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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MARLON TAASAN et al.,

Plaintiffs and Appellants,

v.

FAMILY LENDING SERVICES, INC. et
al.,

Defendants and Respondents.

A132339

(Solano County
Super. Ct. No. FCS 035585)

I. INTRODUCTION

This action arises from nonjudicial foreclosure proceedings initiated against appellants Marlon Taasan and Febes Taasan after they fell behind in making loan payments on their residence in Fairfield. Appellants sued Mortgage Electronic Registration Systems, Inc. (MERS), ReconTrust Company, N.A. (ReconTrust), and HSBC Bank USA, N.A. (HSBC) (collectively, respondents), seeking a declaratory judgment and quiet title to the property, among other forms of relief. The trial court sustained respondents' demurrer to the first amended complaint without leave to amend. Appellants contend that respondents had no legal authority to initiate nonjudicial foreclosure. We will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

The operative pleading is the first amended complaint (FAC), filed in November 2010. The facts alleged in the FAC and the documents attached thereto are as follows: In March 2007, appellants obtained a \$784,000 loan from Family Lending Services, Inc.

(FLS)¹ to finance the purchase of a residence in Fairfield, California. The deed of trust securing the loan was recorded on March 9, 2007. It identifies appellants as borrower and trustor, FLS as the lender, S.P.S. Affiliates as the trustee, and MERS as the beneficiary, “acting solely as a nominee for Lender and Lender’s successors and assigns.” The deed of trust also provides: “Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.”

In March 2009, appellants defaulted on their loan payments. In June 2009, an entity named BAC Home Loans Servicing, LP, contacted appellants about the default. In August 2009, ReconTrust, as agent for MERS, recorded a notice of default and election to sell.

In March 2010, MERS executed a Substitution of Trustee and Assignment of Deed of Trust. By this instrument, MERS substituted ReconTrust as trustee, in place of S.P.S. Affiliates, and assigned “all beneficial interest” in the deed of trust, together with the note and all monies due under the note, to HSBC. Following execution of the Substitution of Trustee and Assignment of Deed of Trust, ReconTrust, acting as trustee, recorded that document as well as a Notice of Trustee’s Sale to take place on April 16, 2010.

On April 13, 2010, appellants filed their original complaint in Solano County Superior Court, alleging nine causes of action relating to their mortgage and the foreclosure proceedings as follows: (1) Declaratory Relief; (2) Demand for Accounting; (3) Breach of the Implied Covenant of Good Faith and Fair Dealing; (4) Violation of

¹ Family Lending Services, Inc. was not a party to the demurrer or the trial court’s dismissal order, and is not a party to this appeal.

Civil Code sections 1920 and 1921;² (5) Violation of Civil Code section 1916.7; (6) Rescission/Cancellation; (7) Unfair Business Practices; (8) Breach of Fiduciary Duty; and (9) Quiet Title. This complaint was largely based on the theory that MERS did not have possession of the promissory note and thus had no legal authority to assign beneficial interest in the deed of trust (and the promissory note) to HSBC. As a result, according to appellants, the foreclosure proceedings contravened California nonjudicial foreclosure law.

In July 2010, respondents filed a demurrer to all causes of action in the complaint. Respondents argued that appellants failed to identify any irregularities in the foreclosure proceedings and that their principal theory of liability—that respondents must be in possession of the promissory note—was legally untenable. Respondents also argued that appellants failed to allege facts stating a cause of action as to their other claims.

In response, appellants filed a “Notice of Intent Not to Oppose Demurrer,” followed by an amended complaint.

The FAC re-asserted the nine causes of action from the original complaint and added a tenth cause of action for cancellation of instruments.

In December 2010, respondents filed a demurrer to all causes of action. In March 2011, the trial court issued a tentative ruling sustaining the demurrer in its entirety without leave to amend. The tentative ruling became the final order of the court.

The trial court rejected appellants’ causes of action for wrongful foreclosure/declaratory relief (first cause of action), to quiet title (ninth), and for cancellation of instruments (tenth) on the basis that respondents had authority to foreclose on the property. It stated: “California’s nonjudicial foreclosure scheme set forth by statute in Civil Code sections 2924 through 2924k provide[s] a comprehensive and exclusive framework for the regulation of nonjudicial foreclosure sales and there is no cause of action to test whether a named nominee beneficiary is authorized to proceed with foreclosure on behalf of the noteholder. (*Gomes v. Countrywide Home Loans, Inc.*

² All further unspecified statutory references are to the Civil Code.

