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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

JOHN LOPEZ et al.,  
Plaintiffs and Appellants,  
v.  
JP MORGAN CHASE et al,  
Defendants and Respondents.

A131658  
(Contra Costa County  
Super. Ct. No. C10-01914)

This case involves the home located at 1828 St. Andrews Drive, Moraga (the property), and particularly a deed of trust on the property. The deed of trust was executed in February 2006 by Sheryl McCryndle, to secure a \$768,000 loan she obtained from Long Beach Mortgage Co. (LBMC), and it identified her as the borrower and LBMC as the lender, the trustee, and the beneficiary. In January 2007 plaintiffs John and Elena Lopez bought the property from McCryndle, subject to the deed of trust. And in March 2010 foreclosure proceedings were begun, via a notice of default signed by California Reconveyance Co. (CRC)—not LBMC.

When a trustee's sale was scheduled, the within lawsuit was filed, naming as defendants CRC and two other entities with which McCryndle had had no interaction. Defendants demurred, and the trial court's first—and only—ruling was to sustain the demurrer without leave to amend.

Plaintiffs appeal, asserting that three of their six causes of action do state a claim, and in any event the court abused its discretion in denying leave to amend. We disagree with plaintiffs' first argument, but agree with their second. We thus reverse.

## BACKGROUND

McCryndle bought the property in February 2006, with a loan from LBMC. The loan was for \$768,000, with an interest rate of 8.9 percent, to be adjusted on March 1, 2009. The loan was secured by a deed of trust which identified McCryndle as the borrower and LBMC as the lender, the trustee, and the beneficiary.<sup>1</sup>

In January 2007, McCryndle sold the property to plaintiffs John Lopez and Elena Lopez, husband and wife as joint tenants (plaintiffs). The terms of the transaction are not in the record, other than plaintiffs' allegation that they "purchased the property subject to the Deeds [*sic*] of Trust."

In March 2010, foreclosure proceedings were begun, with a notice of default recorded March 8, 2010. The notice was signed by CRC, and an attached "Declaration of Compliance" was signed on behalf of JP Morgan Chase Bank, National Association. Apparently, the notice of default was served only on McCryndle, not on plaintiffs. Under the notice of default, no foreclosure date could be set for 90 days, or until June 2010. That month a foreclosure sale was set, scheduled for July 2, 2010. On June 25, 2010, this lawsuit was filed.

## THE PROCEEDINGS BELOW

### The Complaint

According to the register of actions, a complaint was filed on June 25, 2010, which complaint is not in the record. The complaint included McCryndle as a plaintiff, and apparently named as defendants JP Morgan Chase, CRC, and Deutsche Bank National Trust Company as Trustee for Long Beach Mortgage Loan Trust 2006-3. The complaint also named "all persons unknown, claiming any legal or equitable [*sic*] right,

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<sup>1</sup> According to allegations in the complaint—allegations we must accept (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591)—McCryndle is African American, and the complaint further alleged, "Since the date of this transaction, the United States of America filed a lawsuit (Case No. CV-96-6159) against LBMORTGAGE, whereas [*sic*] the complaint alleges, inter alia, LBMORTGAGE engaged in a pattern or practice of illegal discrimination by basing the price of loans, at least in part, on an applicant's race, national origin, sex and/or age."

title, estate, lien, or interest in the property.” Apparently all three named defendants were served.

On August 3, 2010 a request for dismissal was filed as to McCryndle. On August 4, a demurrer was filed (apparently by JP Morgan Chase), which demurrer is also not in the record. The next day, August 5, plaintiffs filed the first amended complaint (FAC), the complaint operative here.

The FAC named three defendants, identified by plaintiffs as follows:

(1) JP Morgan Chase Bank, N.A., as alleged successor in interest to Washington Mutual Bank, as alleged successor in interest to LBMC (JP Morgan Chase); (2) Deutsche Bank National Trust Company, as trustee for Long Beach Mortgage Loan Trust 2006-3 (Deutsche Bank); and (3) CRC. The FAC was verified, and alleged six causes of action: (1) wrongful foreclosure; (2) fraud; (3) rescission; (4) unfair business practices; (5) declaratory relief; and (6) quiet title. JP Morgan Chase and Deutsche Bank were named in all six counts, CRC in all but the third and fifth.

