and the lender had no knowledge of the borrowers' eligibility for tax postponement.

Lender's collection practices after correcting discrepancies created by borrowers' participation in property tax postponement program were consistent with acceptable practices, were not outrageous or unreasonable means to obtain payment, were privileged, and did not subject lender to liability on theory of intentional infliction of emotional distress, even though the lender made a mistake in one letter concerning the amount of the payment under deed of trust; subsequent statements provided the correct amount due, the borrowers continuously failed to pay the arrears, and each month that the account was delinquent, the lender sent form letters and attempted to contact borrowers by telephone up to three times to notify them that foreclosure proceedings would be instituted unless they brought their account current.

Lender's allegedly libelous statements to credit reporting agencies to report late payments and default on deed of trust were privileged; nothing indicated malice. West's Ann.Cal.Civ. Code § 147, subd. (c).

Lender's communications to the credit reporting agencies and the resulting reports produced by the agencies about borrowers were not "publicity," were not made available to the public eye generally, and, therefore, were not actionable as false light invasion of privacy; the communications were made to private credit reporting companies that compiled credit information and made reports available in response to specific inquiries.

Lender did not commit private nuisance by making two to three telephone calls to borrowers each month to discuss delinquent account and inform them of imminent foreclosure of deed of trust; nothing indicated conduct other than

reasonable collection practices.

Allowing borrowers to file a second amended complaint one month before the scheduled trial date and after filing of lender's summary judgment motion would prejudice lender in borrowers' tort suit; the proposed complaint did not add any causes of action, added factual allegations as a continuation of the conduct that formed the basis for the allegations in the operative complaint, and would have defeated the summary judgment motion due to be ruled upon. [West's Ann.Cal.C.C.P. § 473](#).

APPEAL from a judgment of the Superior Court of Los Angeles County. John D. Harris, Judge. Affirmed.

Paul Janossy and Hajnal Janossy, in pro. per., for Plaintiffs and Appellants.

Houser & Allison, Eric D. Houser and Jeffrey S. Allison for Defendant and Respondent.

[GRIGNON](#), Acting P.J.

*1 Plaintiffs and appellants Paul and Hajnal Janossy appeal from a summary judgment in favor of defendant and respondent Washington Mutual Bank in this action, based on the Bank's efforts to collect on a note secured by a deed of trust. The Janossys contend: (1) triable issues of fact exist as to whether the Bank's conduct constituted intentional infliction of emotional distress, libel, invasion of privacy, nuisance, and breach of contract; (2) the trial court should have granted the Janossys' motions for summary judgment; and (3) the trial court erred by denying the Janossys' request to file a second amended complaint. We affirm.

FACTS AND PROCEDURAL BACKGROUND

The Janossys purchased a home on March 14, 1991. In addition to their down payment, they obtained an adjustable rate loan in the amount of \$145,500 from Great Western Bank. The loan was secured by a deed of trust on the property. The initial interest rate was 7.9 percent and the initial monthly payment was \$1,062.57. After the third payment, the rate was adjusted monthly. The Janossys' payments were due on the first of the month. If a monthly payment was not received within 15 days of the due date, a late charge applied. The deed of trust further provided that if the Janossys failed to pay any taxes and assessments on the property, Great Western "may but shall not be obligated to make such payment and any amount so paid shall be charged to and promptly paid by [the Janossys] or at the option of [Great Western] shall be added to the indebtedness secured hereby without regard to the validity or legality of such assessments, liens or charges." In January 1994, the Janossys' property was damaged in the Northridge earthquake.

In 1995, the Janossys learned that the State Controller's Office offers a property tax postponement program to qualified elderly applicants. Under the program, a homeowner submits a claim form to the Controller's Office. If the claim is approved, the Controller's Office sends the homeowner a certificate of eligibility. The homeowner presents the certificate to the county tax collector's office to defer the property taxes due. The postponed amount and interest are not due until the property is sold. To qualify based on age, the homeowner must be 62 years of age or older and the total household income must not have exceeded \$24,000 for the tax year. In addition, the owners must have a 20 percent equity interest in the home at the time of application. A new claim is required to be filed each year. The Janossys applied and received approval from the Controller's Office for the 1992-1993 and 1994-1995 tax years. However, the Janossys submitted only the certificate for the 1992-1993 tax year to the county tax collector's office. They did not continue to reapply for the program.

