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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ARLENE BELL-SPARROW,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant and Respondent.

A134659

(Alameda County
Super. Ct. No. HG11575269)

Plaintiff Arlene Bell-Sparrow (plaintiff or Ms. Bell-Sparrow) appeals from the judgment of dismissal entered following the sustaining of a general demurrer to her second amended complaint. We conclude that the trial court, having given plaintiff generous opportunity to correct deficiencies that were pointed out to her in detail, did not err in denying plaintiff leave to file a fourth pleading. In light of this conclusion, we affirm the judgment of dismissal.

BACKGROUND

Some preliminary points must be established. First, the root of this dispute is a loan obligation plaintiff originally assumed with a financial institution that is no longer in existence and which also went through a couple of mergers. The obligation eventually ended up with defendant Wells Fargo Bank, N.A. For purposes of simplicity, and to avoid cluttering up the narrative with these not-really-relevant events, we shall generally proceed as though Wells Fargo was the original lender. Second, although there is a Mr. Sparrow, and while he did make various appearances in this litigation, he departed just prior to entry of the judgment and is not a party to this appeal. The references to him

will therefore reduced to only those necessary for avoiding misconception and for resolving Ms. Bell-Sparrow's appeal. Third, the following will not recount numerous procedural events that have no bearing on this appeal. Finally, this opinion will have extensive excerpts from the trial court's comprehensive—and thoughtful—orders, to which minor, nonsubstantive changes (i.e., substituting Wells Fargo for Bank) have been made.

In April 2007, the Sparrows refinanced their residence in Union City with a \$604,000 loan from Wells Fargo. The loan was secured with a deed of trust on the property.

In 2009, the Sparrows filed separate bankruptcy petitions. Each of the petitions recited that the property was worth \$445,000 (by Mr. Sparrow) or \$480,000 (by plaintiff), but that \$645,000 was owed Wells Fargo. On schedule D of each petition, the box for whether this claim was “disputed” was not checked. Each of the petitions was executed under penalty of perjury. Both Mr. Sparrow and plaintiff received discharges in bankruptcy near the end of 2009, although the discharges warned that “a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the discharged debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case.”

On April 21, 2011, Wells Fargo recorded a notice of default on the obligation, on the ground that plaintiff was more than \$65,000 in arrears. Plaintiff—who at all times has represented herself—responded with her initial verified complaint against Wells Fargo on May 11, 2011. The complaint is 80 pages long, with more than 50 pages of attached exhibits. There are 12 causes of action, styled as follows: (1) declaratory relief; (2) fraud; (3) tortious violation of statute [i.e., Civil Code § 2923.6]; (4) quiet title; (5) reformation; (6) violation of Business and Professions Code § 17200; (7) violation of Civil Code section 2923.6; (8) violation of Civil Code section 1788.17; (9) violation of Civil Code section 1572; (10) injunctive relief; (11) violation of Civil Code section 2923.52; (12) violation of Civil Code section 2923.53.

Wells Fargo filed a general demurrer alleging numerous defects in plaintiff's complaint. The demurrer included what is a fair assessment of plaintiff's complaint:

“The Complaint contains two ‘Claims for Relief’ and ten ‘Causes Of Action.’ (These are referred to herein as the ‘1st’ through ‘12th’ Causes of Action.) The 80-page Complaint is confusing—it refers to unfurnished exhibits and intersperses allegations with excerpts from news articles, legislative findings, argument, statutes, and the result of a ‘forensic audit.’ However, boiled down to essentials, the Complaint appears to be based on the following claims:

“[Wells Fargo] induced Plaintiffs to accept a loan they could not afford by representing that Plaintiffs qualified for the loan and that the loan was ‘within Plaintiffs’ financial needs and limitations.’ [¶] [Wells Fargo] did not disclose the ‘true cost of the loan,’ that payments would exceed Plaintiffs’ income, and other terms. [¶] Plaintiffs could not make the payments. [¶] Wells Fargo refused to modify Plaintiffs’ loan. [¶] [Wells Fargo] initiated foreclosure in violation of the foreclosure laws and the Rosenthal Fair Debt Collection Practices Act.”

In addition to alleging that plaintiff's causes of action were either time-barred or failed to state a claim, Wells Fargo argued that “All of plaintiff's claims against Wells Fargo are preempted under the Federal Home Owner's Loan Act [12 U.S.C. § 1461 et seq.],” and “Plaintiffs are judicially and equitably estopped from asserting their claims against [Wells Fargo].”

The trial court ruled as follows:

“The demurrer to the First Cause of Action for Declaratory Relief, in both of the versions alleged in the Complaint, is SUSTAINED WITH LEAVE TO AMEND. Plaintiffs have not alleged facts that show an actual controversy. Plaintiffs have not alleged that they are willing or have the ability to tender an amount sufficient to cure the default. Defendants are not required to have possession of the original note. (*Pantoja v. Countrywide Loans, Inc.* (N.D.Cal. 2009) 640 F.Supp.2d 1177, 1186.) The allegation that the deed of trust and note were separated is incomprehensible, and does not state a viable claim for relief as a matter of law. (See *Pantoja, supra*, 640 F.Supp.2d at

1188-1190; *Gomes v. Countrywide Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1156.)

“The demurrer to the Second Cause of Action for Fraud, in both of the versions alleged in the Complaint, is SUSTAINED WITH LEAVE TO AMEND. Plaintiffs have not alleged facts with particularity that support a claim for fraud. Plaintiffs alleges some facts that are not actionable, such as failure to determine whether Plaintiffs could repay. Plaintiffs allege some facts that are irrelevant to fraud, such as the class action settlement and the forensic loan audit. The allegations concerning representations made to Plaintiffs lack specificity, as do the allegations that Plaintiffs reasonably relied on Defendants’ representations.

