



## **Evelia Avila v. Mogeel Weiss et al**

2011 | Cited 0 times | California Court of Appeal | November 29, 2011

Avila v. Weiss CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

### **I. INTRODUCTION**

Mogeel Weiss (Weiss) appeals from a judgment after court trial holding him and Miromax, Inc. jointly and severally liable for negligence, breach of fiduciary duty, negligent misrepresentation, and constructive fraud in connection with the 2006 refinance of a home previously owned by Evelia Avila (Avila).

Weiss, an attorney and real estate broker who has represented himself throughout this action, contends that the judgment against him must be reversed because he did not owe Avila a duty, as a matter of law. Alternatively, Weiss contends the evidence does not support the award of damages in the amount of \$295,824.56. We reject these contentions and affirm the judgment.

### **II. STATEMENT OF FACTS**

#### **A. Preliminary Considerations**

The statement of facts in the appellant's opening brief is argumentative, incomplete and unsupported by any references to the appellate record. Furthermore, that record is sparse, to say the least. In his "Notice Designating Record on Appeal," Weiss designated only a handful of documents and a partial transcript of the trial proceeding. He did ultimately provide a complete transcript of the trial testimony, pursuant to an order of this court. Nevertheless, we are unable to verify many of the factual representations in Weiss's appellate brief.<sup>1</sup>

For the sake of expediency and in the interests of justice, we will address the merits of this appeal despite Weiss's multiple violations of the California Rules of Court. We note for the record, however, that Weiss has forfeited his right to rely on facts or evidence that may be relevant to the issues on appeal but that are not part of this record on appeal. With that caveat, our independent review of the



## Evelia Avila v. Mogeheb Weiss et al

2011 | Cited 0 times | California Court of Appeal | November 29, 2011

record discloses the following pertinent facts.

### B. Avila's Claims

In November 2008, Avila filed a complaint alleging negligence, fraud, breach of fiduciary duty and other torts in connection with a 2006 transaction pursuant to which she refinanced her two home loans. The named defendants were Weiss "individually and Doing Business AS MIROMAX LENDING," Miromax, Inc., a California Corporation, and DOES 1-100. In the body of her complaint, Avila alleged that DOE 1 was a man named "Miguel" who was the employee and agent of Weiss and/or Miromax, Inc. and/or Miromax Lending. Avila alleged that she met with Miguel after she responded to a Spanish radio advertisement stating that one could refinance their home at a favorable interest rate, that all of her conversations with Miguel and the defendants were in Spanish, and that Miguel made several false representations that induced her to enter into the 2006 refinancing transaction. Avila also alleged that Weiss was "the loan broker for the subject loan."

On March 16, 2009, Avila filed a first amended complaint which added "MIGUEL (LAST NAME UNKNOWN)" as an individual defendant. The first amended complaint also added allegations regarding Weiss's direct involvement in the refinancing transaction, including that he authorized the wrongful conduct of his co-defendants and that he processed a loan application for Avila which contained falsified information. The first amended complaint also repeated the allegation that Weiss "was the loan broker for the subject loan."

There is no evidence in the appellate record that Miguel was ever served in this action. According to the Register of Action, Miromax, Inc. was served but failed to answer the complaint, and its default was entered on October 29, 2009.

### C. Trial Evidence

A court trial was conducted on December 13 and 14, 2010, before the Honorable Gail Bereola.

Avila, who does not have a good command of the English language, testified through an interpreter that she first heard about a company called Miromax Lending from a commercial on the radio. The radio commercial said that a person could refinance a house at the low rate of 2.9 percent. Avila called the number that was provided and asked for the name of someone at Miromax Lending who could help her out. In response to her inquiry, a man named Miguel contacted Avila and told her that the 2.9 interest rate would not last long, so she made an appointment to meet with Miguel.

Avila testified that, during their first meeting, Miguel told her that her interest rate would be fixed at 2.9 percent, this would not be a negative amortization loan and her monthly payments would be \$1,600. Avila had a second meeting with Miguel, when he brought "all the papers" to her house and asked her to sign them. During that meeting, Miguel discussed the loan terms with Avila, Avila's



## Evelia Avila v. Mogeelb Weiss et al

2011 | Cited 0 times | California Court of Appeal | November 29, 2011

husband, and a few friends who were interested in getting the same type of loan. Miguel spoke in Spanish and said the loan would be a fixed rate for five years, and that it would reduce her monthly payments by \$2,000 to \$1,600 per month. Avila testified that she signed several documents but she did not know what those documents said because they were in English and Miguel did not give her copies of the documents that she signed. Furthermore, she did not sign any papers in front of a notary, but only in front of Miguel, who said he "was representing Miromax."<sup>2</sup>

Avila testified that, after she obtained her new loan, she noticed that her principal balance had gone up. She called Miguel who told her the bank had made a mistake and that he would fix it. But, after that, Miguel disappeared and Avila never saw him again. Avila continued to make loan payments until she lost her house through foreclosure. She testified she never would have made the 2006 loan if she had known what the actual terms were going to be.