In the regular course of business, Great Western discovered that property tax payments had not been made on the Janossys' property. In 1996, unaware of the Janossys' participation in the tax postponement program, Great Western advanced the tax payments as provided under the note and deed of trust and charged the advances to an impound account. The Janossys' monthly statements showed various amounts charged to principal, interest, and the impound account. Apparently, the Janossys paid into the impound account in 1996.

*2 In 1997, Great Western sent form notices to the Janossys stating that their loan was delinquent and foreclosure proceedings were imminent. The Janossys disputed that Great Western was entitled to collect payments for an impound account and asked Great Western to return the payments collected in 1996 for that purpose. The Janossys

refused to pay the impound account component. The Janossys wrote several letters to Great Western in their attempt to resolve the property tax and impound account issue. In 1997 or 1998, Great Western merged with the Bank.

In March 1998, the Bank sent the Janossys a letter notifying them that their new monthly payment of principal and interest was \$938.22. The Bank also sent the Janossys notices of delinquency. The Bank's records showed that the Janossys had a history of making late or incomplete payments. On June 16, 1998, the Bank sent the Janossys a loan statement reflecting arrearages of \$4,392.99.

On August 13, 1998, the Bank's collections department wrote to the Janossys. It had confirmed with the taxing authorities that the Janossys were entitled to a tax postponement, provided they complied with the terms of the postponement program and reapplied each year. The Bank requested that the Janossys submit the 1994-1995 tax year certificate to the county tax collector's office for processing. Based on the Janossys' eligibility for the tax postponement program, the Bank informed them it would delete the impound component from the Janossys' account. After deletion of the impound account and correction of the resulting misapplications to the loan, the Bank's records showed that the Janossys owed loan payments for July and August in the amount of \$938.22 each. The total required to bring the loan current was \$1,876.44. The remaining principal balance was approximately \$124,172.

On August 27, 1998, the Bank wrote to the Janossys to notify them that the impound account had been cancelled. The letter mistakenly stated that their next monthly installment was due on December 10, 1998, and their monthly mortgage payment was \$924.52. In fact, the next payment was due in September and the correct payment amount was \$938.22. The Bank continued to send monthly statements showing the correct monthly installment as \$938.22. The Janossys made four payments, two in the amount of \$924.52 and two in the amount of \$924.13. They failed to make their monthly loan payments in the proper amount, which was \$938.22. Moreover, they did not pay the amount in arrears.

On November 27, 1998, the Bank sent to the Janossys a notice of intent to foreclose that stated the amount of the arrears was \$1,932.02. On December 9, 1998, the Bank advised the Janossys that it was preparing a notice of default and commencing foreclosure proceedings. The Janossys apparently wrote to the Bank and claimed that they had made their payments on time and in the correct amounts. On January 7, 1999, the Bank acknowledged that the August 27, 1998 letter had provided misinformation concerning the amount of the monthly loan payments, but noted that the Janossys had previously been provided with correct information as to the most recent rate change as well as monthly statements showing the correct amount. On January 26, 1999, the Bank sent another notice advising that it was preparing a notice of default and commencing foreclosure proceedings.

*3 On February 23, 1999, the Janossys filed a complaint against the Bank alleging causes of action for intentional infliction of emotional distress, libel, invasion of right of privacy, private nuisance, and breach of contract. The lawsuit was based on the multiple letters the Bank sent notifying the Janossys that they were in default and foreclosure was imminent, multiple telephone calls for collection purposes, and letters sent to credit agencies regarding the Janossys' loan that prevented the Janossys from obtaining further credit. The Janossys alleged that they had made all of the payments required under the loan. On April 29, 1999, the Janossys filed an "amended complaint" that added a statement of damages of \$406,000, including punitive damages of \$200,000.