“The demurrer to the Third Cause of Action for Tortious Violation of Civil Code section 2923.6 and the Seventh Cause of Action for Violation of Civil Code section 2923.6 is SUSTAINED WITHOUT LEAVE TO AMEND. Section 2923.6 does not create a private right of action in favor of borrowers and does not create a duty owed by lenders to provide a loan modification to borrowers.

“The demurrer to the Fourth Cause of Action for Reformation is SUSTAINED WITH LEAVE TO AMEND. Defendants Wells Fargo did not have a duty to ensure that Plaintiffs were able to repay the loan.

“The demurrer to the Fifth Cause of Action to Quiet Title and Set Aside Foreclosure is SUSTAINED WITH LEAVE TO AMEND. Defendant Wells Fargo did not have a duty to ensure that the loan was in Plaintiffs’ best interests, or that they would be able to repay.

“The demurrer to the Sixth Cause of Action for Violation of Business & Professions Code section 17200 is SUSTAINED WITH LEAVE TO AMEND. The claim incorporates 68-pages of pleading. Plaintiffs have not alleged what unlawful, unfair, or fraudulent act by Defendant Wells Fargo is the basis for this claim. Plaintiffs do not allege facts supporting a claim for restitution.

“The demurrer to the Eighth Cause of Action Violation of the Fair Debt Collection Practices Act is SUSTAINED WITHOUT LEAVE TO AMEND. Civil Code section

1788.17, also known as the Rosenthal Act, does not apply to attempts by lenders to initiate foreclosure proceedings on loans secured by real property.

“The demurrer to the Ninth Cause of Action for Violation of Civil Code section 1572 is SUSTAINED WITH LEAVE TO AMEND. Plaintiffs have not alleged fraud with particularity. Defendants did not have a duty to determine Plaintiffs’ ability to repay.

“The demurrer to the Tenth Cause of Action for Injunctive Relief is SUSTAINED WITH LEAVE TO AMEND. The claim is dependent upon the existence of an underlying claim for relief, which is lacking.

“The Court does not find it necessary at this time to rule on Defendants’ arguments based on (1) the statute of limitations or (2) judicial estoppel resulting from the prior bankruptcy proceeding filed by Plaintiff Ronald W. Sparrow. The Court does not agree with Defendants that Plaintiffs’ claims are barred by the Homeowners Loan Act. [Citations.]”

On August 25, 2011, plaintiff filed a 40-page first amended complaint with causes of action for (1) declaratory relief; (2) fraud; (3) reformation; (4) to quiet title and set aside foreclosure; (5) violation of Business & Professions Code section 17200; (6) violation of Civil Code section 1572, negligent misrepresentation; and (7) injunctive relief.

Wells Fargo again demurred. The grounds varied, but in large part asserted that the deficiencies noted in the court’s ruling had not been cured. Wells Fargo reiterated that all of the causes of action were “barred by judicial and equitable estoppel as a result of discharge orders issued in plaintiffs’ bankruptcy proceedings.”

The trial court ruled on this demurrer as follows (with minor editorial changes):

“The demurrer to the First Cause of Action is SUSTAINED WITH LEAVE TO AMEND. Plaintiffs have not alleged facts that show that Defendants violated Civil Code section 2923.5. Plaintiffs admit that Defendants contacted them in letters and phone calls to discuss loan modification and a short sale. On its face, such conduct appears to be an effort to explore options to foreclosure and to assess Plaintiffs’ financial condition. The

Court takes judicial notice that the Notice of Default included the declaration required by Civil Code section 2923.5(g) stating that Defendant Wells Fargo had tried with due diligence to contact Plaintiffs. Civil Code sections 2923.52 and 2923.53 have been repealed, and Plaintiffs do not allege how these provisions support their claim for a loan modification. Plaintiffs fail to allege facts supporting a right to any particular loan modification. Civil Code section 2923.6 does not create a private right of action in favor of borrowers. The allegation that the deed of trust and note were separated does not state a viable claim for relief as a matter of law. (*Pantoja v. Countrywide Loans, Inc.* (N.D.Cal. 2009) 640 F.Supp.2d 1177, 1186; *Gomes v. Countrywide Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1156.) Plaintiffs admit that a substitution of trustee naming defendant Golden West Savings Association Servicing Company as trustee has been filed. Plaintiffs have not adequately alleged tender, which is a requirement for equitable relief. Plaintiffs' claims for violation of Civil Code sections 1624 and 2932.5 are conclusory. Commercial Code section 3302 is not applicable to foreclosure proceedings. Plaintiffs' claims of irregularity during the loan initiation appear to be time-barred.

“Plaintiffs’ claims for monetary damage . . . are barred by the doctrine of judicial estoppel. The Court takes judicial notice that Plaintiffs failed to disclose their claims for damage against Defendants at the time of their bankruptcy filings in 2009. The facts alleged show that the doctrine of judicial estoppel is fully applicable here, since Plaintiffs successfully took a position in the prior judicial proceeding that is directly contrary to their position in this action. Plaintiffs’ contention that Wells Fargo Bank, Wachovia Bank, and World Savings could have protested the bankruptcy is based on the status of those entities as creditors of Plaintiffs. Defendants’ judicial estoppel argument is directed at Plaintiffs’ claims for affirmative damages. There was no basis for Defendants to protest, because Plaintiffs did not disclose that they had claims for monetary damages against Defendants.