On cross-examination, Weiss asked Avila what she did when she discovered that Miguel had misrepresented the terms of the loan and she responded: "I contacted you, and then I only had Miguel's phone number. And then after that, we couldn't find him. And then that's when we decided to look for an attorney."

Through his trial testimony, Weiss confirmed that he was a licensed real estate broker between 2005 and 2009, and that he was also the "designated broker" for Miromax, Inc. during that period. Weiss also expressly admitted that he did "oversee" Avila's loan transaction, but he testified that he did not recall if he sat down and reviewed Avila's loan documents in 2006. When asked to identify copies of loan documents that were generated for Avila, Weiss testified as follows: "I was not personally involved in this transaction. Michael Genzoli. So I can't answer this question, whether these documents were the ones submitted or not."

During his trial testimony, Weiss did not provide any information about Michael Genzoli or his relationship to Weiss or to Miromax, Inc. Instead, Weiss offered the court general information about the way "we" operated when a transaction was handled by a licensed real estate agent. Weiss testified that "we" would provide the agent with guidelines as to how to conduct a transaction and then, when the broker received the final closing statement and documents, "we check for any violation of the law, we check for signatures, and we make sure all the steps are followed." According to Weiss, "we go through a checklist, and if everything is in compliance, we take the file, we take the check, and that's it."

Weiss testified that the broker-officer was not responsible for explaining a transaction to the client or for making sure that client understood English, unless that broker was "actually representing the client." Weiss went on to testify that, in a case like this, what he would have done as the "broker-officer" was go through his checklist to ensure compliance with state and federal law and "that's as far as my duty goes in a transaction that I was not personally involved."



## Evelia Avila v. Mogeel Weiss et al

2011 | Cited 0 times | California Court of Appeal | November 29, 2011

Documentary evidence that Avila refinanced her home mortgage loans in November of 2006 was admitted into evidence as Plaintiff's Exhibit 2. Those documents included a "Uniform Residential Loan Application" that Weiss completed for Avila. According to that document, Weiss interviewed Avila and completed the application as an employee of Miromax Lending. Weiss admitted at trial that he never did personally interview Avila in connection with the loan at issue in this case.

The loan application that Weiss completed for Avila stated, among other things, that Avila was the self-employed owner and manager of a roofing company with a gross monthly income of \$9,250. Avila testified at trial that she did not own a roofing company, that she did not earn \$9,250 per month, and that she never told Miguel otherwise.

A real estate broker named Patricia Anderson testified as an expert in the area of real estate finance. Anderson testified that there is a fiduciary relationship between the mortgage broker and the borrower in a transaction involving refinancing, and that the broker's obligations include explaining the loan product and reviewing the financing with the client to ensure it makes sense and will be a good fit. The broker also has an obligation to train his salespeople, to review the files generated by the sales agent, and to have a "check-off list of what the agent should be doing for the clients." According to Anderson, the standard of practice in this industry is that when the broker uses a salesperson in a transaction, the broker must still make himself aware of the specific circumstances pertaining to that client and transaction. Furthermore, by law, the broker is responsible for the actions of the agent. The broker's responsibilities include supervising and instructing his salespeople and overseeing their work.

Anderson testified that the loan Avila made in 2006 was not a better loan than the one she previously had and that the broker for this loan had an obligation to sit down with Avila and to ensure she understood that. Among other things, the new loan was not a fixed interest loan; the interest rate adjusted to 9.777 percent after only 13 days. Furthermore, the monthly payments did not increase which resulted in a large payment at the end of the loan. Avila's prior loan package consisted of two loans that were not negative amortization loans. By calculating the amortized payments over the 30-year life of the prior loans, Anderson determined that the refinancing resulted in an increase of approximately \$1,100 in Avila's monthly payment obligations.