(2011) 192 Cal.App.4th 1149, 1154-1155 [(*Gomes*)].” The trial court found that appellants executed a deed of trust conferring on MERS or any successor in interest the right to exercise the power of sale as the named nominee beneficiary. The court also found that MERS properly assigned its interest in the deed of trust to HSBC and substituted ReconTrust as the trustee.

The second cause of action for an accounting failed to allege when appellants made a demand for a statement, whether the demand was in writing and timely, and whether they paid the fees permissibly charged for preparation of the statement.

Appellant’s third cause of action for breach of the implied covenant of good faith and fair dealing failed because appellants failed to allege any contractual relationship with respondents. To the extent that HSBC, as a successor in interest, undertook the contractual relationship of the original lender FLS, appellants alleged no action by HSBC that would constitute a breach of the implied covenant. The eighth cause of action for breach of fiduciary duty failed to allege any facts establishing a fiduciary relationship.

The court found that appellants’ fourth, fifth, and sixth causes of action for violation of various statutes and rescission were barred by the statutes of limitations.

Finally, the seventh cause of action for unfair business practices failed because it was derivative of the wrongful foreclosure claims, which were inadequately pled.

The trial court dismissed the action as to MERS, ReconTrust, and HSBC on March 28, 2011.

Appellants timely filed this appeal.

III. DISCUSSION

A. *Standards of Review.*

“A demurrer tests the legal sufficiency of factual allegations in a complaint. (*Title Ins. Co. v. Comerica Bank-California* (1994) 27 Cal.App.4th 800, 807.) In reviewing the sufficiency of a complaint against a general demurrer, this court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. This court also considers matters that may be judicially noticed. When a demurrer is sustained, this court determines whether the complaint

states facts sufficient to constitute a cause of action. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

“On appeal, a plaintiff bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law. This court thus reviews the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory. Because a demurrer tests the legal sufficiency of a complaint, the plaintiff must show the complaint alleges facts sufficient to establish every element of each cause of action. If the complaint fails to plead, or if the defendant negates, any essential element of a particular cause of action, this court should affirm the sustaining of a demurrer. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879-880.)

“When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. The plaintiff bears the burden of proving there is a reasonable possibility of amendment. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) The plaintiff may make this showing for the first time on appeal. (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386-1388.)

“To satisfy that burden on appeal, a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.’ (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The assertion of an abstract right to amend does not satisfy this burden. (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 161, superseded by statute on another point, as stated in *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637.) The plaintiff must clearly and specifically set forth the ‘applicable substantive law’ (*Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 897) and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. (*McMartin v. Children’s Institute International* (1989) 212 Cal.App.3d 1393, 1408; *McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57

Cal.App.4th 1011, 1024.) Allegations must be factual and specific, not vague or conclusory. (*Cooper v. Equity Gen. Insurance* (1990) 219 Cal.App.3d 1252, 1263-1264.)

“The burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1153.) Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1098; *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 513, fn. 3.)” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43-44 (*Rakestraw*).

B. *Analysis.*

As an initial matter, with respect to their third, eighth, and tenth causes of action (breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and cancellation of instruments, respectively), appellants concede that the demurrer was properly sustained and do not seek an opportunity to amend their pleading. Therefore, we will not address the propriety of the trial court’s ruling as to those causes of action.

1. *Wrongful Foreclosure/Declaratory Relief.*

Appellants contend they stated a declaratory relief cause of action as to three issues arising from the initiation of a nonjudicial foreclosure proceeding: (1) whether HSBC had authority to foreclose based on MERS’ assignment of right under a deed of trust without delivery of physical possession of the note; (2) whether MERS had authority to assign to HSBC a valid beneficial interest in the deed of trust despite not having possession of the note; and (3) whether respondents complied with section 2923.5, which required that appellants be contacted about the default 30 days prior to the filing of a notice of default. We reject these contentions because they neither state a legally tenable claim nor could they succeed on the merits, as we shall explain.

- a. *No cause of action to determine authority to initiate nonjudicial foreclosure proceedings.*

By way of their first two issues, appellants contend they are entitled to declaratory relief to require respondents to demonstrate to a court that they have authority to initiate a nonjudicial foreclosure proceeding.