“The demurrer to the Second Cause of Action for Fraud is SUSTAINED WITH LEAVE TO AMEND. In addition to the problems with the First Cause of Action identified above, Plaintiffs have not alleged the facts supporting their fraud claims with

particularity, and have not alleged reasonable reliance. The claim for fraud appears on its face to be barred by the 3-year limitation period for fraud, and Plaintiffs have not alleged facts, with particularity, showing delayed discovery.

“The demurrer to the Third Cause of Action for Reformation and Fourth Cause of Action to Quiet Title and Set Aside Foreclosure is SUSTAINED WITHOUT LEAVE TO AMEND. The Court has already ruled that Plaintiffs’ theory based on inseparability of the promissory note and deed of trust does not state a viable claim. Plaintiffs are not allowed to challenge the right of the foreclosing beneficiary. (*Gomes v. Countrywide Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154, 1156.)

“The demurrer to the Fifth Cause of Action for Violation of Business & Professions Code section 17200 is SUSTAINED WITH LEAVE TO AMEND. Plaintiffs have not alleged a predicate act that supports a claim for restitution or injunctive relief. Even if Plaintiffs had stated a claim under Civil Code section 2923.5, it would not support restitution. The claim for injunctive relief is subsumed within the First Cause of Action for declaratory relief, and Plaintiffs do not show that injunctive relief is appropriate, given their failure and apparent inability to tender. Plaintiffs have not stated a predicate act based on harassing phone calls, because they do not allege any damage and do not claim that the calls are continuing. Plaintiffs have not stated a claim for fraud under RESPA [the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq.], because the Act does not require production of the original mortgage note.

“The demurrer to the Sixth Cause of Action for Negligent Misrepresentation is SUSTAINED WITH LEAVE TO AMEND. Plaintiffs have not alleged fraud with particularity. Negligent misrepresentation requires an affirmative representation of fact. Plaintiffs do not allege reliance on an affirmative representation of fact and resulting damage. The allegation of failure to disclose that the Pick-A-Payment option was negative amortization is based on failure to disclose, not an affirmative representation and Plaintiffs fall well short of alleging facts that would support a claim based on failure to disclose this fact. In any event, as discussed above, Plaintiffs are stopped to seek monetary damages.”

Plaintiff's 50-page second amended complaint was filed on November 23, 2011. Her causes of action were now reduced to (1) declaratory relief; (2) fraud; (3) violation of Business and Professions Code § 17200; (4) violation of Civil Code section 1572, negligent misrepresentation; and (5) injunctive relief.

Wells Fargo demurred to all but the fourth of these claims on the ground that "the claim is barred by judicial estoppel." As to the fourth cause of action, Wells Fargo asserted it was vulnerable because plaintiffs "have not alleged a viable underlying claim" and "cannot allege a tender of the amounts owing on the loan."

The court's final ruling was as follows:

"The demurrer to the First Cause of Action for Declaratory Relief . . . is SUSTAINED WITHOUT LEAVE TO AMEND. Plaintiff seeks a declaration that she is entitled to a loan modification, but has not alleged facts showing that Wells Fargo made an enforceable promise to a loan modification. Plaintiff seeks to enjoin foreclosure but does not allege facts showing that she can tender an amount sufficient to reinstate the loan and make reasonable monthly payments. Plaintiff cannot rely on promises to consider a loan modification that were provided by Wells Fargo in the *Mandrigues* class action law suit because Plaintiff opted out of that lawsuit, and to the extent Plaintiff seeks to enforce the ruling in that case, she must seek relief from the *Mandrigues* court. Finally, the underlying claims on which the First Cause of Action are based are time-barred, and Plaintiff has been unable to allege facts supporting tolling of the limitation periods based on delayed discovery.

"The demurrer to the Second Cause of Action for Fraud is SUSTAINED WITHOUT LEAVE TO AMEND. Plaintiff has still not alleged fraud with particularity. The face of the pleadings shows that Plaintiff's claim for fraud and for violation of the Truth In Lending Act . . . are time-barred, but Plaintiff does not allege facts showing why she failed to discover the alleged wrongful conduct at the time the loan closed or shortly thereafter. Plaintiff alleges that she first discovered the alleged fraud and related theories when she received the results of the forensic audit and received notice of the class action lawsuit, but she does not allege why she could not reasonably have discovered the alleged

problems well before those dates, and she does not allege any damage except from the negative amortization feature of the Pick-A-Payment loan. Plaintiff's claim for damages is also barred by the doctrine of judicial estoppel. The Court takes judicial notice that Plaintiff failed to disclose her claim for damage against Wells Fargo at the time of her bankruptcy filing in 2009, and that the bankruptcy court denied her recent request to reopen the bankruptcy proceeding. The facts alleged show that the doctrine of judicial estoppel is fully applicable here, since Plaintiff successfully took a position in the prior judicial proceeding that is directly contrary to her position in this action. Plaintiff argues that she was not aware of her claims against Wells Fargo at the time of the bankruptcy proceeding, but judicially noticeable facts show that Plaintiff was already claiming that she had a claim against her lender at the time the bankruptcy proceeding closed. Plaintiff also argues that judicial estoppel does not apply because title to the property was transferred to A.R.W. Sparrow, LLC, but that fact is irrelevant, since it is not ownership of the property that Plaintiff was required to disclose, but her claim for damages. If Plaintiff is suggesting that the claim belonged to A.R.W. Sparrow, LLC, the claim would not belong to her and she would lack standing to prosecute that claim.