On June 17, 1999, the Janossys filed for bankruptcy. The Janossys listed their home on the schedule of real property. They listed the current market value of the property as \$120,000 and the amount of the Bank's secured claim against the property as \$123,924.58. On a schedule of property claimed as exempt, the Janossys listed the home as a homestead and claimed the maximum exemption of \$100,000. The Janossys listed the Bank's address and the amount of the Bank's secured claim on a schedule of secured claims. The Janossys listed 27 different credit card and store credit accounts with unsecured charges totaling \$56,786.30. On a schedule of current expenditures, the Janossys listed the monthly mortgage payment of \$938.22 and a monthly real property tax payment of \$140. The Janossys did not list their lawsuit against the Bank as an asset. The Janossys did not provide the Bank's name and address as one of the parties to receive notice of the proceedings. On July 29, 1999, the trustee appointed for the Janossys' bankruptcy estate filed a Report of Chapter 7 Trustee in No Asset Case.

In August 1999, the Bank filed its answer in this case. On September 27, 1999, the bankruptcy court discharged the Janossys' unsecured debts, but not the Bank's secured note. The bankruptcy court discharged the trustee and closed the Janossys' bankruptcy case on October 4, 1999. On November 29, 1999, without obtaining leave of the trial court to amend, the Janossys filed an amended complaint that additionally alleged the balance of \$124,172.56

due on the Bank's loan should be discharged due to unconscionability, impossibility, impracticability, frustration of purpose, and compensation for illegal act under [Civil Code sections 3281](#) and [3345](#).

In December 1999, the Janossys filed a motion in the bankruptcy court to avoid the Bank's real property lien. The bankruptcy court instructed them that they needed to reopen their bankruptcy case. In February 2000, the Janossys filed a motion to reopen the bankruptcy case to allow them to amend their schedules and discharge debt. The bankruptcy court denied the motion on March 10, 2000. The Janossys filed a motion to amend their schedules, which the bankruptcy court denied as well. The Janossys appealed the bankruptcy court orders to the district court. The district court affirmed the decisions of the bankruptcy court. The district court specifically found that the Bank's lien survived bankruptcy and could not be avoided. Therefore, the Janossys would not have benefited from reopening the case. In a footnote, the district court noted that the Janossys had not asserted until their reply brief that their lawsuit for damages of \$406,000 was an asset warranting reopening the estate for administration.

*4 In July 2001, the Janossys filed a motion for summary judgment, including a separate statement, that was subsequently taken off calendar. The motion was based on the Bank's statements that the Janossys' action against the Bank was the property of the bankruptcy estate. On October 23, 2001, the Janossys filed a motion for summary judgment renewing their original motion. On November 11, 2001, the trial court denied the Janossys' motion for summary judgment as unintelligible and lacking a separate statement.

On January 23, 2002, the Bank filed a motion for summary judgment. The total amount outstanding on the loan at that time was \$154,146 .55, including principal, interest, late fees, and miscellaneous charges. The Janossys had not made any payments since early 1999. On January 29, 2002, the Janossys filed a motion for summary judgment, based on additional statements in the Bank's pleadings that the Janossys' action was the property of the bankruptcy estate. On February 4, 2002, the Janossys filed an opposition to the Bank's motion for summary judgment. On February 11, 2002, the Janossys requested permission to file a second amended complaint. On February 13, 2002, the Janossys requested that the trial court consider the July 2001 motion for summary judgment, because a separate statement had been filed with that motion.

A hearing was held on February 22, 2002. The trial court found that there were no material facts in dispute as to the issues raised by the Bank. The trial court further found that the Janossys had provided no credible evidence in opposition to the motion for summary judgment. Moreover, the Janossys did not provide any factual support for their tort or contract causes of action. The Janossys had missed payments, made late payments, and made payments in insufficient amounts. The trial court found that the bankruptcy matter should have resolved all of the issues and the failure to raise the issues in bankruptcy court was res judicata.

On March 28, 2002, the trial court entered an order granting the Bank's motion for summary judgment and entering judgment in favor of the Bank. The trial court also entered an order denying the Janossys' motion for summary judgment, which the trial court found was essentially an untimely and improper motion for reconsideration under [Code of Civil Procedure section 1008](#) of their earlier motion for summary judgment. The trial court also entered an order denying the Janossys' request to file a second amended complaint. On April 15, 2002, the trial court entered judgment in favor of the Bank. [\[FN1\]](#)

[FN1](#). We have taken judicial notice of the entire superior court file in this matter. The Janossys' motion for judicial notice is denied.