The regulation in California of nonjudicial foreclosure pursuant to a power of sale contained in a deed of trust is governed by the “comprehensive framework” set forth at sections 2924-2924k. (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830 (*Moeller*)). “The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.” (*Id.* at p. 830.) As our Supreme Court has recognized, “[n]onjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, ‘[n]either appraisal nor judicial determination of fair value is required,’ and the debtor has no postsale right of redemption.” (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1236.)

“ ‘Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.’ (*Lane v. Vitek Real Estate Industries Group* (E.D. Cal. 2010) 713 F.Supp.2d 1092, 1098; see also *Moeller*, at p. 834 [‘It would be inconsistent with the comprehensive and exhaustive statutory scheme regulating nonjudicial foreclosures to incorporate another unrelated cure provision into statutory nonjudicial foreclosure proceedings.’].)” (*Gomes, supra*, 192 Cal.App.4th at p. 1154.)

Appellants point to nothing in the nonjudicial foreclosure statutes themselves to support creating the right they seek, and we discern nothing that would support implying such a right. The *Gomes* court addressed this same question of a right to test the foreclosing entity’s authority, and we find that court’s analysis persuasive.

Gomes involved a loan to purchase real estate, with a promissory note secured by a deed of trust that identified MERS as the beneficiary and “ ‘acting solely as a nominee for Lender and Lender’s successors and assigns’” (*Gomes, supra*, 192 Cal.App.4th at p. 1151.) The borrower defaulted on his payments and received a notice of default and election to sell from ReconTrust, acting as an agent for MERS. (*Ibid.*) He brought suit against the lender, MERS, and ReconTrust. He alleged several causes of action including wrongful foreclosure, and sought declaratory relief based on the contention that MERS did not have authority to initiate foreclosure because it was not authorized to do so by the owner of the note. (*Id.* at p. 1152.) The trial court sustained the demurrer without leave to amend; on appeal the only issue was whether MERS had the authority to initiate the foreclosure process. (*Id.* at pp. 1152-1153.)

The appellate court determined that “[b]y asserting a right to bring a court action to determine whether the owner of the Note has authorized its nominee to initiate the foreclosure process, *Gomes* is attempting to interject the courts into this comprehensive nonjudicial scheme.” (*Gomes, supra*, 192 Cal.App.4th at p. 1154.) The *Gomes* court found no support for such an action, either express or implied. (*Id.* at p. 1155.) Moreover, “[t]he recognition of the right to bring a lawsuit to determine a nominee’s authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures.” (*Id.* at p. 1155; see also *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495 (*Herrera*) [rejecting plaintiff’s attempt to set aside foreclosure sale on the basis that MERS lacked authority to assign the deed of trust].)

In arguing for the right to declaratory relief, appellants rely on the statement in *California Golf, LLC v. Cooper* (2008) 163 Cal.App.4th 1053, 1070 (*California Golf*), that “California courts have repeatedly allowed parties to pursue additional remedies for misconduct arising out of a nonjudicial foreclosure sale when not inconsistent with the policies behind the statutes.” Appellants argue that they were “seeking a judicial determination as to whether or not [HSBC] had the authority to conduct the nonjudicial

foreclosure process. They [appellants] were not seeking to insert an additional procedural requirement into that process.”

These contentions do not advance appellants’ position, for two reasons. First, for the very reason that it would be inconsistent with the policies behind the statutes, we will not permit a cause of action to determine a foreclosing entity’s right to conduct the process. Second, appellants are not seeking a remedy for misconduct. The *Gomes* court rejected the borrower’s argument based on the same statement in *California Golf*, reasoning that “Gomes is not seeking a remedy for misconduct. He is seeking to impose the additional requirement that MERS demonstrate in court that it is authorized to initiate a foreclosure. . . . [S]uch a requirement would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy. [Citation.]” (*Gomes, supra*, 192 Cal.App.4th at p. 1154, fn. 5.) Just so here.

b. *No cause of action to determine compliance with section 2923.5.*

For the same reasons, we affirm the trial court’s rejection of appellants’ request for declaratory relief regarding whether respondents complied with section 2923.5. This statute provides that a notice of default under section 2924 cannot be filed until 30 days after “[a] mortgagee, trustee, beneficiary, or authorized agent” contacts the borrower “in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure.” (§ 2923.5, subd. (a)(1), (2).) When filed, the notice of default must include a declaration that the foreclosing entity contacted the borrower or “tried with due diligence” to contact the borrower, as provided in the section. (*Id.*, subd. (b).) As with the nonjudicial foreclosure statutory scheme at sections 2924-2924k, nothing in this section supports finding a right to bring a lawsuit to require a foreclosing entity to prove its compliance to a court. To read such a right into this statute “would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures.” (*Gomes, supra*, 192 Cal.App.4th at p. 1155.)