“The demurrer to the Third Cause of Action for Violation of Business and Professions Code section 17200 is SUSTAINED WITHOUT LEAVE TO AMEND. This claim requires an underlying act that must be enjoined or gives rise to a claim for restitution. Any claim for restitution is barred by judicial estoppel. Plaintiff has not alleged facts showing that injunctive relief is appropriate, for the reasons in the ruling on the First Cause of Action. Plaintiff's claims based on TILA [Truth In Lending Act, 15 U.S.C. § 1601 et seq.] are time-barred. Plaintiff's allegation that Wells Fargo violated the Real Estate Settlement Act does not state a claim, because Wells Fargo is not required to produce the original note. Plaintiff has not stated a claim under the Rosenthal Fair Debt Collection Practices Act because she does not allege any damage or that the harassing calls are continuing.

“The demurrer to the Fourth Cause of Action for Negligent Misrepresentation is SUSTAINED WITHOUT LEAVE TO AMEND for failure to state a cause of action.

Plaintiff has still not alleged fraud with particularity. The face of the pleadings shows that Plaintiff's claim for fraud and for violation of the TILA are time-barred, but Plaintiff does not allege facts showing why she failed to discover the alleged wrongful conduct at the time the loan closed or shortly thereafter. Plaintiff alleges that she first discovered the alleged fraud and related theories when she received the results of the forensic audit and received notice of the class action lawsuit, but she does not allege why she could not reasonably have discovered the alleged problems well before those dates. Plaintiff's claim for damages is also barred by the doctrine of judicial estoppel. The Court takes judicial notice that Plaintiff failed to disclose her claim for damage against Wells Fargo at the time of her bankruptcy filing in 2009. The facts alleged show that the doctrine of judicial estoppel is fully applicable here, since Plaintiff successfully took a position in the prior judicial proceeding that is directly contrary to her position in this action. Plaintiff argues that she was not aware of her claims against Wells Fargo at the time of the bankruptcy proceeding, but judicially noticeable facts show that Plaintiff was already claiming that she had a claim against her lender at the time the bankruptcy proceeding closed. Plaintiff also argues that judicial estoppel does not apply because title to the property was transferred to A.R.W. Sparrow, LLC, but that fact is irrelevant, since it is not ownership of the property that Plaintiff was required to disclose, but her claim for damages. If Plaintiff is suggesting that the claim belonged to A.R.W. Sparrow, LLC, the claim would not belong to her and she would lack standing to prosecute that claim.

“The demurrer to the Fifth Cause of Action for Injunctive Relief is SUSTAINED WITHOUT LEAVE TO AMEND for failure to state a cause of action. Plaintiff does not allege facts showing that it would be equitable to enjoin the foreclosure sale. Plaintiff's underlying claims are time-barred, and she failed to disclose her claims against Wells Fargo in her bankruptcy proceeding. Plaintiff's allegation that Ronald Sparrow misrepresented his employment status on the loan application shows that Plaintiff has unclean hands. Plaintiff's conclusory allegation of ‘tender of indebtedness’ does not allege what was tendered, to whom, by whom, or when the tender was made. Plaintiff's

own allegations show that she claims her payment should have been \$3,865, and that she stopped making mortgage payments in August 2009.”

Following entry of a formal judgment of dismissal, plaintiff then perfected this timely appeal.

REVIEW

Although plaintiff started out with as many as a dozen causes of action, the ones at issue here are nowhere as numerous. Plaintiff contends that she has valid causes of action for (1) fraud, (2), violation of Business and Professions Code section 17200, (3) negligent misrepresentation, and (4) quiet title. Although the quiet title cause of action was not present in the second amended complaint, as Wells Fargo’s demurrer to it in the first amended complaint was sustained without leave to amend, it may nevertheless be addressed here even if it was not re-alleged in the second amended complaint. (See *Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 208-209.)

Plaintiff also challenges the trial court’s conclusion that her claims based on the Truth-In-Lending Act are time-barred, which would impact her fraud and negligent misrepresentation causes of action. Finally, plaintiff attacks the trial court’s determination that this is a proper instance of judicial estoppel. The four causes of action are all that are here for review.

Although at numerous points in her opening brief plaintiff insists that there is “substantial evidence of a reasonable probability” that she will “prevail” on various causes of action, this is not yet a consideration. The scope of our inquiry on this appeal is more modest.

“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.

[Citation.]” (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869-870.) Thus, we are not concerned with plaintiff’s ability to prove what she alleges in her second amended complaint, only whether that pleading makes out a claim for some relief, even if an amount less than claimed. (*Caldera Pharmaceuticals, Inc. v. Regents of University of California* (2012) 205 Cal.App.4th 338, 350.)

But there are other considerations. “A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any of the grounds stated in the demurrer, whether or not the court acted on that ground” (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.) And the most fundamental principle of appellate review is that “A judgment or order of a 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.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

An appeal from a final judgment is ordinarily appropriate to review a variety of orders or rulings made prior to entry of the judgment. However, this does not apply to orders or rulings that are independently appealable. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 128; *In re Matthew C.* (1993) 6 Cal.4th 386, 393.) Therefore, we do not examine the propriety of the trial court denying plaintiff’s request for a preliminary injunction, because that ruling could have been appealed. (Code Civ. Proc., § 904.1, subd. (a)(6).) And as to her attack on the denial of her peremptory challenge to the trial court, review of such a ruling may not be obtained by appeal, but only by a petition for an

extraordinary writ of mandate.¹ (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 110.)