The beginning paragraphs of the FAC identified the parties and then alleged some boilerplate language commonly found in most complaints. Then, beginning at paragraph 13, the FAC alleged thirteen paragraph (paragraphs 13 to 25) of background factual allegations, which include allegations about the “Mortgage Transaction,” the chain of title, and the pooling and servicing agreement (PSA). The factual allegations were incorporated into all six causes of action.

Seven exhibits were attached to the complaint: the deed of trust executed by McCryndle; the note; the grant deed to plaintiffs; an assignment of deed of trust; a substitution of trustee; a notice of default; and a notice of trustee’s sale.

We will not detail all the allegations of all the causes action, but suffice to say that at the heart of the FAC was this fundamental claim: that what occurred “shortly” after the January 19, 2007 deed from McCryndle to plaintiffs were a “whole slew” of invalid recordings, with plaintiffs focusing particularly on an entity not named as a defendant—“Washington Mutual” or “WAMU.” And as to it, plaintiffs alleged as follows:

“20. Shortly thereafter, a whole slew of invalid recordings occurred. Specifically, the recorded interests contradict the assertion that CRC and DEUTSCHE have standing to foreclose on the property pursuant to the Deeds Of Trust, and reveal a slew of other illegal actions and procedural violations. The chain of recordings are as follows:

“21. Assignment of Deed of Trust: Dated 8/30/08, Notarized 8/30/2008, and Recorded 9/3/2008; On or about 8/30/2008, a complete stranger to title arrived, WASHINGTON MUTUAL BANK (not identifying itself as to which Washington Mutual Entity it was—e.g., Inc., N.A., etc.) WASHINGTON MUTUAL BANK allegedly executed an Assignment of the Deed of Trust (ADOT) (again, failing to indicate whether it was an FSB, INC, LLC, or any other corporate entity status), and signed as ‘successor in interest to Long Beach Mortgage Company,’ allegedly assigning the Deeds of Trust from WASHINGTON MUTUAL BANK to DEUTSCHE. The individual who signed on behalf ‘WASHINGTON MUTUAL BANK’ is Huey Jen Chiu, (Chiu) the alleged Vice President of WASHINGTON MUTUAL BANK at the time. Now, assuming that Chiu was in fact VP of WASHINGTON MUTUAL BANK, there are multiple, glaring problems with the ADOT—all of which (in and of themselves) invalidate the ADOT’s execution and validity, and in turn, makes everything that flows from it a legal nullity—i.e. the entire process of foreclosure on the Subject Property is VOID:

“i. The only party on 8/30/2008 who *may* (notwithstanding the fact, that on information and belief, that even LBMORTGAGE may have been divested of their interest to transfer this right as discussed below) have had the right to transfer their beneficial interest in the Deeds of Trust would have been LBMORTGAGE-A complete and separate legal entity from WASHINGTON MUTUAL BANK (i.e.—WASHINGTON MUTUAL BANK did not, nor have they ever, had the right to assign any interest in the DOT’s because LBMORTGAGE failed to ever assign their interest in the DOT’s to WASHINGTON MUTUAL BANK). This is clear evidence of a break in the chain of title—and as such, everything that flows from this invalid transaction is VOID, *Bank of America v. La Jolla Group II* [(2005) 129 Cal.App.4th 706].

“ii. The language employed in the ADOT allegedly transferring WASHINGTON MUTUAL BANK’s non-existent interest in the DOT’s, further illegally attempts, through subterfuge, to transfer the Note—‘[Transfer of the Deed of Trust] . . . TOGETHER with the note or notes therein described and secured thereby . . .’ A transfer in the interest in the note and subsequently, the DOT, is inoperative pursuant to CCC § 2936 and its progeny. ‘The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carried the mortgage with it, while an assignment of the latter alone is a nullity.’ *Carpenter v. Longan* (1872) 83 U.S. 271; *In re Vargas*: 2008 [sic]; *Henley v. Hotaling* (1871) 41 Cal. 22; *Turner v. Gosden* (1932) 121 Cal.App. 20;

“iii. The ADOT fails to indicate which Washington Mutual (if any), that Chiu, is allegedly signing on behalf of—e.g., is he signing on behalf of Washington Mutual, Inc.; Washington Mutual, N.A.; or any of the other Washington Mutual companies in existence at the time of this invalid ADOT;

“iv. It is uncertain that Chiu was VP in fact for WASHINGTON MUTUAL BANK, and even if he was VP of WASHINGTON MUTUAL BANK, which WASHINGTON MUTUAL BANK entity he was an alleged VP of;

“v. The PSA which allegedly related to this loan is Long Beach Mortgage Loan Trust 2006-3. The PSA does not mentioned [sic] WASHINGTON MUTUAL BANK anywhere as having an assigned interest in the Note(s); and

“vi. By contract and securities law, the PSA mentioned above cannot be assigned these notes. In particular, the cut-off date (the date that the PSA is no longer allowed to accept assets) for transfer of the notes into the PSA was 4/6/2006. This alleged transfer occurred on either 8/30/2008, or 9/4/2008—in each instance, over two years beyond the PSA’s deadline to accept assets.