According to Anderson, the broker had a duty to sit down with Avila and discuss these unfavorable terms with her and a failure to do so would be a breach of the broker's standard of care.<sup>3</sup>

### C. The Judgment

It appears that the trial was concluded in less than eight hours, which would have required that any request for a Statement of Decision be made prior to submission. (See Code Civ. Proc., § 632.) In any event, there is no evidence of any such request, either before the case was submitted or at any time thereafter. Rather, Judge Bereola took the case under submission on December 14, 2010, and then



## Evelia Avila v. Mogeheb Weiss et al

2011 | Cited 0 times | California Court of Appeal | November 29, 2011

filed the judgment on March 6, 2011.

The court entered judgment in favor of Avila and against Weiss "IDB Miromax Lending" and Miromax, Inc., on four of the ten causes of action pled by Avila in her first amended complaint, namely, negligence, breach of fiduciary duty, fraud and deceit (negligent misrepresentation), and constructive fraud. The key holdings in the court's judgment were the following:

"The court finds that this is a case in which due to the greed of Defendants and their real estate agent, Miguel, Plaintiff was lured into a refinance of her property by a 'teaser' interest rate that was not in her best interest and that adjusted to a substantially higher rate (9.777%) after only 13 days on a new loan with a negative amortization. Compared to the interest rate she had on her prior loan (6.9%) that did not have a negative amortization, the new negative amortized loan resulted in Plaintiff incurring unnecessary but significant pre-payment penalties, lender fees and broker fees paid out of the loan, title insurance and other fees, and the eventual loss of her home due to foreclosure.

"Plaintiff, who only speaks Spanish, was taken advantage of by the Defendants' real estate agent, Miguel, who made false representations and omissions of material facts regarding the terms of the refinance. Miguel told Plaintiff that the new loan was not a negative amortization loan, had an interest rate of 2.525 percent and would remain at that rate for five years. In fact the 2.525 percent rate was simply a 'teaser' that would adjust after only 13 days from the closing of the refinance to 9.777 percent. Although Plaintiff's monthly mortgage payment of \$1,637.42 would remain the same when the interest adjusted, this payment was in actuality a minimum payment and not a fully amortized payment. Thus, with the interest being higher, a large negative would accrue at the end of the loan causing a substantial increase in the principal mortgage balance and all to Plaintiff's detriment.

"The court finds that this transaction was not beneficial to Plaintiff and put her in a worse position than what she was in before she refinanced. But for the intentional, dishonest and fraudulent conduct of Miguel who is, unfortunately, not a Defendant in this case, as well as the negligent conduct of Defendants Weiss and Miromax Lending in failing to properly supervise Miguel and failing to have procedures in place that would necessitate Defendants having a face to face discussion with Plaintiff to disclose and go over material terms of the loan documents she signed, Plaintiff would not have refinanced her property with this loan product. Unfortunately, and sadly, Plaintiff subsequently lost her home due to foreclosure.

"The Court finds from the evidence that the real estate agent, Miguel, intentionally and recklessly misrepresented, concealed, suppressed and omitted material facts and was not honest and truthful with Plaintiff when he discussed the terms of the new loan. The Court also finds that Miguel knowingly took advantage of Plaintiff's inability to understand, read, and speak English when he had her sign loan documents written only in English. . . . The court finds from the totality of evidence that had Plaintiff been told in Spanish all the important and material details regarding the terms of



## Evelia Avila v. Mogeeb Weiss et al

2011 | Cited 0 times | California Court of Appeal | November 29, 2011

the loan and known the true facts, she never would have refinanced her property on the astonishingly unfavorable terms offered by defendants.

"The court does not find that Defendants Weiss and Miromax Lending knew or should have known of the material and intentional misrepresentations, suppression of facts and untruthful and dishonest behavior by their agent Miguel . . . . Nor does the Court find from the evidence that Defendants Weiss and Miromax Lending intended that their failure to discuss with Plaintiff the signed loan documents and confirm whether she understood the terms of the loan, as well as their failure to properly and adequately supervise Miguel would cause Plaintiff severe emotional distress or harm. And, although the court infers from the totality of evidence that Plaintiff suffered general emotional distress from Defendants and their agent Miguel's conduct, in searching the evidence the court does not find that Plaintiff produced any evidence that she suffered severe emotional harm. . . ."