As previously mentioned, plaintiff is continuing to represent herself. “A lay person . . . who exercises the privilege of trying his own case must expect and receive the same treatment as if represented by an attorney—no different, no better, no worse.” (*Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1009.) She is therefore “ “restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts.” ’ ’ ” (*City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 819.) “[A]s is the case with attorneys, pro. per. litigants must follow correct rules of procedure.” (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.) This requires her to establish that the judgment cannot be sustained on any of the grounds of Wells Fargo’s demurrer or the trial court’s orders. Plaintiff’s selective arguments fail to address all of the possible grounds that may support the trial court’s judgment.

“ ‘Instead of a fair and sincere effort to show the trial court was wrong, appellant’s brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondent. An appellant is not permitted to evade or shift his responsibility in this manner.’ [Citations.] . . . [I]t is no more than a rehash of arguments about the strength of the evidence, which is not open on appeal.” (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 102; accord *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 505.) An appellant cannot simply reiterate arguments that lost in the trial court without attempting to demonstrate error and prejudice. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

Unfortunately, that is largely what plaintiff does in her briefs. Most of her briefs are simply reproductions of material produced in the trial court. Although there is no rule

¹ Plaintiff accuses the trial court (Hon. Ronni MacLaren) of “retaliation” because plaintiff filed a complaint with the Commission on Judicial Performance. One reason the trial court’s demurrer rulings were quoted at such length is that they—and indeed, the entire record—contain no hint of any bias.

requiring an appellant to rework arguments that failed in the trial court—indeed, in this case failed repeatedly—it does seem common sense that a new approach might be in order. Repeatedly accusing the trial court of “detour[ing] from the issue” does not assist matters.

The Cause of Action for Fraud

“ ‘ “The elements of fraud . . . are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity . . . ; (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” ’ ” (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173, quoting *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) “ ‘In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] “Thus, ‘ “the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.” ’ [Citation.] This particularity requirement necessitates pleading *facts* which ‘show how, when, where, to whom, and by what means the representations were tendered.’ ” ’ ” (*Small v. Fritz Companies, Inc., supra*, at p. 184, quoting *Lazar v. Superior Court, supra*, p. 645.) “The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent misrepresentations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.” (*Tarman v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

From the beginning, in each of its three orders, the trial court reminded plaintiff of the principle that fraud must be alleged with detailed particularity. The relevant portions of plaintiff’s second amended complaint (pp. 3, 16-26) show why the trial court did not give plaintiff a third opportunity to meet this requirement.

“In early January 2005, Plaintiff responded to solicitation by World Saving to engage its services to procure a home loan in connection with his [*sic*] interest in a property located at 33089 Calistoga Street, Union City, CA 94587. A second refinance occurred on or round June 2007. Wachovia made material misrepresentations and omitted material facts from its sale pitch. Among other things, Plaintiff was not told that

taking out a 100% loan with a three year pre-payment penalty would prevent him from refinancing his loan during that period unless there was a substantial increase in the market value of the property. To the contrary, World Saving representative told Plaintiff(s) they could refinance the property at a lower fixed rate within two years to keep the mortgage low and affordable.”

“Defendant [*sic*] act of fraud was that they ‘failure to disclose negative amortization mortgage note called the Pick-A-Payment. Defendant is attempting to treat all of Plaintiff’s separately-alleged violations as solely a ‘failure to disclose negative amortization. Undoubtedly, the cumulative effect of Defendants’ conflicting disclosures and glaring omissions is that Plaintiff entered into her loan without being told and without knowing that it was certain to result in negative amortization.”

“Wachovia made material misrepresentations and omitted material facts that they failed to disclose that the pick-a-payment mortgage loan was a negative amortization package.”

“Defendants’ TILA Violation Relating to Negative Amortization—Inaccurate statements about the likelihood of Negative Amortization is an initial matter, Defendants’ first TILA violation arises because they made inaccurate, incomplete and conflicting statements regarding negative amortization, not because there was a complete absence of disclosure. Because Defendants chose the words they use to make these disclosures, they are responsible for making sure the language they used to disclose was both meaningful and truthful.”

“Defendants through deception and their reliance were justified as they believed that Defendant, and each of them, working for them and in their best interest. Defendant verbally promised a modification and subsequently Rejected said offer after Plaintiff fully complied with Defendant World Saving’s requests for financial information. In 2005 when Plaintiff(s) refinanced the mortgage with World Saving they were given a Pick-a-Payment loan, when Plaintiff(s) asked about the increase in payment, Defendant assured them that they could refinance the loan and therefore keep the loan affordable. The deceit and fraud in Defendant action was that they did not disclosed that the loan was

a negative amortization loan, in essence Plaintiff(s) would never be able to afford the loan and the principal will never decrease.”

Contrary to what we said at the beginning of this opinion, the situation regarding the fraud cause of action is an instance where it is very pertinent to emphasize the differing identifies of the parties involved. It appears from plaintiff’s allegations that the original refinance occurred in 2005. Although the month the actual refinancing occurred is not specified, the other party to the refinancing was World Savings Bank. The second refinance, although somewhat more specific as to date (“on or round June 2007”), clearly involved Wachovia Mortgage. Thus, Wells Fargo is being asked to stand liable for representations and omissions made by the employees of two other institutions that were, at the relevant periods, completely unrelated to Wells Fargo. It is particularly appropriate in these circumstances to enforce the heightened specificity requirement for a fraud cause of action.