“A true and correct copy of the ADOT is attached hereto as Exhibit D and incorporated herein by reference.

“22. Substitution of Trustee (‘SOT’) purportedly replacing LBMORTGAGE as Trustee with CRC: 8/30/2008; Notarized 8/30/2008; and Recorded on 9/3/2008. The SOT was executed by Chiu, on behalf of DEUTSCHE, by WASHIGNTON MUTUAL

BANK, as ‘attorney in fact’. Plaintiffs incorporate all allegations set forth in Paragraph 22 as pertaining to the SOT—i.e., DEUTSCHE was not the beneficiary of the DOT’s because WASHINGTON MUTUAL BANK’S transfer was VOID (not voidable) for the reasons stated above.”

Interestingly, at the end of the FAC, just before the prayer, plaintiffs set forth an unusual provision:

“DISCOVERY DEMAND

“1. Plaintiffs hereby demand the financial records of DEUTSCHE as Trustee showing the income stream of payments into the Loan Pool from the Subject Loan.

“2. Plaintiffs hereby demand an explanation from the various defendants of the exact dates that the Note and Deed of Trust were each transferred, from whom, to whom, on what terms, what rights were conveyed, and any documents which support said explanation.”

The prayer for relief followed, seeking among other things, a declaration that the Deed of Trust and the Note had been separated; a declaration that the foreclosure was wrongful and void; a declaration that the subsequent separation of the Deed of Trust and Note extinguished any security interest; a declaration that Washington Mutual Bank’s assignment of the Deed of Trust was void and as such “all that flows from the void ADOT is void.” Plaintiffs also sought a judgment setting forth the terms of restitution; cancellation of the Deeds of Trust, Assignment of Interest and the Note; to quiet title; and for damages and declaratory relief.

Plaintiffs’ “discovery demand” would be to no avail.

**The Demurrer**

On September 27, 2010, defendants filed a demurrer to all six causes of action, on the basis that they did not state facts sufficient to constitute a cause of action. Accompanying the demurrer was a request for judicial notice of what defendants claimed were “true and correct” copies of certain documents “recorded . . . with the Contra Costa County recorder’s office,” described as follows: (1) the grant deed in connection with the subject property (First Grant Deed) recorded on or about February 24, 2006, as

instrument number 2006-0058246; (2) the deed of trust (DOT) recorded on or about February 24, 2006, as instrument number 2006-0058247; (3) the grant deed in connection with the subject property (Second Grant Deed) recorded on or about January 19, 2007, as instrument number 200-0017952; (4) the assignment of deed of trust (Assignment) in connection with the DOT recorded on or about September 3, 2008, as instrument number 2008-0196104; (5) the substitution of trustee (Substitution) in connection with the DOT recorded on or about September 3, 2008, as instrument number 2008-0196104; (6) the notice of default (NOD) in connection with the DOT recorded on or about March 8, 2010, as instrument number 2010-0045172; and (7) the notice of trustee's sale (NOTS) in connection with the DOT recorded on or about June 10, 2010, as instrument number 2010-0116079.

As a result, defendants argued, "All of Plaintiffs' claims fail as they are premised on an erroneous assumption. The underlying allegation is that Defendants have no interest in the subject deed of trust and thus had no interest to assign thereafter. However, Commercial Code § 3301 provides that the beneficiary of the deed of trust is holder of the instrument and thus entitled to enforce the provisions of the deed at issue. Thus, Deutsche as the assigned beneficiary under the deed of trust, is holder of the instrument, and therefore, entitled to enforce the deed and commence nonjudicial foreclosure proceedings. Further, CRC as the trustee under the DOT, and JPMorgan as the servicing agent, were authorized agents to commence the foreclosure proceedings. [¶] Accordingly, as fully discussed below all of Plaintiffs' claims fail and are subject to demurrer without leave to amend."