c. *Physical possession of the note is not required.*

Appellants' attempt to require a foreclosing entity to have physical possession of the note in order to initiate a nonjudicial foreclosure is also without merit. Appellants cite section 2932.5 in arguing that "the person entitled to enforce the promissory note is the only person entitled to exercise the power of sale." They then argue that neither MERS nor HSBC is a "person entitled to enforce the note" as that phrase is defined in section 3301³ of the Commercial Code because neither is in possession of the note. They also contend that, pursuant to the Commercial Code, a promissory note is a negotiable instrument which cannot be assigned without an endorsement and physical delivery to the transferee. (See Com. Code, §§ 3201, 3203.) Thus, appellants argue, the purported transfers here were invalid.

Section 2932.5 addresses the power of sale under an assigned mortgage. It provides that "the power [of sale] is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument" and "may be exercised by the assignee if the assignment is duly acknowledged and recorded." (§ 2932.5.) However, both by its terms and as reaffirmed in three recent decisions, including one by Division Four of this district, the provisions of section 2932.5 apply only to mortgages and not to deeds of trust. (*Herrera, supra*, 205 Cal.App.4th 1495; *Haynes v. EMC Mortgage Corp.* (2012) 205 Cal.App.4th 329, 332-334; *Calvo v. HSBC Bank USA, N.A.* (2011) 199 Cal.App.4th 118, 122.) In addition, even if section 2932.5 applied to deeds of trust, the statute does not require physical possession of the note to effectuate an assignment. (See, e.g., *Champlaie v. BAC Home Loans Servicing, L.P.* (E.D.Cal. 2009) 706 F.Supp.2d 1029, 1050 (*Champlaie*) [listing federal unpublished

³ Commercial Code section 3301 provides: " 'Person entitled to enforce' an instrument means (a) the holder of the instrument, (b) a nonholder in possession of the instrument who has the rights of a holder, or (c) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3309 or subdivision (d) of Section 3418. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."

decisions holding that possession of the note is not required for an assignment of the power of sale under section 2932.5].)

The Commercial Code is similarly unhelpful to appellants. As an aside, they note in their brief that California's adoption of the Uniform Commercial Code, including the provisions in Article Three upon which they rely, reflects the goal of ensuring the same laws in *interstate commerce*. By contrast, the regulation in *California* of nonjudicial foreclosure pursuant to a power of sale contained in a deed of trust is governed by the "comprehensive" and "exhaustive" framework set forth at sections 2924-2924k, as we have already discussed. (*Moeller, supra*, 25 Cal.App.4th at p. 830.)

The same arguments regarding applicability of the Commercial Code were addressed recently by the Sixth District in a decision that was filed after briefing in this appeal was complete.⁴ In *Debrunner v. Deutsche Bank Nat. Trust Co.* (2012) 204 Cal.App.4th 433 (*Debrunner*), a junior secured lender conducted a nonjudicial foreclosure sale and purchased the property, subject to the lien of the first deed of trust. (*Debrunner, supra*, 204 Cal.App.4th at pp. 435-437.) The senior lienholder subsequently initiated its own nonjudicial foreclosure, and the junior lender/property owner brought suit for declaratory judgment and quiet title, claiming that Deutsche Bank, the final assignee of the deed of trust, had no right to foreclose because it did not have physical possession of, or ownership rights to, the original promissory note. (*Id.* at p. 436-437.) Deutsche Bank demurred, the trial court sustained the demurrer, and the appellate court affirmed. (*Id.* at pp. 437-438, 444-445.)

On appeal, the property owner argued that under the Commercial Code, a promissory note is a negotiable instrument which cannot be assigned without a valid endorsement and physical delivery to the assignee. Thus, no foreclosure of a deed of trust is valid unless the beneficiary is in possession of the promissory note. (*Debrunner, supra*, 204 Cal.App.4th at p. 440.)

⁴ Counsel for respondents submitted a copy of the case to this court and to opposing counsel.