"What is clear is that Defendants Mogeeb Weiss as the broker and corporate officer and Miromax Lending, Inc. [were] negligent in their relationship with the Plaintiff client. Both clearly breached their fiduciary duty to Plaintiff to act with the utmost care, good faith and in the best interests of the Plaintiff when they refinanced her property. Both negligently failed to disclose material terms of the new loan and failed to determine whether Plaintiff understood said terms when it was within their power to do so thereby causing unnecessary harm and emotional distress to Plaintiff when she found herself in a loan contract that was clearly not in her best interests. Defendants are culpable for constructive fraud and the Court finds from all the evidence that their conduct substantially resulted in Plaintiff's harm."

The court then found that Avila had suffered six different items of special damage, totaling \$73,956.14, and \$221,898.42 in general damages, for a total of \$295,824.56.<sup>4</sup> It held, however, that Avila failed to prove that either defendant had acted with "malice, oppression, or fraud" and thus declined to award her punitive damages.

Weiss filed a timely notice of appeal.

### III. DISCUSSION

#### A. Standard and Principles of Appellate Review

In addressing the claims of error Weiss advances on appeal, we are guided by three principles. First, the "judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error. [Citations.]" (9 Witkin Cal. Procedure (5th ed. 2008) Appeal, § 355, p. 409.)





## Evelia Avila v. Mogeheb Weiss et al

2011 | Cited 0 times | California Court of Appeal | November 29, 2011

Second, as the appellant, Weiss bears the burden of affirmatively showing error by an adequate record. Error is never presumed; the presumption favors the correctness of the lower court's judgment or order. (Null v. City of Los Angeles (1988) 206 Cal.App.3d 1528, 1532-1533.) Therefore, when the appellant has not provided a complete record, we presume that the evidence was sufficient to support the judgment. (Ibid.; Pringle v. La Chapelle (1999) 73 Cal.App.4th 1000, 1003; Cosenza v. Kramer (1984) 152 Cal.App.3d 1100, 1102.)

Third, "[w]ithout a statement of decision, and timely objections to any ambiguities or omissions in it, the doctrine of implied findings applies. 'The doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment. [Citation.]" (County of Orange v. Barratt American, Inc. (2007) 150 Cal.App.4th 420, 438-439 ; see also Fladeboe v. American Isuzu Motors, Inc. (2007) 150 Cal.App.4th 42, 58; Slavin v. Borinstein (1994) 25 Cal.App.4th 713, 718.)

### B. Duty

Weiss contends the judgment against him must be reversed because he did not owe Avila a duty, as a matter of law. We disagree. The record before us supports the trial court's finding that Weiss did owe Avila a fiduciary duty because he was her mortgage broker.

There is substantial evidence that Weiss was the mortgage broker for the loan that Avila purchased in 2006 when she refinanced her mortgage. That evidence includes Weiss's own testimony that he was a mortgage broker and that he was responsible for overseeing Avila's loan refinance. Beyond that, Weiss and his business, Miromax Lending, were both identified by name on Avila's loan application. Indeed, there are multiple references to Miromax Lending in Plaintiff's Exhibit 2 which reflect, among other things, that Miromax Lending was paid fees for its role in Avila's 2006 loan transaction. On appeal, Weiss does not dispute that he did business as Miromax Lending.<sup>5</sup>

California law establishes that a "mortgage broker has a fiduciary duty to a borrower." (Smith v. Home Loan Funding, Inc. (2011) 192 Cal.App.4th 1331, 1332 & 1335; see also Wyatt v. Union Mortgage Co. (1979) 24 Cal.3d 773, 782 (Wyatt).) As the Wyatt court explained, "[a] mortgage loan broker is customarily retained by a borrower to act as the borrower's agent in negotiating an acceptable loan. All persons engaged in this business in California are required to obtain real estate licenses. [Citation.] Thus, general principles of agency [citation] combine with statutory duties created by the Real Estate Law [citation] to impose upon mortgage loan brokers an obligation to make a full and accurate disclosure of the terms of a loan to borrowers and to act always in the utmost good faith toward their principals. 'The law imposes on a real estate agent "the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary." [Citations.] This relationship not only imposes upon him the duty of acting in the highest good faith toward his principal but precludes the agent from obtaining any advantage over the principal in any transaction had by virtue of his agency. [Citation.]" [Citation.] A real estate licensee is 'charged with



## Evelia Avila v. Mogeheb Weiss et al

2011 | Cited 0 times | California Court of Appeal | November 29, 2011

the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. [Citations.]" [Citations.]" (Wyatt, supra, 24 Cal.3d at p. 782.)