On December 20, 2010, plaintiffs filed opposition to the demurrer. They apparently filed no opposition to the request for judicial notice. Plaintiffs' opposition noted, by way of introduction, "demurrer is not appropriate for determining the truth of disputed facts or what inferences should be drawn when competing inferences are possible. (*Ball v. GTE Mobilnet of California* (2000) 81 Cal.App.4th 529, 534-535.) [¶] Nevertheless, if the Court should decide to entertain Defendants [*sic*] Demurrer the appropriate relief is to grant leave to amend the Complaint. 'Where a demurrer is

sustained . . . denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment.’ (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.) ‘Leave to amend should be denied [only] where facts are not in dispute and the nature of the claim is clear but no liability exists under substantive law.’ (*Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436; *Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1465.) In doing so, the Court would be providing the parties an opportunity to seek ‘substantial justice’ on the merits. (Code of Civil Procedure §452.)”

Plaintiffs’ opposition then turned to the argument, and addressed each of the six causes of action, arguing that as to the first, alleged as “wrongful foreclosure,” it should be read as a claim for cancellation of instruments and a violation of Civil Code section 2923.5.<sup>2</sup> Following their arguments as to each cause of action, plaintiffs’ opposition concluded as follows: “For all of the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants’ Demurrer [in] its entirety. Alternatively, if the Court finds that one or more of Plaintiffs’ causes of action have not been properly pled, Plaintiffs respectfully request leave of the court to amend their complaint.”

### **The Ruling on the Demurrer**

The demurrer was scheduled for hearing on January 6, 2011, and apparently the court had issued a tentative ruling sustaining the demurrer without leave to amend. There is no transcript of any court proceeding that day and, apparently there was no reporter and no hearing.<sup>3</sup> Rather, the register of actions contains the following entry for January 6, an entry that was lengthy and detailed, being three pages single-spaced:

“HEARING ON DEMURRER TO 1st Amended COMPLAINT of  
MCCRYNDLE FILED BY JP MORGAN CHASE BANK, N.A. AS ALLEGED,

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<sup>2</sup> At some point plaintiffs apparently cured the default, so the foreclosure action did not proceed, the result of which is that plaintiffs remain in the property.

<sup>3</sup> Defendants’ brief says that the demurrer “came [on] regularly for hearing,” and that the court made its ruling “after oral argument.” As indicated by the court order, this seems to be a mistake.

DEUTSCHE BANK NATIONAL TRUST COMPANY AS, CALIFORNIA  
RECONVEYANCE COMPANY

“Dept.: 07 Time : 8:30

“Cause called for hearing before JUDGE BARRY BASKIN.

“Clerk: C. FORFANG

“Not Reported

“No Appearance, Either Party

“There being no Opposition to the Court’s Tentative Ruling, same is adopted as follows: Defendants’ unopposed Request for Judicial Notice is granted. (Evid. Code section 452(c) [public records]. The Court did not consider the Defendants’ late-filed Reply.

“Defendants JP Morgan Chase Bank, N.A, Deutsch Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-3, and California Reconveyance Company’s Demurrer to each cause of action within the First Amended Complaint is sustained without leave to amend. (Cal. Code Civ. Proc. section 430.10, subd. (e).) Further leave to amend is denied, as Plaintiffs have not met their burden of showing in what manner they can amend their Complaint and how that amendment will change the legal effect of their pleading. (*McMartin v. Children’s Institute International* (1989) 212 Cal.App.3d 1393, 1408.)

“First cause of action for wrongful foreclosure. The Plaintiffs concede that the foreclosure sale has not taken place. Thus, Plaintiffs fail to plead a necessary element of this cause of action. Plaintiffs likewise fail to state a cause of action for cancellation of instrument pursuant to Civil Code, section 3412. To state a cause of action to remove a cloud, instead of pleading in general terms that the defendant claims an adverse interest, the plaintiff must allege, inter alia, facts showing actual invalidity of the apparently valid instrument. (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, sections 671-674, pp. 97-99.) Further, rescission of contract of sale and return of property is prerequisite condition of maintaining action to cancel promissory notes given in payment of purchase price. (*Wolf v. Brakebill* (1916) 32 Cal App 300.) The rule applies although the plaintiff

was induced to enter into the contract by the fraudulent representations of the defendant. (*Henry v. Phillips* (1912) 163 Cal. 135, 143.) In the alternative, Plaintiffs have not alleged a violation of Civil Code section 2923.5. The Plaintiffs are not the borrowers under the loan agreements at issue; rather, nonparty Sheryl R. McCryndle is the borrower. Thus, there is no statutory requirement to contact Plaintiffs. (See Civil Code section 2923.5(a)(1).)