The appellate court rejected the plaintiff's contention that physical possession of the note was required in order to foreclose. The court found nothing in the nonjudicial foreclosure statutes that would preclude foreclosure when the foreclosing party does not have possession of the note, and observed that "many federal courts" had come to the same conclusion. (*Debrunner, supra*, 204 Cal.App.4th at p. 440, and cases cited therein; see also *Herrera, supra*, 205 Cal.App.4th 1495 [lack of possession of the note fails to demonstrate MERS lacked authority to validly assign the note on behalf of original lender].) "Notably, section 2924, subdivision (a)(1), permits a notice of default to be filed by the 'trustee, mortgagee, or beneficiary, or any of their authorized agents.' The provision does not mandate physical possession of the underlying promissory note in order for this initiation of foreclosure to be valid." (*Debrunner, supra*, 204 Cal.App.4th at p. 440.)

The court also concluded that the Commercial Code provisions were inapplicable, reasoning that the "comprehensive statutory framework . . . [was] intended to be exhaustive," and did not allow for implying additional requirements into the nonjudicial foreclosure process. (*Debrunner, supra*, 204 Cal.App.4th at p. 441, quoting *Moeller, supra*, 25 Cal.App.4th at p. 834, and citing *Gomes, supra*, 192 Cal.App.4th at pp. 1154-1157; *Lane v. Vitek Real Estate Indus. Group, supra*, 713 F.Supp.2d at pp. 1098, 1099.) "[W]e are not convinced that the cited sections of the Commercial Code (particularly section 3301) displace the detailed, specific, and comprehensive set of legislative procedures the Legislature has established for nonjudicial foreclosures." (*Debrunner, supra*, 204 Cal.App.4th at p. 441, and cases cited therein.) We agree.

Moreover, we note that our colleagues in Division One of this court have also rejected the contention that, because MERS (identified as the lender's nominee in the deed of trust) did not have possession of the note, it did not have authority to assign it. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270 (*Fontenot*)). "While it is true MERS had no power *in its own right* to assign the note, since it had no interest in the note to assign, MERS did not purport to act for its own interests in assigning the note. Rather, the assignment of deed of trust states that MERS was acting

as nominee for the lender, which *did* possess an assignable interest. A ‘nominee’ is a person or entity designated to act for another in a limited role—in effect, an agent. [Citations.] The extent of MERS’s authority as a nominee was defined by its agency agreement with the lender, and whether MERS had the authority to assign the lender’s interest in the note must be determined by reference to that agreement.” (*Id.* at pp. 270-271.)

Here, as in *Fontenot*, the assignment in the deed of trust names MERS as the beneficiary, “acting solely as a nominee for Lender and Lender’s successors and assigns.” The deed of trust also provides: “Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.”

Under the statutory scheme, the “trustee, mortgagee, or beneficiary, or any of their authorized agents” may initiate the nonjudicial foreclosure process by recording a notice of default.⁵ (§ 2924, subd. (a)(1); see also § 2924b, subd. (b)(4) [“A ‘person authorized to record the notice of default or the notice of sale’ shall include an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee.”].) Nowhere in this framework is a requirement for production of the note as a prerequisite for initiating a nonjudicial foreclosure, as numerous federal district courts in California have noted. (See, e.g., *Hamilton v. Bank of Blue Valley* (E.D. Cal. 2010) 746 F.Supp.2d 1160, 1181-

⁵ Section 2923.5 provides that the foreclosing party may not record the notice of default, however, until 30 days after either contacting the borrower “to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure, or engaging in “due diligence” efforts to contact the borrower. (§ 2923.5, subds. (a)(1), (2), (g).)

1182 [“ ‘Under Civil Code section 2924, no party needs to physically possess the promissory note.’ ”]; *Jensen v. Quality Loan Service Corp.* (E.D. Cal. 2010) 702 F.Supp.2d 1183, 1189 [California law does not require possession of the note as a precondition to nonjudicial foreclosure]; *Castaneda v. Saxon Mortgage Services, Inc.* (E.D.Cal. 2009) 687 F.Supp.2d 1191, 1195 [no requirement under California law for the production of the original note to initiate a nonjudicial foreclosure]; *Hafiz v. Greenpoint Mortgage Funding, Inc.* (N.D. Cal. 2009) 652 F.Supp.2d 1039, 1043 [“ ‘California law does not require possession of the note as a precondition to nonjudicial foreclosure under a deed of trust’ ”]; *Champlaie, supra*, 706 F.Supp.2d at pp. 1048-1051 [exhaustive set of requirements contained in nonjudicial foreclosure statutes does not include production or possession of the note; non-judicial foreclosure in California is governed by these statutes, not the Commercial Code]; *Gandrup v. GMAC Mortgage* (N.D.Cal. 2011) 2011 WL 703753 [“[U]nder California law, there is no requirement that the trustee have possession of the physical note before initiating foreclosure proceedings.”]; *Morgera v. Countrywide Home Loans, Inc.* (E.D.Cal. 2010) 2010 WL 160348, at p. *8 [MERS, as nominee of the lender, is authorized to initiate nonjudicial foreclosure without possession of the underlying promissory note].)

