

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 30 2017

FOR THE NINTH CIRCUIT

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

DAVID M. CURLEY, Sr.,

No. 15-16695

Plaintiff-Appellant,

D.C. No. 3:13-cv-03805-NC

v.

MEMORANDUM*

WELLS FARGO & COMPANY; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Nathanael M. Cousins, Magistrate Judge, Presiding

Argued and Submitted May 19, 2017
San Francisco, California

Before: SCHROEDER and MURGUIA, Circuit Judges, and MCCALLA,**
District Judge.

David M. Curley, Sr. appeals the district court's grant of summary judgment to defendants in his action alleging breach of contract and fraud. Curley argues the district court failed to consider late-filed evidence that created a dispute as to

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

** The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

whether Curley properly accepted the Trial Period Plan (“TPP”) offer by submitting all required materials for his loan modification application to defendants. We have jurisdiction pursuant to 28 U.S.C. § 1291. Reviewing the grant of summary judgment de novo, *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc), we affirm.

1. We review for abuse of discretion the district court’s exclusion of late-filed evidence in granting summary judgment. *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1547 (9th Cir. 1991). At the district court, defendants moved for summary judgment and argued that Curley failed to file an IRS 4506-T form as required by the TPP offer. Curley’s counsel submitted evidence and a declaration on this issue a day after the district court’s deadline. The district court did not abuse its discretion by excluding Curley’s late-filed evidence and declaration because there was no good cause for late filing.

2. Based on the evidence the district court considered, no genuine dispute of material fact remains as to whether Curley filed an IRS 4506-T form within the deadline to accept the TPP offer. We also find the district court did not abuse its discretion in entertaining a second motion for summary judgment. *Hoffman v. Tonnemacher*, 593 F.3d 908, 911 (9th Cir. 2010).

3. Finally, defendants request dismissal of the appeal because of Curley’s inadequate excerpts of record. “As with briefing inadequacies, the failure to

present a sufficient record can itself serve as a basis for summary affirmance.”

Cnty. Commerce Bank v. O’Brien (In re O’Brien), 312 F.3d 1135, 1137 (9th Cir.

2002). Though we exercise our discretion by not dismissing on this ground, we

note that Curley had no justification for failing to comply with Ninth Circuit Rules.

AFFIRMED.