The key to plaintiff’s cause of action is the “failure to disclose [the] negative amortization mortgage note called the Pick-A-Payment.” But plaintiff does not identify whether it was a World Savings or Wachovia employee responsible for this failure, although, from the allegation “Wachovia made material misrepresentations and omitted material facts that they failed to disclose that the pick-a-payment mortgage loan was a negative amortization package,” it appears to be the latter. On the other hand, the allegation “In 2005 when Plaintiff(s) refinanced the mortgage with Word Saving they were given a Pick-a-Payment loan” points at the other lender. And the allegation “the cumulative effect of Defendants’ conflicting disclosures and glaring omissions is that Plaintiff entered into her loan without being told and without knowing that it was certain to result in negative amortization” appears to point to at least two lenders.

The issue of which, or both, of Wells Fargo’s predecessors in interest actually made the misrepresentations or omissions is thus far from clear. This confusion only compounds the need for precise allegations as to the circumstances attending the claimed misrepresentations or omissions. (*Small v. Fritz Companies, Inc.*, *supra*, 30 Cal.4th 167, 184; *Lazar v. Superior Court*, *supra*, 12 Cal.4th 631, 645; *Tarman v. State Farm Mut.*

Auto. Ins. Co., *supra*, 2 Cal.App.4th 153, 157.) Plaintiff did not attach to her second amended complaint any documents from either of the refinancings, which hardly clarifies matters to plaintiff's advantage. (See *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248 ["with regard to the alleged fraudulent omissions . . . the enhanced pleading burden of a fraud claim is met by the attachment of the relevant . . . documents"].) This is particularly true with respect to the Truth-In-Lending disclosure statement which the lender was required to provide, and which plaintiff was required to sign, prior to completion of the refinancing. (See 12 U.S.C. § 2603; 12 C.F.R. §§ 226.17, 226.19.)²

With the trial court having already twice told plaintiff that greater specificity was required, and given her two opportunities to provide more precise allegations, we cannot conclude the trial court erred in not giving plaintiff yet another opportunity to make good the deficiency. This conclusion is only reinforced by our determination *post*, that the allegations in plaintiff's fraud cause of action that are based on the federal Truth-In-Lending Act (TILA) are time-barred.

The Cause of Action For Negligent Misrepresentation

"The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. [Citation.] In contrast to fraud, negligent misrepresentation does not require knowledge of falsity. A defendant who makes false statements ' "honestly believing that they are true, but without reasonable ground for such belief, . . . may be liable for negligent misrepresentation" [Citations.]' [Citation.] However, a positive assertion is required; an omission or an implied assertion or representation is not sufficient. [Citations.]" (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.) The rules for

² It was not until 2010 that information about negative amortization was included in the required disclosures. (See 12 C.F.R. § 226.18(s).)

pleading fraud are also applicable to negligent misrepresentation. (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 185, fn. 14; *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.)

Virtually the entirety of plaintiff’s fraud cause of action is incorporated by reference into her cause of action for negligent misrepresentation, although much of the material is re-alleged under the heading “Alleging Fraud With Particularity.” TILA-based allegations permeate the cause of action for negligent misrepresentation just as prominently as they do the fraud cause of action. Much of the cause of action for negligent misrepresentation is based on omissions and Wells Fargo’s noncompliance with its “duty to disclose.”

Plaintiff’s cause of action for negligent misrepresentation is even more vulnerable than the one for fraud. Not only are the TILA-based allegations to be excluded from consideration because they are time-barred, so are all misrepresentations by omission are not to be considered. What is left are purely express representations that are not founded on the federal law. What we concluded concerning the lack of specificity—and plaintiff’s missed opportunities to correct them with respect to her fraud cause of action—is just as applicable to her cause of action for negligent misrepresentation.

The Cause of Action For Unfair Competition

California’s Unfair Competition Law (UCL) defines unfair competition as “any unlawful, unfair, or fraudulent business act or practice” (Bus. & Prof. Code, § 17200) Although the statutory language is directed at commercial enterprises, it also protects the public from fraud and unlawful conduct. (*Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 283.) But “[w]hile the scope of conduct covered by the UCL is broad, its remedies are limited. [Citation.] A UCL action is equitable in nature; damages cannot be recovered. [Citation.] Civil penalties may be assessed in public unfair competition actions, but the law contains no criminal provisions. [Citation.] We have stated that under the UCL, ‘[p]revailing plaintiffs are generally limited to injunctive relief and restitution.’ ” (*Korea Supply Company v. Lockheed Martin Corporation* (2003) 29 Cal.4th 1134, 1144.)

This cause of action in plaintiff’s second amended complaint begins with three pages of allegations summarizing *Boschma v. Home Loan Center, Inc., supra*, 198 Cal.App.4th 230, where a Court of Appeal concluded that borrowers who had obtained adjustable rate mortgages with a negative amortization feature could state a claim for fraudulent omissions under the UCL. (*Id.* at pp. 234-235.)³ Plaintiff then alleged that “the violations” of the UCL and the TILA discovered in the forensic audit amounted to “fraudulent concealment” and “non-disclosure” of the negative amortization feature of the Pick-A-Payment refinancing. Plaintiff then detailed—just as she did in the fraud and negligent misrepresentation causes of action—all of the particulars of the lender’s noncompliance with the TILA. “As a result of the foregoing unlawful conduct,” and the notice of default, plaintiff “suffered monetary and property loss,” specifically, “diminished access to credit, fees, and costs, including, without limitation, and costs with respect to the wrongful ‘Notice of Default to Sale’ and loss of some or all of the benefits appurtenant to the ownership and possession of real property. [¶] As a result of Defendants’ unfair competition, and unfair business practices Plaintiffs are entitle to restitution for all sums received by Defendants . . . including, without limitation, the excessive fees . . . and premiums received up selling the mortgages at an inflated value.”