- d. *The FAC contains no facts supporting failure to comply with section 2923.5.*

Next, appellants argue that respondents did not comply with section 2923.5, which provides in part that “[a] mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to section 2924” until 30 days after “[a] mortgagee, beneficiary, or authorized agent” contacts the borrower “in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure.” (§ 2923.5, subdivision (a)(1), (2).)

As required by subdivision (b) of section 2923.5, the notice of default in this case included a declaration stating that the borrower had been contacted for this purpose. The declaration was signed by an individual at BAC Home Loans Servicing, LP (BAC). The irregularity appellants assert is that the declaration was issued by “a third party from a

completely different financial institution without any connection to HSBC,” and thus was not issued by the “mortgagee, trustee, beneficiary, or authorized agent,” as required by the statute.

It is unclear whether appellants are arguing (1) that BAC is a stranger to the proceedings and thus was not a proper entity to contact appellants and submit the declaration, or (2) that only HSBC or MERS, and not BAC, could properly contact appellants and submit the declaration. No matter; neither contention has merit.

First, any contention that BAC is a stranger is belied by documents appellants filed as exhibits to the FAC. The notice of default and election to sell under deed of trust provides contact information for the borrower. It lists “HSBC . . . C/O BAC Home Loans Servicing, LP,” with an address and telephone number. The notice also states: “If required by the provisions of Section 2923.5 of the California Civil Code, the declaration from the mortgagee, beneficiary or authorized agent is attached to the Notice of Default duly recorded with the appropriate County Recorder’s office.” In addition, the deed of trust provides that changes of the loan servicer may occur.⁶ Appellants do not explain how BAC is not an authorized agent of HSBC. Second, nothing in the statute requires that the same entity that files the notice of default must also be the one to contact the borrower. The statute clearly provides that an “authorized agent,” among other specified entities, may undertake various activities such as filing the notice of default (§ 2923.5, subd. (a)(1)), contacting the borrower (§ 2923.5, subd. (a)(2)), and submitting a declaration regarding that contact with the borrower (§ 2923.5, subd. (b)). Here, there is no dispute that appellants were contacted regarding their financial situation and options to avoid foreclosure in advance of the filing of the notice of default, as required by the statute. Appellants have not stated a cognizable claim under this statute.

In sum, the demurrer to appellants’ first cause of action for wrongful foreclosure/declaratory relief was properly sustained. Appellants set forth no specific

⁶ Respondents maintain that BAC is the servicer on appellants’ loan, which is certainly a reasonable presumption, but we observe that they cite to nothing in the record to support this contention.

facts or argument to establish that they could amend their pleading to state a cause of action, and thus have not sustained their burden of proving a reasonable possibility that amendment can cure the defect. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38, 39.)

2. *Unfair Business Practices.*

Appellants alleged unfair business practices as their seventh cause of action on the basis that respondents “were foreclosing on properties without the legal right to do so.” However, as we have just explained, appellants signed a deed of trust that gave MERS the right to exercise the power of sale. The nonjudicial foreclosure statutes do not require MERS or HSBC to have possession of the promissory note in order to exercise that power. The trial court sustained the demurrer as to this cause of action on the ground that it was “wholly derivative” of the wrongful foreclosure claim. We agree.

3. *Quiet Title.*

Similarly, in their ninth cause of action, quiet title, appellants claimed that respondents had no interest in the property and no authority to foreclose because they were not in possession of the promissory note. On appeal, appellants argue that they adequately pled the elements of quiet title, with the exception of the date as of which the determination of title is sought. On this point, they assure us that they could easily cure the deficiency with leave to amend. There is, however, no way around the fact that appellants’ theory here is legally untenable. The reasons supporting dismissal of the declaratory relief cause of action also support dismissal of appellants’ quiet title cause of action.