“Second cause of action for fraud. The elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. (See *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 96.) Plaintiffs have not pleaded the second element of duty to disclose. Absent special circumstances, a loan transaction is at arm’s length and there is no fiduciary relationship between the borrower and lender. (See *Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 466.) A commercial lender pursues its own economic interests in lending money. (See *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) Moreover, to assert a fraud claim against a corporation, the plaintiff must allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

“Third cause of action for rescission. To state a claim for contract rescission, plaintiff must allege some grounds for rescission-fraud, mistake, coercion, etc. (Civ. Code § 1689, subd. (b).) To the extent that this cause of action rests on the fraud claims, it fails for the same reasons. (*Committee on Children’s Television, Inc. v.*

*General Foods Corp.* (1983) 35 Cal.3d 197, 216; *Tarmann v. State Farm Mut. Auto. Ins. Co.*, *supra*,] 2 Cal. App.4th 153, 157. )

“Fourth cause of action for unfair business practices. A cause of action for violation of Business and Professions Code section 17200 fails where it is predicated on a violation of predatory lending law that also fails. (See *Wolski v. Fremont Investment & Loan* (2005) 127 Cal.App.4th 347, 357.)

“Fifth cause of action for declaratory relief. The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject. There is no basis for declaratory relief where only past wrongs are involved. (See, *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79; 5 Witkin, Cal. Procedure [, *supra*, ] Pleading, 869.)

“Sixth cause of action to quiet title. Plaintiffs’ FAC does not comply with the statutory requirements specified in Code of Civil Procedure section 761.020. The complaint is not verified, and fails to allege that these Defendants have a claim to the subject property, which is adverse to that of Plaintiffs, as required by subsection (c). Plaintiffs also fail to allege the date as of which the determination of quiet title is sought, as required by subsection (d). Moreover, Plaintiffs fail to allege tender of the outstanding principal. (See *Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477.)

“Moving parties to prepare the Order.

“In the event that this ruling is contested, wholly or in part because leave to amend is denied, the Plaintiffs are to provide a copy of the proposed amended complaint to the Defendants with all changes highlighted (and be prepared to provide the Court with a highlighted copy).

“This matter is reassigned for all purposes to Department 31, The Honorable Judge Brady.

“DEMURRER SUSTAINED WITHOUT LEAVE TO AMEND. DISMISSAL ENTERED/FILED ON THE COMPLAINT OF 1st Amended COMPLAINT of MCCRYNDLE.”

### **The Dismissal and the Appeal**

On January 18, 2011, the court filed an order sustaining the demurrer without leave to amend, which order ended with this: “2. In this action, the FAC in its entirety is dismissed with prejudice as to Defendants. 3. Defendants are entitled to judgment in its [sic] favor.”

Such an order is to be treated as a judgment for the purposes of taking an appeal (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699), and on April 11 plaintiffs filed their notice of appeal.

### **DISCUSSION**

Plaintiffs contend that the trial court erred in dismissing the complaint without leave to amend because they stated three valid causes of action against the defendants, pointing specifically to the first, which plaintiffs say was for cancellation of instruments; the fifth, for declaratory relief; and the sixth, for quiet title.

#### **The General Principles and Standard of Review**

“It is well established that a demurrer tests the legal sufficiency of the complaint. [Citations.] On appeal from a dismissal entered after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the [complaint] states a cause of action as a matter of law. [Citations.] We give the [complaint] a reasonable interpretation, reading it as a whole and viewing its parts in context. [Citations.] We deem to be true all material facts that were properly pled. [Citation.] We must also accept as true those facts that may be implied or inferred from those expressly alleged. [Citation.] We may also consider matters that may be judicially noticed, but do not accept contentions, deductions or conclusions of fact or law.” (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal. App. 4th 861, 869-870.)

We thus turn to the three causes of action plaintiffs contend stated a claim. And reject their arguments.