On appeal, Weiss does not dispute that a mortgage loan broker owes a fiduciary duty to the borrower. But he does indirectly challenge the finding that he was the broker for Avila's 2006 loan by repeatedly arguing that his sole connection to this transaction was as the designated broker/officer of the corporate defendant, Miromax, Inc. First, we have already summarized the substantial evidence that supports a different conclusion. Second, Weiss's efforts to minimize his involvement in this transaction are not supported by the evidence in the appellate record.

For example, Weiss intimates that Miromax, Inc. was the broker for this loan. However, the trial evidence supports the conclusions that Avila contacted Miromax Lending, not Miromax, Inc., and that Miguel identified himself to Avila and her friends as a representative of Miromax Lending. Furthermore, we were unable to find any reference to Miromax, Inc. in Avila's loan documents. Indeed, it appears to us that the only evidence connecting Miromax, Inc. to Avila's loan is that Weiss happened to be the designated broker of Miromax, Inc. when he brokered the 2006 refinance of Avila's mortgage.

In his opening brief to this court, Weiss also contends that "Miguel" is Michael Genzoli and that the loan documents show that Genzoli was the Miromax, Inc. employee who "assisted" Avila with this loan. We have found a single reference to the name Michael Genzoli in the loan documents that were admitted as Plaintiff's Exhibit 2. His name appears as the interviewer on one of two Uniform Residential Loan Applications that were completed for Avila. To the extent this evidence establishes that Genzoli "assisted" Avila, it also establishes that Weiss, who was identified on the other loan application in this file, also assisted her. Furthermore, as discussed above, undisputed evidence establishes that Weiss was a broker when he assisted Avila with this loan.

Weiss also contends that, at the time of the 2006 refinance, Genzoli was a licensed real estate agent associated with Miromax, Inc. However we have not found any evidence regarding Genzoli's professional qualifications or his relationship to Miromax, Inc. Furthermore, to the extent we are willing to presume that Miguel and Genzoli are the same person, we do have evidence that Miguel told Avila and her friends that he was a representative of Miromax Lending, not Miromax, Inc.

Finally, Weiss relies on the dearth of evidence regarding his personal involvement with Avila to show that he was not directly responsible for this loan transaction. However, this circumstance actually undermines his claim of error in light of the substantial evidence establishing that Weiss was the broker for this loan. As such, Weiss had a duty to communicate directly with Avila. The notion that a broker can avoid liability for breach of fiduciary duty simply by avoiding any personal interaction with his client is both illogical and unsupported by any authority supplied to us on appeal.

### C. Failure to Supervise





## Evelia Avila v. Mogeheb Weiss et al

2011 | Cited 0 times | California Court of Appeal | November 29, 2011

Weiss contends that the trial court committed reversible error by holding him liable to Avila solely because he failed to properly supervise Miguel. Weiss acknowledges he had a duty to supervise Miguel/Michael, but argues that he owed that duty to their corporate employer, Miromax, Inc., and not to Avila. (Citing Bus. & Prof. Code, § 10159.2 (section 10159.2).)

Section 10159.2, subdivision (a), states that the officer designated by a corporate broker license is "responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees . . . including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required."

Courts have held that this statute does not, by itself, create a private right of action against a designated officer-broker for failing to control or supervise a corporate employee. (*Nevis v. Wells Fargo Bank* (2009) 2009 U.S. Dist. Lexis 44069 (*Nevis*), *Holly v. Crank* (9th Cir. 2005) 400 F.3d 667 (*Holly*); *In re Grabau* (N.D.Cal. 1993) 151 B.R. 227 (*Grabau*).) Rather, in order to hold the designated broker liable for the acts of another employee, there must be additional circumstances to support a finding of vicarious liability, such as an agency relationship between the designated broker and the employee, or a situation in which a piercing of the corporate veil would be appropriate. (*Nevis*, supra, 2009 U.S. Dist. Lexis at pp. 12-13; *Holly*, supra, 400 F.3d at p. 673; *Grabau*, supra, 151 B.R. at pp. 231-232.)

However, section 10159.2 and the line of authority referenced above do not insulate Weiss from liability in this case. Contrary to the premise of this appeal, the judgment does not hold Weiss liable to Avila for violating section 10159.2. Indeed, it does not even mention that statute. Rather, it holds Weiss liable for negligence, breach of fiduciary duty, negligent misrepresentation and constructive fraud. Weiss's duty to Avila did not arise because he was the designated broker of the defendant corporation, but rather because he was the broker for Avila's 2006 loan. As such, Weiss owed Avila a fiduciary duty.