Plaintiff then alleged that “several courts have acknowledged . . . WELLS FARGO . . . is not the owner of the underlying note and therefore could not transfer the note, the beneficial interest in the deed of trust, or foreclose upon the *property secured by the deed.*” She concluded by asserting that the TILA violations were not time-barred, and “Judicial estoppel does not apply.” In the prayer for this cause of action, plaintiff sought “an Order enjoining Defendants from continuing to . . . violate the statutes alleged,”

³ *Boschma* is obviously distinguishable because the UCL claim there was (1) based on a valid fraud cause of action, (2) which was in turn substantiated with considerable documentation from the refinancing, and (3) did not involve alleged TILA non-disclosures that were time-barred. (See *Boschma v. Home Loan Center, Inc., supra*, 198 Cal.App.4th 230, 235-241, 247, 253.)

costs, reasonable attorney’s fees, and “such other and further relief as the court may deem proper.”⁴

As will be shown, the trial court correctly determined that plaintiff’s claims based on TILA violations are time-barred. The UCL cannot be used to plead around the TILA’s statute of limitations. (*Jordan v. Paul Financial, LLC* (N.D.Cal. 2010) 745 F.Supp.2d 1084, 1098-1099; *Champlaine v. BAC Home Loans Servicing, LP* (E.D.Cal. 2009) 706 F.Supp.2d 1029, 1045.) Plaintiff’s personal damages—and that presumes she has monetary damages—are not to be considered here (*Korea Supply Company v. Lockheed Martin Corporation, supra*, 29 Cal.4th 1134, 1144). However, none of the causes of action she is contesting on this appeal establishes that she did, which would be even more true if plaintiff is correct in her insistence that ownership of the property was transferred to an LLC.

Plaintiff included no allegation that the purportedly misleading and fraudulent practices she experienced in 2005 and 2007 are still being used by Wells Fargo, which is a prerequisite for the injunctive relief she sought. (*Pfizer Inc v. Superior Court* (2010) 182 Cal.App.4th 622, 631, fn. 5; *Madrid v. Perot Systems Corporation* (2005) 130 Cal.App.4th 440, 464-465.) Like the fraud count, the absence of the loan documents works against plaintiff. (See *Boschma v. Home Loan Center, Inc., supra*, 198 Cal.App.4th 230, 253 [“Plaintiffs’ [UCL] allegations also focus on the same material omissions/misleading disclosures in the loan documents”].) Finally, as will also be

⁴ Various state and federal statutory violations were also mentioned, but they do not feature in plaintiff’s argument here. Only the federal Real Estate Settlement and Procedures Act is mentioned in plaintiff’s opening brief, but the references to “violations” are so fleeting and undeveloped with sustained argument that we deem them not a part of plaintiff’s presentation on this appeal. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [“ [E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]’ [Citations.] This principle is especially true when an appellant makes a general assertion, unsupported by specific argument”].)

shown, plaintiff's theory of the inseparability of the promissory note and deed of trust is erroneous.

For each and all of these reasons, we conclude the trial court did not err in sustaining a general demurrer to this cause of action without granting further leave to amend.

The Truth In Lending Act

This federal statute imposes a number of disclosures which a lender must provide to a consumer refinancing a residence. (E.g., 15 U.S.C. §§ 1638a, 1639, 1639b, 1639c.) Wells Fargo's alleged violations of these obligations permeated plaintiff's fraud, unfair competition, and negligent misrepresentation causes of action. The TILA allows civil damages for violations of its provisions, but action must be commenced "within one year from the date of the occurrence of the violation." (15 U.S.C. §§ 1640, subds. (a), (e).)

Ordinarily, application of this statute would put plaintiff out of court because the one-year period would commence at the time plaintiff executed the loan documents, that is, no later than June 2007. (*Cervantes v. Countrywide Home Loans, Inc.* (9th Cir. 2011) 656 F.3d 1034, 1045-1046.) Plaintiff sought to avoid this result by invoking the doctrine of equitable tolling. However, " 'if on the face of the complaint the action appears barred by the statute of limitations, plaintiff has an obligation to anticipate the defense and plead facts to negative the bar.' " (*Union Carbide Corporation v. Superior Court* (1984) 36 Cal.3d 15, 25.) This means that the plaintiff must put forth allegations that establish the existence "of the elements necessary for application of the doctrine of equitable tolling." (*Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 407.) " 'Absent such allegations, the complaint is subject to demurrer' " (*Gentry v. EBay, Inc.* (2006) 99 Cal.App.4th 816, 824.)

Plaintiff continues to advance the same argument the trial court repeatedly rejected—that she did not have actual knowledge of the falsity of the misrepresentations and omissions attending the refinancing until she learned of the "forensic audit" in

August 2010, less than a year before this action was commenced in May 2011.⁵ But here plaintiff mistakenly assumes that equitable tolling continues until actual knowledge of the misrepresentation is obtained. But equitable tolling is not dependent upon a plaintiff's subjective knowledge. It is pegged to "inquiry notice," a type of constructive notice that charges the plaintiff with the knowledge that a reasonable investigation would have produced. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807-808.)

The "forensic audit" is not a government document, or some industry-wide analysis, but a personalized "Forensic Mortgage Violation Assessment Screening Post-Close Audit" prepared by the Neighborhood Assistance Corporation of America that was "prepared . . . on behalf of Arlene Bell-Sparrow," with "Date Audited" being "05/19/2010." Clearly, at some point plaintiff had suspicions about the propriety of her refinancing, which led her to commission this audit. But what she was required to provide, what she was repeatedly reminded by the trial court to furnish, was an explanation of why she had not acted sooner. (*Union Carbide Corporation v. Superior Court, supra*, 36 Cal.3d 15, 25; *Aubry v. Goldhor, supra*, 201 Cal.App.3d 399, 407.) Because that explanation was not forthcoming, there was no error in sustaining Wells Fargo's third demurrer attacking those portions of plaintiff's causes of action that were based on alleged violations of the TILA. (*Gentry v. EBay, Inc., supra*, 99 Cal.App.4th 816, 824.)