### **The First Cause of Action**

As noted, the first cause of action pleaded was styled “wrongful foreclosure.” However, plaintiffs apparently cured the default and, as the trial court put it, “concede that the foreclosure sale has not taken place. Thus, plaintiffs fail to plead a necessary element of their cause of action.” As also noted, plaintiffs’ position was that whatever its label, the first cause of action should be viewed as one for “cancellation of instruments” and, so viewed, stated a claim.

The rules in this regard are well settled, that in ruling on a demurrer the court “is obligated to look past the form of a pleading to its substance. Erroneous or confusing labels attached by the inept pleader are to be ignored if the complaint pleads facts which would entitle the plaintiff to relief. [Citation.] ‘It is not what a paper is named, but what it is that fixes its character.’ ” (*Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.)

The leading practical treatise states the principle this way: “**ANY valid cause of action overcomes demurrer:** It is not necessary that the cause of action be the one intended by plaintiff. The test is whether the complaint states *any* valid claim entitling plaintiff to relief. Thus, plaintiff may be mistaken as to the nature of the case, or the legal theory on which he or she can prevail. But if the essential facts of *some* valid cause of action are alleged, the complaint is good against a general demurrer. [*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 [Cal.4th 26, 38-39]; *Adelman v. Associated Int’l Ins. Co.* (2001) 90 [Cal.App.4th 352, 359]; see *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 [Cal.4th 992, 998]—general demurrer may be upheld ‘only if the complaint fails to state a cause of action under *any possible legal theory*’ (emphasis added)].” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶7:41, pp. 7(1)-20.)

As to this cause of action, the trial court ruled that, “To state a cause of action to remove a cloud, instead of pleading in general terms that the defendant claims an adverse interest, the plaintiff must allege, inter alia, facts showing actual invalidity of the apparently valid instrument. (See 5 Witkin, Cal. Procedure[, *supra*,] Pleading, §§ 671 674, pp. 97-99.) . . . .” The first cause of action does not measure up.

### **The Fifth Cause of Action**

The fifth cause of action was styled “declaratory relief.” As to it, the trial court ruled that “There is no basis for declaratory relief where only past wrongs are involved. (See *City of Cotati v. Cashman*[, *supra*,] 29 Cal. 4th 69, 79; 5 Witkin, Cal. Procedure [, *supra*,] Pleading, 869.)” However, numerous cases allow a claim for declaratory relief despite the existence of another remedy. (See, e.g., *Ermolieff v. R.K.O. Radio Pictures* (1942) 19 Cal.2d 543, 547; *Tolle v. Struve* (1932) 124 Cal.App. 263, 267 [breach already occurred]). Plaintiff should be given an opportunity to allege a proper claim.

### **The Sixth Cause of Action**

As to the sixth cause of action, for quiet title, the trial court ruled as follows: “Plaintiffs’ FAC does not comply with the statutory requirements specified in Code of Civil Procedure section 761.020. The complaint is not verified, and fails to allege that these Defendants have a claim to the subject property, which is adverse to that of Plaintiffs, as required by subsection (c). Plaintiffs also fail to allege the date as of which the determination of quiet title is sought, as required by subsection (d). Moreover, Plaintiffs fail to allege tender of the outstanding principal. (See *Aguilar v. Bocci*[, *supra*,] 39 Cal.App.3d 475, 477.)”

The first ground was wrong, as the complaint was verified. However, defendants also argued below, and argue here, that a “condition precedent” to all cause of action was tender, which the trial court relied on.

While we disagree with plaintiffs that they adequately alleged tender, they should be allowed to attempt to allege it, or at least one or more of the recognized exceptions to the requirement of tender. (See, e.g., *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112-113; *Humbolt Sav. Bank v. McCleverty* (1911) 161 Cal. 285, 291 [inequitable to require tender]; *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 878 [trustee’s deed void on its face].)

### **The Trial Court Abused Its Discretion in Denying Leave to Amend**

Plaintiffs also argue here that the trial court erred in sustaining the demurrer without leave to amend, an argument, as noted above, they also made to the trial court.

As plaintiffs' brief puts it at one point, "While reading through the tentative ruling, it was a shock to [plaintiffs] that the Court, after going through a laundry list of what appeared to be non-fatal flaws, denied leave to amend the Complaint." While shock may be too strong to describe our reaction, we certainly were surprised.