Moreover, “ ‘[i]t is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured.’ (*Shimpones v. Stickney* (1934) 219 Cal. 637, 649; see *Mix v. Sodd* (1981) 126 Cal.App.3d 386, 390 [‘a mortgagor in possession may not maintain an action to quiet title, even though the debt is unenforceable’]; *Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477 [trustor is unable to quiet title ‘without discharging his debt’].)” (*Hamilton v. Bank of Blue Valley, supra*, 746

F.Supp.2d at p. 1170.) Appellant has made no allegation of tender, and does not contend he would do so if given leave to amend.

4. *Section 2943.*

Appellants' second cause of action, although labeled "Accounting," is actually a claim that respondents violated section 2943, which provides, inter alia, that a borrower may request a "beneficiary statement" from the mortgagee or beneficiary of a deed of trust that sets forth the amount of the unpaid balance, the interest rate, the total amounts of any overdue installments, and other specified information about the loan. (§ 2943, subd. (a)(1), (2), (4).) The request for a beneficiary statement may be made "at any time before, or within two months after, the recording of a notice of default under a mortgage or deed of trust" (§ 2943, subd. (b)(2).) The beneficiary must prepare and deliver a written beneficiary statement within 21 days of receipt of the request. (§ 2943, subd. (b)(1).) If the beneficiary willfully fails to deliver the beneficiary statement within 21 days, the beneficiary is liable to the borrower for "all damages which he or she may sustain by reason of the refusal" and the sum of \$300. (§ 2943, subd. (e)(4).)

Appellants alleged in their complaint that, prior to filing this action, they requested "an accounting" pursuant to section 2943. They further allege that respondents "have failed and refused to respond" to the request.

The trial court sustained the demurrer as to this cause of action because appellants' "conclusory allegation" was insufficient to state a cause of action. It concluded that appellants "fail[ed] to allege with specificity when they made the demand for a statement, whether that demand was properly made in writing and within the time required by the statute, and whether they paid any fees permissibly charged for the preparation of the statement." They also failed to allege any facts showing that MERS (the beneficiary at all relevant times) willfully refused to provide the statement, entitling appellants to recover damages.

Appellants effectively concede that the trial court was entitled to sustain the demurrer based on the lack of factual allegations in the first amended complaint, but contend that the court erred in failing to grant leave to amend. As the sum total of their

argument on this point, they state the legal principle that “[i]n the event that the complaint is found to not state a cause of action, but there is a reasonable possibility that amendment can cure the defect, leave to amend must be granted,” citing *Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at pp. 38, 39. This is plainly inadequate. Having set forth no facts to establish that they could in fact amend their pleading to state a valid cause of action, appellants have failed to sustain their burden of proving a reasonable possibility that the pleading’s defect can be cured by amendment. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

5. *Violations of Sections 1916.7, 1920, and 1921.*

Appellants alleged as their fourth and fifth causes of action the violation by respondents of sections 1916.7 (fifth), and 1920 and 1921 (fourth). These statutes set forth requirements, including disclosure requirements, for lenders who originate adjustable rate mortgage loans. Section 1916.7 provides in part that a disclosure notice must be provided to an applicant for an “adjustable-payment, adjustable-rate loan” at the time he or she requests an application. (§ 1916.7, subd. (c).) Section 1920 contains requirements for mortgage instruments, including notice requirements for changes in the interest rate and disclosures prior to execution of loan documents by the borrower. (§ 1920, subds. (b), (f).) Section 1921 requires that a lender offering adjustable-rate residential mortgage loans must provide to a prospective borrower a copy of the “Consumer Handbook on Adjustable-Rate Mortgages” either upon the borrower’s request or at the time the lender first provides written information other than direct-mail advertising about an adjustable-rate loan. (§ 1921, subd. (b).)

In the first amended complaint, appellants alleged that respondents violated sections 1920 and 1921, respectively, by “failing to meet the requirements of an adjustable rate mortgage instrument,” and failing to meet “the requirements for disclosure of information and connections [sic] with an adjustable rate mortgage instrument” Appellants alleged that respondents violated section 1916.7 “in failing to provide the disclosure notice . . . in a timely manner.” The trial court held that these claims were

barred by the statute of limitations (Code Civ. Proc., § 338, subs. (a), (d)) and that appellants made “no attempt to allege, with specificity and particularity,” facts that would support a delayed accrual date such as “ ‘the time and manner of discovery and the inability to make earlier discovery despite reasonable diligence.’ (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160.)”