The Cause of Action To Quiet Title

The gist of this cause of action, as alleged by plaintiff in her first amended complaint, appears to be that Wells Fargo had no superior title to foreclose because while plaintiff's original deed of trust with the originating lender had been transferred to Wells Fargo, there was no evidence that the promissory note was also transferred. The trial court sustained the demurrer without leave to amend on the ground that it "has already ruled that Plaintiffs' theory based on inseparability of the promissory note and deed of trust does not state a viable claim. Plaintiffs are not allowed to challenge the right of the

⁵ Appellant states in her opening brief that she "requested" the audit in May 2010.

foreclosing beneficiary. (*Gomes v. Countrywide Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154, 1156.)” This conclusion was correct.

The plaintiff in *Gomes* borrowed money from KB Home Mortgage, and executed a promissory note secured by a deed of trust. The deed identified KB Home as the lender, and Mortgage Electronic Registration Systems (MERS) as the holder of legal title, and entitled to act on behalf of the lender, as well the lender’s successors and assigns. Gomes defaulted and was sent a notice of default and election to sell by ReconTrust—which identified itself as an agent for MERS—accompanied by a declaration from the loan servicer, Countrywide Loans. Gomes initiated suit to establish that “MERS lacks the authority to initiate the foreclosure process because it was not authorized to do so by the owner of the Note,” which had apparently been sold by “KB Home . . . on the secondary mortgage market.” (*Gomes v. Countrywide Loans, Inc., supra*, 192 Cal.App.4th 1149, 1151-1152.) The pages of *Gomes* cited by the trial court (with a little more included by us) read:

“California’s nonjudicial foreclosure scheme is set forth in Civil Code sections 2924 through 2924k, which ‘provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.’ [Citation.] ‘These provisions cover every aspect of exercise of the power of sale contained in a deed of trust.’ [Citation.] ‘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.’ [Citation.] ‘Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the nonjudicial foreclosure statute.’ [Citation.]

“By 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. As Defendants correctly point out, Gomes has identified no legal authority for such a lawsuit. Nothing

in the statutory provisions establishing the nonjudicial foreclosure process suggests that such a judicial proceeding is permitted or contemplated.” (*Gomes v. Countrywide Loans, Inc., supra*, 192 Cal.App.4th 1149, 1154, fns. omitted.)

“Gomes appears to acknowledge that California’s nonjudicial foreclosure law does not provide for the filing of a lawsuit to determine whether MERS has been authorized by the holder of the Note to initiate a foreclosure. He argues, however, that we should nevertheless interpret the statute to provide for such a right because ‘the Legislature may not have contemplated or had time to fully respond to the present situation.’ That argument should be addressed in the first instance to the Legislature, not the courts. Because California’s nonjudicial foreclosure statute is unambiguously silent on any right to bring the type of action identified by Gomes, there is no basis for the courts to create such a right. We therefore conclude that the trial court properly sustained Defendants’ demurrer to . . . Gomes’s complaint.” (*Gomes v. Countrywide Loans, Inc., supra*, 192 Cal.App.4th 1149, 1156, fns. omitted.)

This reasoning is sound, and has been followed by other courts. (See *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440-442; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 268; *Jensen v. Quality Loan Service Corp.* (E.D.Cal. 2010) 702 F.Supp.2d 1183, 1189; *Osei v. Countrywide Home Loans* (E.D.Cal. 2010) 692 F.Supp.2d 1240, 1250-1251.) It was correctly accepted by the trial court as controlling.

The federal district court decision cited by the trial court is even clearer: “Under California law, there is no requirement for the production of an original promissory note prior to the initiation of a nonjudicial foreclosure. [Citations.] Therefore, the absence of an original promissory note in a nonjudicial foreclosure does not render the foreclosure invalid.” (*Pantoja v. Countrywide Home Loans, Inc., supra*, 640 F.Supp.2d 1177, 1186.) And, like *Gomes*, this decision is one of many. (See, e.g., *Ngoc Nguyen v. Wells Fargo Bank, N.A.* (N.D.Cal. 2010) 749 F.Supp.2d 1022, 1035; *Jensen v. Quality Loan Service Corporation, supra*, 702 F.Supp.2d 1183, 1189; *Saldate v. Wilshire Credit Corporation*

(E.D.Ca. 2010) 686 F.Supp.2d 1051, 1068; *Hafiz v. Greenpoint Mortgage Funding, Inc.* (N.D.Cal. 2009) 652 F.Supp.2d 1039, 1043.)

Plaintiff is not able to convince us otherwise with decisions from other states and this boilerplate statement from *Munger v. Moore* (1970) 11 Cal.App.3d 1, 7: “[A] trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there has been an illegal, fraudulent or willfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust.” This statement assumes the existence of what is missing here, namely “an illegal . . . sale of property.”⁶

In light of the foregoing, the judgment may be affirmed without examining the question of whether judicial estoppel was correctly invoked against plaintiff.

DISPOSITION

The judgment is affirmed.

Richman, J.

We concur:

Kline, P.J.

Haerle, J.

⁶ Indeed, in her reply brief, plaintiff as much as concedes that the property has not been sold.