As our Supreme Court has put it, "If a complaint does not state a cause of action, but there is a reasonable possibility that the defect can be cured by amendment, leave to amend must be granted. (*Blank v. Kirwan* [(1985)] 39 Cal.3d [311], 318.)" (*Quelimane Co., Inc. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at p. 39.) And, it also has said, it is an abuse of discretion for the court to deny leave to amend where there is any *reasonable possibility* that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *Okun v. Superior Court* (1981) 29 Cal.3d 442, 460.)

Some courts of appeal have said that if the demurrer is sustained as to the original complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment. (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 877; *Virginia G. v. ABC Unified School Dist.*, *supra*, 15 Cal.App.4th at p. 1852.) Again, the leading practical treatise: "Indeed, in the case of an *original* complaint, plaintiff need not even request leave to amend. 'Unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion, irrespective of whether leave to amend is requested or not.' [*McDonald v. Superior Ct. (Flintkote Co.)* (1986) [180 Cal.App.3d 297, 303-304]; see also *City of Stockton v. Sup.Ct.* (2007) [42 Cal.4th 730]—where plaintiff has not had opportunity to amend complaint in response to demurrer, 'leave to amend is liberally allowed as a matter of fairness unless the complaint shows on its face that it is incapable of amendment']." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶7:129, p. 7(l)-51.)

While the FAC was not literally the "original complaint," the ruling on the demurrer was the first ruling made, the FAC having been filed one day after the JPMorgan demurrer, and which FAC, from all indications, merely deleted McCryndle as a plaintiff.

Defendants' contention as to leave to amend is succinctly stated: "As indicated throughout this brief, [plaintiffs'] claims are premised on the allegation that WaMu did not have any interest under the DOT to assign to Deutsche Bank and, as such, none of the named [defendants] has authority to foreclose. However, as fully briefed herein and in the Demurrer to the FAC, [defendants] are authorized to proceed with nonjudicial foreclosure since WaMu acquired LBMC in its entirety. Thus, there was no need for an assignment of deed of trust from LBMC to WaMu to be recorded. [Citation.] Consequently, the Substitution of Trustee and Notice of Sale recorded by Deutsche Bank are likewise valid. [¶] Accordingly, [plaintiffs] simply cannot amend the operative complaint to allege facts to refute the fact that [defendants] have authority to foreclose. Thus, the Trial Court did not err in denying [plaintiffs] leave to amend."

We disagree, especially as the trial court did not cite the so-called "WaMu" evidence in its ruling. For example, in addressing the first cause of action, the trial court indicated that the plaintiffs could perhaps have pled a cause of action for cancellation if they had alleged "inter alia, facts showing actual invalidity of the apparently valid instrument." And the court continued in the same vein for each of the other five causes of action, proceeding to cite the various flaws it found in each cause of action.

As discussed above, plaintiffs argue that three of their causes of action were sufficient to withstand demurrer. In addition, in an earlier section of their brief plaintiffs assert that their complaint could succeed—apparently in its entirety—because "Defendant's Failure to Seek Adjudication of Identity under [Code of Civil Procedure section] 770.020 Renders Its Attempted Assignment of the Deed of Trust Void under Civil Code 1096; *Puccetti v. Girola* (1942) 20 Cal.2d 574." And, plaintiffs go on, "Absent Adjudication Of Identity Or A Transfer From Mortgagee To The Assignor, The Court's Judicial Notice Of The Hearsay Statement That 'Washington Mutual' Was 'Successor in Interest' To 'Long Beach Mortgage Company' Was Inappropriate And Fails To Defeat The Complaint's Allegation That Washington Mutual Never Had An Interest To Transfer." Plaintiffs' brief then goes on for several pages about the impropriety of accepting any facts in judicially noticed documents.

We note, however, that arguments based on Civil Code section 1096 or *Puccetti, supra*, 20 Cal.2d 574, were not made in the trial court. Nor did plaintiffs make any argument about the extent of any judicial notice. Needless to say, defendants did not address these issues below. Thus, we will not consider the arguments here, though we do offer one comment in connection with plaintiffs' conclusion that "judicial notice of the recorded documents did not establish that the Bank was the beneficiary, or that CRC was the trustee under the 2006 deed of trust."