The Janossys filed a notice of appeal purporting to appeal from "the Judgment entered on February 22, 2002," denying the Janossys' motion for summary judgment, request to reconsider their first motion for summary judgment, and request for an order allowing filing of a second amended complaint, and granting the Bank's motion for summary judgment. However, the February 22, 2002 order is not an appealable order. In the interests of justice, we construe the notice of appeal to be taken from the judgment entered on April 15, 2002. ([Avila v. Standard Oil \(1985\) 167 Cal.App.3d 441, 445, 213 Cal.Rptr. 314.](#))

DISCUSSION

Standard of Review

*5 We review orders granting or denying a summary judgment motion de novo. ([FSR Brokerage, Inc. v. Superior](#)

[Court \(1995\) 35 Cal.App.4th 69, 72, 41 Cal.Rptr.2d 404; Union Bank v. Superior Court \(1995\) 31 Cal.App.4th 573, 580-581, 37 Cal.Rptr.2d 653.](#)) 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" ([Iverson v. Muroc Unified School Dist. \(1995\) 32 Cal.App.4th 218, 222, 38 Cal.Rptr.2d 35.](#)) "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." ([Aguilar v. Atlantic Richfield Co. \(2001\) 25 Cal.4th 826, 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.](#))

Intentional Infliction of Emotional Distress

The Janossys contend that the Bank's conduct was a sufficient basis for their cause of action for intentional infliction of emotional distress. We disagree.

"The elements of a prima facie case of intentional infliction of mental distress are (1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress. [Citations]" ([Bogard v. Employers Casualty Co. \(1985\) 164 Cal.App.3d 602, 616, 210 Cal.Rptr. 578.](#))

Outrageous conduct is conduct "so extreme as to exceed all bounds of that usually tolerated in a civilized community." ([Yurick v. Superior Court \(1989\) 209 Cal.App.3d 1116, 1123, 257 Cal.Rptr. 665.](#)) "In the context of debt collection, courts have recognized that the attempted collection of a debt by its very nature often causes the debtor to suffer emotional distress. [Citation.] 'Frequently, the creditor intentionally seeks to create concern and worry in the mind of the debtor in order to induce payment.' [Citation.] Such conduct is only outrageous if it goes beyond 'all reasonable bounds of decency.'" [Citation.]" ([Ross v. Creel Printing & Publishing Co. \(2002\) 100 Cal.App.4th 736, 745, 122 Cal.Rptr.2d 787.](#)) "The requirements of the rule are rigorous, and difficult to satisfy. [Citation]" ([Yurick v. Superior Court, supra, 209 Cal.App.3d at p. 1129, 257 Cal.Rptr. 665.](#)) "In the area of collection practices, California recognizes a creditor has a qualified privilege to protect its economic interest, though that privilege may be lost if the creditor uses outrageous and unreasonable means in seeking payment." ([Symonds v. Mercury Savings & Loan Assn. \(1990\) 225 Cal.App.3d 1458, 1469, 275 Cal.Rptr. 871.](#))

"In other debtor/creditor cases, outrageous conduct has been found where a creditor contacted the plaintiff by calling her neighbor at 11:00 p.m. and having the plaintiff summoned on the ground the call constituted an emergency, only to harass her about a nonexistent debt [citation]; where a bank called the elderly plaintiff daily to threaten to attach her bank accounts and pressure her into signing a promissory note [citation]; and where a medical center contacted a plaintiff while she was a patient there recovering from surgery and harassed her about how she would pay her uninsured medical expenses. [Citation.]" ([Ross v. Creel Printing & Publishing Co., supra, 100 Cal.App.4th at pp. 747-748, 122 Cal.Rptr.2d 787.](#))

*6 [1] In this case, although the Janossys participated in a tax postponement program, they did not inform the Bank of their arrangement, they did not submit the certificate to postpone their property taxes for the 1994- 1995 tax year, and they did not continue to reapply to the tax postponement program. Having no knowledge of the Janossys' eligibility for tax postponement, the Bank was entitled to pay the taxes due and charge the Janossys under the terms of the deed of trust. The Bank's conduct in conformity with the terms of the agreement was not outrageous.