The statute of limitations for “an action upon a liability created by statute, other than a penalty or forfeiture,” is three years. (Code Civ. Proc., § 338, subd. (a).) All three of the statutes at issue require certain disclosures at the time of, or prior to, the execution by the borrower of a mortgage payment instrument. (See § 1916.7, subd. (c), 1920, subd. (f), 1921, subd. (c).) Here, appellants executed the loan documents on March 1, 2007; this is the date by which appellants would have known of the alleged failure to provide the required disclosures. Appellants, however, did not file their initial complaint until April 12, 2010, which was more than three years later. The trial court correctly concluded that the claims were time-barred.

In addition, appellants’ pleading is inadequate as to respondents because the first amended complaint fails to include any allegations explaining why respondents HSBC, MERS, and/or ReconTrust, *as opposed to appellants’ lender FLS*, would be required to comply with these statutes.⁷

As they did with respect to their section 2943 allegations, appellants concede that the trial court did not err in sustaining the demurrer to these causes of action, but contend there is a reasonable possibility that they could amend to set forth allegations supporting a later accrual date. As we concluded above, this bare assertion is insufficient to meet their burden to establish an abuse of the trial court’s discretion in denying leave to amend.

⁷ Respondents argue several more bases for upholding the trial court’s ruling on these causes of action, but in light of the foregoing discussion, we need not address them.

6. *Rescission/Cancellation.*

Finally, appellants alleged as their sixth cause of action a claim for “rescission/cancellation” based on fraudulent concealment of the true cost of the mortgage loan. The trial court ruled that this cause of action was time-barred under Code of Civil Procedure section 338, subdivisions (a) and (d), for the same reasons as the alleged violations of sections 1916.7, 1920, and 1921. Appellants concede that the demurrer was properly sustained as to this cause of action but repeat their mantra of a reasonable possibility that they could amend, in this case to allege facts regarding “the time and manner of the discovery and their inability to make earlier discovery despite reasonable diligence.” In turn, respondents no longer rely on the statute of limitations;⁸ rather, they argue a new ground for sustaining the demurrer, i.e., appellants’ failure to tender the loan proceeds.

Rescission allows a party to a contract to be “relieved of the burdens and [to] produce restitutionary redress respecting a contract which was defective at its inception because consent was not freely or knowingly given.” (*Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304, 317, fn. 16.) A party may rescind a contract if, among other things, that party’s consent “was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.” (§ 1689, subd. (b)(1).) To obtain rescission, however, the party must “[r]estore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so.” (§ 1691, subd (b).) This rule, that the complainant is required to restore to the defendant everything of value received in the transaction, applies even in cases where the plaintiff “ ‘was induced to enter into the contract by the

⁸ We note that the limitations period for an action based upon rescission of a contract in writing is four years, not three. (Code Civ. Proc., § 337, subd. (3).)

fraudulent representations of the defendant.’ ” (*Hamilton v. Bank of Blue Valley, supra*, 746 F. Supp.2d at p. 1170, quoting *Fleming v. Kagan* (1961) 189 Cal.App.2d 791, 796.)

Thus, a party seeking to rescind a deed of trust must tender the amount owed on the debt. (See, e.g., *Karlsen v. American Savings & Loan Assn.* (1971) 15 Cal.App.3d 112, 117 [“A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust.”]; *Touli v. Santa Cruz County Title Co.* (1937) 20 Cal.App.2d 495, 499-500 [reversing judgment extinguishing a deed of trust without repayment of the underlying debt pursuant to section 1691 rescission requirements].) The FAC failed to allege that appellants returned or offered to return everything of value they received, that is, the \$784,000 loan principal. To the contrary, the FAC alleges that appellants are entitled to the proceeds of the loan and the security for the loan, i.e., the house, while refusing to repay the loan. The trial court did not err in sustaining the demurrer to this cause of action.

7. *Leave to Amend.*

Throughout their brief, appellants argue—in entirely conclusory fashion—that they are entitled to an opportunity to amend because a reasonable possibility exists that they could cure the defects in their pleading. As we have stated as to individual causes of action, this assertion is completely inadequate to meet the burden of a party seeking such leave. In an abundance of caution, we will reiterate: “To satisfy that burden on appeal, a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.’ [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the ‘applicable substantive law’ [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusory. [Citation.] [¶] The burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. [Citation.] Where the appellant offers no allegations

to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. [Citations.]” (*Rakestraw, supra*, 81 Cal.App.4th at pp. 43-44.)

IV. DISPOSITION

The order of dismissal is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.