Defendants' response to plaintiff's assertion takes two tacks. The first asserts that defendants showed the necessary interest, and standing, to foreclose, arguing as follows: "In this case, fatal to [plaintiffs'] contention is the common knowledge that WaMu acquired LBMC in its entirety through a stock purchase agreement. In fact, the Courts have routinely accepted WaMu's status as the successor in interest to LBMC in the appearance of JPMorgan as acquirer of certain assets and liabilities of WaMu, which is in turn the successor in interest to LBMC. (*See Bracamontes v. Chase Home Finances, LLC* (N.D. Cal. Jan. 31, 2011, No. 10-CV-03888), 2011 WL 332527, at \*2, *Cabrera v. Long Beach Mortgage* (N.D. Cal. Dec. 16, 2010, No. C10-03143) 2010 WL 5211460 at \*2, and *Costantini v. Wachovia Mortgage FSB* (E.D. Cal., Jun. 24, 2009, No. CV-0406) 2009 WL 1810122 at \*1.) WaMu's acquisition of LBMC is also documented in the news and constitutes a fact that is of public knowledge and acceptance. *See* [Defendants'] Request for Judicial Notice (RJN), Exhibit 1. Evidence Code §§451(f) and 452(h) state that facts and propositions of generalized knowledge that are so universally known that they cannot be reasonably be [*sic*] the subject of dispute can be judicially noticed. As a result, the Court can take judicial notice of the fact that WaMu was the successor in interest to LBMC."

We would not be so sanguine.

To begin with, we denied defendants' request for judicial notice of this "news" by order of October 11, 2011. But beyond that, the unpublished federal cases cited by defendants hardly lend them the support they claim. For example, in *Bracamontes*, the first case cited, the District Court noted that according the to Purchase and Assumption

Agreement, “JPMorgan expressly refused to assume liability for borrower claims arising from loans made by or acquired by WaMu.” (*Bracamontes v. Chase Home Finances, LLC, supra*, WL 332527, at \*5.) And *Cabrera* said only that “JPMorgan Chase Bank . . . acquired certain assets of Washington Mutual Bank, who succeeded Long Beach Mortgage Company. . . .” (*Cabrera v. Long Beach Mortgage, supra*, WL 5211460 at \*2.)

Defendants’ other tack is to apparently argue that judicial notice is of no moment, arguing as follows: “[Plaintiffs] contend that the Trial Court ‘improperly relied on the “truthfulness” of the judicially noticed documents in granting the demurrer without leave to amend.’ [Citation.] [Plaintiffs] argue at considerable length in their opening brief as to this alleged impropriety by the Trial Court. However, the records do not support [plaintiffs’] contention and must be disregarded. [¶] Specifically, the Trial Court’s ruling in granting the Demurrer did not rely on the title documents that the Trial Court took judicial notice of. As fully set forth on the record, the Trial Court found that [plaintiffs] failed to sufficiently allege facts to support each of the six causes of action alleged against Respondents. [Citation.] In summary, the Trial Court . . . further found that, to the extent this claim is actually a cause of action for ‘Cancellation of Instruments,’ it still fails as [plaintiffs] failed to allege tender and facts as to the invalidity of the subject instruments. [Citation.] The second cause of action for ‘Fraud’ fails as [plaintiffs] failed to allege facts in support of the elements of this cause of action, specifically, to the extent this claim is for alleged fraudulent concealment, that [plaintiffs] failed to allege any duty owing by Respondents to disclose facts to [plaintiffs]. [Citation.] The third cause of action for ‘Rescission’ fails for the same reasons that the cause of action for ‘Fraud’ fails. [Citation.] The fourth cause of action for ‘Unfair Business Practices’ fails as [plaintiffs’] allegations of predatory lending fails [*sic*]. [Citation.] The fifth cause of action for ‘Declaratory Relief’ fails as the Trial Court found there is no actual controversy as [plaintiffs] are seeking relief for past wrongs. [Citation.] Lastly, the sixth cause of action for ‘Quiet Title’ fails as [plaintiffs] failed to allege tender of the outstanding amount. [Citation.] [¶] Based on the above, it is clear that the Trial Court did not merely rely on

the documents it took judicial notice of in sustaining the Demurrer. Rather, the Trial Court found that there is no merit to [plaintiffs'] causes of action as [plaintiffs] failed to meet their burden to sufficiently plead facts in support of the same.”

We agree with defendants’ reading of what the trial court did here—a reading that only confirms our conclusion that plaintiffs should at least be given an opportunity to cure, if they can, defects the trial court found.

**DISPOSITION**

The order sustaining the demurrer without leave to amend is reversed, and the matter remanded in order that plaintiffs may have an opportunity to file an amended complaint if they are so advised. Plaintiffs shall recover their costs of appeal.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.