[2] Once the Bank had corrected the discrepancies created by the tax situation, the Bank's records showed that the Janossys' owed two months arrearages. The Janossys never paid the arrears. In addition, the Bank presented evidence that the Janossys had a history of late payments and payments in amounts other than the amount required. The fact that the Bank made a mistake in one letter concerning the amount of the payment required did not require finding otherwise. Subsequent statements provided the correct amount due and the Janossys continuously failed to pay the arrears. Based on the status of the Janossys' account, the Bank was entitled to commence foreclosure proceedings under the parties' agreement. Each month that the Janossys' account was delinquent, the Bank sent form letters and attempted to contact them by telephone up to three times to notify them that foreclosure proceedings would be instituted unless they brought their account current. Under the circumstances, the Bank's collections practices were consistent with acceptable collection practices and were not outrageous or unreasonable means to obtain payment. Therefore, the Bank's collections efforts were privileged. The Janossys did not present evidence to show a triable issue of fact as to whether they had made timely payments in the full amount required, nor did they submit

evidence from which a trier of fact could conclude the Bank's letters or telephone calls were outrageous and beyond acceptable collections practices. The trial court properly granted summary judgment as to the cause of action for intentional infliction of emotional distress.

Libel

[3] The Janossys contend that the Bank's written communication to credit reporting agencies stating that the Janossys had made late payments and were in default on their loan constituted libel. We disagree.

"Libel is a false and unprivileged publication by writing ... which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." ([Civ.Code § 45.](#)) "Truth of the statements made is a complete defense against civil liability for defamation, regardless of bad faith or malicious purpose." ([5 Witkin, Summary of Cal. Law \(9th ed. 1988\) Torts, § 494, p. 583.](#)) "A credit report, even one that causes harm, is not defamatory if it is true." ([Francis v. Dun & Bradstreet, Inc. \(1992\) 3 Cal.App.4th 535, 540, 4 Cal.Rptr.2d 361.](#))

*7 In addition, [Civil Code section 47](#), subdivision (c) provides that a publication is privileged "[i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." ([Civ.Code § 47\(c\).](#)) This privilege extends to mercantile agencies, such as credit reporting agencies that collect and distribute credit information for profit. ([Roemer v. Retail Credit Co. \(1970\) 3 Cal.App.3d 368, 370, 83 Cal.Rptr. 540; Pavlovsky v. Board of Trade \(1959\) 171 Cal.App.2d 110, 113-114, 340 P.2d 63.](#)) "For purposes of [Civil Code] section [47, subdivision (c)], malice has been defined as 'a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person.' [Citation.] If [Civil Code] section [47, subdivision (c)] applies to the occasion on which a communication is made and if it was made without malice, it is privileged and cannot constitute a defamation under California law." ([Brown v. Kelly Broadcasting Co. \(1989\) 48 Cal.3d 711, 723, 257 Cal.Rptr. 708, 771 P.2d 406.](#))

" [O]rdinarily the privilege is lost if defendant has no reasonable grounds for believing his statements to be true' [citation]." ([Roemer v. Retail Credit Co., supra, 3 Cal.App.3d at p. 371, 83 Cal.Rptr. 540.](#)) But mere negligence in making a sufficient inquiry into the facts on which the statement was based does not, of itself, relinquish the privilege. (Ibid.) " Mere inadvertence or forgetfulness, or careless blundering, is no evidence of malice.' [Citation.]" (Ibid.)

In this case, the Bank was entitled to pay the property taxes and charge the Janossys through an impound account. The Bank submitted evidence that the Janossys' account showed arrears over several months, even after the charges associated with the impound account were reversed. Therefore, the Bank's reports to credit agencies were true and did not constitute libel. The Janossys did not submit evidence to the contrary to show the existence of a triable issue of fact.

Even had the Bank's statements to the credit agencies been false, the statements were privileged under [Civil Code section 47](#), subdivision (c). As the Janossys' lender, the Bank was interested in the Janossys' credit status. The credit reporting agencies were also interested parties. There was no evidence from which a trier of fact could conclude that the Bank's communications to the credit agencies were made with malice toward the Janossys. No triable issue of fact existed and summary judgment was properly granted as to the cause of action for libel.