The judgment does contain a finding that Weiss failed to properly supervise Miguel, but that was not the sole basis for imposing liability as Weiss contends on appeal. The trial court made several additional findings to support the judgment, including that Weiss failed to directly communicate with Avila; failed to act in the best interests of Avila; failed to disclose the material terms of the loan to Avila; and failed to determine whether Avila understood the terms of that loan. Testimony by Avila's trial expert supported the court's conclusion that Weiss's conduct constituted a breach of the fiduciary duty that Weiss owed to Avila as the broker of her loan.

Weiss repeatedly contends that the trial court held him vicariously liable for Miguel's unlawful conduct. In the judgment, the court did explain how Miguel committed intentional fraud. However, the judgment does not hold Weiss vicariously liable for intentional fraud. Rather, the court separately identified the conduct by Weiss which gave rise to his personal liability for negligence, breach of fiduciary duty and negligent misrepresentation.



## Evelia Avila v. Mogeelb Weiss et al

2011 | Cited 0 times | California Court of Appeal | November 29, 2011

### D. Damages

Weiss's final contention on appeal is that the "the trial court erred in calculating damages." Specifically, Weiss argues that (1) the general damages award of \$221,868.42 must be reversed because Avila failed to produce evidence "to substantiate this exponential amount of damages," and (2) some components of the special damages are not supported by the evidence. We summarily reject these arguments for at least two reasons.

First, as noted at the outset of our discussion, in addition to the presumption of correctness that applies to every judgment, the judgment in this case is doubly strengthened by the doctrine of implied findings because Weiss did not request a statement of decision. When measured against these presumptions, Weiss's superficial challenges to the damages award fail on their face.

The measure of damages for breach of fiduciary duty and constructive fraud is set forth in Civil Code section 3333, which states: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." "There is no fixed rule for the measure of tort damages under Civil Code section 3333. The measure that most appropriately compensates the injured party for the loss sustained should be adopted." [Citations.] (Strebel v. Brenlar Investments, Inc. (2006) 135 Cal.App.4th 740, 749.) Weiss has not even attempted to overcome the presumption that the trial court properly applied this measure of damages to calculate Avila's damages in this case.

Second, it appears to us that most, if not all, of Weiss's vague theories pertain to the amount of the damages that were awarded and not to the method by which they were calculated. However, Weiss waived the right to argue that the damages award is excessive because he did not file a motion for new trial.

"A failure to timely move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or by the court. [Citation.] The power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court. [Citation.] Thus, a party who first challenges the damage award on appeal, without a motion for a new trial, unnecessarily burdens the appellate court with issues that can and should be resolved at the trial level. [Citation.] Consequently, if ascertainment of the amount of damages turns on the credibility of witnesses, conflicting evidence, or other factual questions, the award may not be challenged for inadequacy or excessiveness for the first time on appeal. [Citation.]" (Jamison v. Jamison (2008) 164 Cal.App.4th 714, 719-720.)

### IV. DISPOSITION

The judgment is affirmed.



## Evelia Avila v. Mogeelb Weiss et al

2011 | Cited 0 times | California Court of Appeal | November 29, 2011

We concur: Lambden, J. Richman, J.

1. According to a letter filed by Avila's trial counsel, she could not afford to file a respondent's brief in this court.
2. Avila's husband and sister-in-law provided corroborating testimony regarding Miguel's representations to Avila about the terms of the loan that Miromax could provide. These witnesses also confirmed that Miguel identified himself as the representative of Miromax Lending.
3. Through Anderson, Avila also presented evidence that she paid pre-payment penalties in connection with the refinancing in the amount of \$10,168, and that Miromax was paid a fee of \$20,025 from the lender for brokering the loan.
4. The judgment reflects that the special damages award consists of six items, including two sets of pre-payment penalties, fees paid to the defendants in connection with the 2006 loan, the additional amount of Avila's monthly payments after the interest adjusted on the new loan, and Avila's loss of equity in her home.
5. 5 On this record, we cannot determine whether Weiss expressly admitted in the trial court that he did business as Miromax Lending. We note for the record that the address that Weiss used for his law practice during the lower court proceedings was the same address that was used for Miromax Lending in Avila's loan documents, except that the two businesses used different suite numbers.