False Light Invasion of Privacy

[4] The Janossys contend the Bank's communications with the credit reporting agencies violated the Janossys' right of privacy by placing them in a false light. This is incorrect.

Publicity that places the plaintiff in a false light in the public eye is an actionable invasion of privacy, if the false light is highly offensive to a reasonable person. ([Fellows v. National Enquirer, Inc. \(1986\) 42 Cal.3d 234, 238-239, 228 Cal.Rptr. 215, 721 P.2d 97.](#)) As used in connection with the invasion of privacy torts, "publicity" is communication to the public in general or to a large number of persons as distinguished from one individual or a few. (See [Porten v. University of San Francisco \(1976\) 64 Cal.App.3d 825, 828, 134 Cal.Rptr. 839.](#)) "[A] false light action is in substance equivalent to a defamation suit. A plaintiff alleging false light, therefore, must also

satisfy the requirements of malice...." ([Johnson v. Harcourt, Brace, Jovanovich, Inc. \(1974\) 43 Cal.App.3d 880, 893, 118 Cal.Rptr. 370.](#))

*8 In this case, the Bank's communications to the credit reporting agencies and the resulting reports produced by the agencies did not constitute publicity and were not made available to the public eye generally. The Bank's communications were made to private credit reporting companies that compiled credit information and made reports available in response to specific inquiries. (Compare [Fellows v. National Enquirer, Inc., supra, 42 Cal.3d at pp. 238-239, 228 Cal.Rptr. 215, 721 P.2d 97](#) [publication in a newspaper available to the general public]; [Roemer v. Retail Credit Co. \(1975\) 44 Cal.App.3d 926, 934, 119 Cal.Rptr. 82](#) [credit reports are provided upon the request of the party concerned, reach but a relatively limited readership, and in most cases are kept in strict confidence].) Moreover, the Bank's communication was privileged, made without malice, and true, as discussed above. ([Fellows v. National Enquirer, Inc., supra, 42 Cal.3d at p. 243-244, 228 Cal.Rptr. 215, 721 P.2d 97](#); see [Civ.Code, § 1785.32.](#)) Summary judgment was properly granted as to the false light invasion of privacy cause of action.

Nuisance

[5] The Janossys alleged that the numerous telephone calls from the Bank's employees concerning their account constituted a private nuisance, because it made their home uninhabitable. We find that the trial court properly granted summary judgment as to this cause of action.

A private nuisance is a nontrespassory interference with the private use and enjoyment of land. ([Civ.Code § 3479; San Diego Gas & Electric Co. v. Superior Court \(1996\) 13 Cal.4th 893, 937, 55 Cal.Rptr.2d 724, 920 P.2d 669.](#)) Liability for private nuisance requires: (1) interference with the plaintiff's use and enjoyment of the plaintiff's property; (2) the interference caused the plaintiff to suffer substantial actual damage; and (3) the interference with the protected interest was unreasonable. ([San Diego Gas & Electric Co. v. Superior Court, supra, 13 Cal.4th at pp. 937-938, 55 Cal.Rptr.2d 724, 920 P.2d 669.](#))

Nuisance is always a tort against land and the plaintiff's action must be founded upon his interest in the land. ([11 Witkin, Summary of Cal. Law \(9th ed. 1990\) Equity, § 122, p. 804.](#)) Actual physical interference with land use constitutes the most common type of nuisance. (Id. at § 126, p. 807.) An activity, without directly damaging or preventing use of the land, may nevertheless disturb or prevent its comfortable enjoyment, such as smoke, odors and noise. (Id. at § 127, pp. 808-809.)

Assuming the tort of nuisance can apply to telephone calls under California law, between two and three telephone calls a month from the Bank to the Janossys would not constitute a nuisance under the circumstances of this case. The Bank and the Janossys had a contractual relationship. The Bank submitted evidence that the Janossys' account was delinquent and foreclosure proceedings were imminent. The Bank was entitled to pursue reasonable collections efforts. It was not unreasonable for the Bank to attempt to contact the Janossys a few times each month to discuss the status of their account and inform them of the consequences of a continuing default. The Janossys did not submit evidence from which to conclude that the Bank's telephone calls were other than made as part of acceptable collections practices.

Breach of Contract

*9 The Janossys contend that the Bank's conduct breached the parties' loan agreement. However, as discussed above, the Bank's evidence showed that the Bank's conduct was entirely in conformity with the provisions of the agreement. The Janossys failed to submit any evidence to create a triable issue of fact on this cause of action. Summary judgment was properly granted.

November 29, 1999 Amended Complaint

After the Bank had filed its answer to the existing complaint, and without obtaining leave of the trial court, on November 29, 1999, the Janossys attempted to file an amended complaint adding a cause of action for discharge of the remaining loan balance. [Code of Civil Procedure section 472](#) provides that a pleading may be amended once by the party at any time before the answer or demurrer is filed by filing it as amended and serving a copy on the adverse party. Otherwise, the party must obtain permission to file an amended complaint under [Code of Civil Procedure section 473](#). The Bank's answer had already been filed and the Janossys did not obtain permission to file their November 29, 1999 amended complaint. Therefore, the November 29, 1999 amended complaint is not the

operative pleading in this case. [\[FN2\]](#)

[FN2](#). Because we decide that the Janossys did not properly plead an action for discharge of the loan, we need not address the Bank's argument that the bankruptcy schedules listing the Bank's secured lien were judicial admissions and the cause of action was barred by res judicata based on the bankruptcy proceedings.

The Janossys' Motions for Summary Judgment

The Janossys contend their motions for summary judgment should have been granted. [\[FN3\]](#) All three of the Janossys' motions for summary judgment were based on the Bank's purported judicial admissions that the Janossys' \$406,000 action against the Bank was the property of the bankruptcy estate. It is clear from our review of the relevant pleadings that the Bank was simply referring to ownership of the right to pursue the action and not admitting liability. The Janossys erroneously equated the Bank's statements with an admission that the Janossys' action had merit. The motions for summary judgment were properly denied. Similarly, the motion to reconsider the summary judgment motions was properly denied.

[FN3](#). An order denying a motion for summary judgment may be reviewed on appeal from the final judgment. ([Waller v. TJD, Inc. \(1993\) 12 Cal.App.4th 830, 836, 16 Cal.Rptr.2d 38](#); contra, [Sierra Craft, Inc. v. Magnum Enterprises, Inc. \(1998\) 64 Cal.App.4th 1252, 1256, 75 Cal.Rptr.2d 681](#).)

Request to File Second Amended Complaint

The Janossys contend that the trial court abused its discretion in denying their request to file a second amended complaint. We disagree.

[Code of Civil Procedure section 473](#) provides the trial court may, "in its discretion, ... allow, upon any terms as may be just, an amendment to any pleading." Ordinarily, trial courts should exercise liberality in permitting amendments. ([Hulsey v. Koehler \(1990\) 218 Cal.App.3d 1150, 1159, 267 Cal.Rptr. 523](#).) " [N]evertheless, whether such an amendment shall be allowed rests in the sound discretion of the trial court. [Citations.] And courts are much more critical of proposed amendments ... when offered after long unexplained delay or on the eve of trial [citations], or where there is a lack of diligence, or there is prejudice to the other party [citations]." ([Hulsey v. Koehler, supra, 218 Cal.App.3d at p. 1159, 267 Cal.Rptr. 523](#).)

[\[6\]](#) In this case, the Janossys requested leave to file a second amended complaint one month before the scheduled trial date and after the Bank's motion for summary judgment had been filed. The proposed second amended complaint did not add any causes of action to the operative complaint. The additional factual allegations in the proposed complaint were simply a continuation of the conduct that formed the basis for the allegations in the operative complaint. It would have been highly prejudicial to the Bank to allow the Janossys to file a second amended complaint that added nothing to the operative complaint, but defeated the summary judgment motion due to be ruled upon. The trial court did not abuse its discretion in denying the Janossys' request to file a second amended complaint.

DISPOSITION

*10 The judgment is affirmed. Respondent Washington Mutual Bank is awarded its costs on appeal.

We concur: [ARMSTRONG](#), and [MOSK](#), JJ.

2002 WL 31031636 (Cal.App. 2 Dist.) Not Officially Published, (Cal. Rules of Court, Rules 976, 977)

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