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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MARTHA E. LOWE et al., Plaintiffs and Appellants, v. NL, INC. et al., Defendants and Respondents.	A138164 (Alameda County Super. Ct. No. RG12616626)

Martha E. Lowe and Ralph Kanz (collectively, the borrowers) sued a number of parties, including, NL, Inc. (NL), RPM Mortgage, Inc. (RPM), and Placer Title Company (Placer Title) for, among other things, fraud and negligent misrepresentation. NL and RPM (collectively, the mortgage companies) demurred and Placer Title filed a separate demurrer. The trial court sustained both demurrers with leave to amend and, after the borrowers filed an amended complaint, the mortgage companies and Placer Title again demurred. The trial court sustained these demurrers without leave to amend, and the borrowers appeal. We affirm.

BACKGROUND

The borrowers, a married couple, entered into a loan transaction with NL in May 2005 to purchase a property in Oakland, California (the property).[1] In 2011, after receiving loan documents, they believed that their loan application had been backdated,

[1] The facts are from the pleadings.

forged, and changed. In February 2012, the borrowers, in propria persona, filed a verified complaint with nine causes of action against various defendants, including the mortgage companies and Placer Title. The claims related to the loan and purchase of the property and their pleading included causes of action for rescission, declaratory relief, and intentional and negligent misrepresentation. The mortgage companies and Placer Title separately demurred.

On October 24, 2012, the trial court sustained the demurrers with leave to amend. The court explained that the fraud causes of action in the amended pleading "must be pled with the required particularity." The court also advised the borrowers that they "shall allege facts, if possible, in support of (a) any cognizable cause(s) of action [that] are not barred by the applicable statute(s) of limitations, or (b) any cognizable causes(s) of action and reasons why the applicable statute(s) of limitations do not apply thereto. Particularly, to the extent [the borrowers] intend[] to rely on the 'discovery rule' to delay accrual beyond the date(s) of the alleged misconduct reflected in the complaint, [the borrowers] must allege the time and manner of [the borrowers'] discovery and [their] inability to have made earlier discovery despite reasonable diligence. Currently, [the borrowers] have failed to allege facts to bring [their] causes of action within the discovery rule."

The borrowers filed their verified first amended complaint (FAC) against numerous defendants on November 14, 2012. Of the eight causes of action set forth in the FAC, six of them were against the mortgage companies and/or Placer Title. These causes of action were the following: fraud in the inducement (first cause of action) against the mortgage companies and Placer Title, declaratory relief (second cause of action) against NL, cancellation of instrument (third cause of action) against the mortgage companies and Placer Title, intentional misrepresentation (fourth cause of action) against the mortgage companies and Placer Title, negligent misrepresentation (fifth cause of action) against the mortgage companies and Placer Title, and quiet title (eighth cause of action) against the mortgage companies.

According to the FAC, on April 15, 2005, the borrowers met with Susan A. Thomas, a loan consultant at La Salle Financial Inc. (LaSalle), and signed a loan application (handwritten loan application).[2] La Salle, according to the FAC, "was acting as the agent, joint venture[r], partner, representative . . . of RPM and/or NL." Lowe told Thomas that her annual income was $50,840 and Kanz reported a salary of "approximately $10,000." Thomas told them that they qualified for a $350,000 loan at 5.75 percent interest and that they could "reasonably purchase a home with a value as high as $500,000." Thomas, according to the FAC, knew that the borrowers' income "would not support being approved for a $350,000 mortgage loan." The borrowers did not receive a copy of the loan application that they signed.

After consulting with their real estate agent, Luanne Warner Katz, the borrowers on April 23, 2005, submitted an offer of $473,000 for the property. The seller rejected this offer and the borrowers increased their offer to $487,000, which the seller accepted. The borrowers paid a deposit of $14,610.

On April 27, 2005, Katz contacted Jackie Hutty, an agent for Placer Title, to complete a Preliminary Title Report and Escrow Transaction. On this same date, Katz also contacted LaSalle and spoke with Thomas or Susan M. Andrade about the borrowers' possible purchase of the property. Andrade determined that Lowe had an excellent credit score but Kanz did not have credit and was ineligible for a mortgage loan. Andrade contacted Lowe and proposed a loan at 5.875 percent. She advised Lowe that she, alone, should be on the loan. The borrowers received no other information or disclosures regarding the loan.

On this same date, April 27, 2005, Thomas or Andrade contacted Craig J. Conrad to have him appraise the property. Conrad, according to the FAC, was an agent of the mortgage companies and was informed that the target value for the appraisal was

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[2] Attached to the FAC is exhibit B, a loan application with the information handwritten on the form. Lowe, Kanz, and Thomas signed this application on April 15, 2005.

$487,000. Conrad submitted his appraisal on April 29, 2005, and, based on the "sales comparison approach," valued the property at $487,000.

On May 6, 2005, NL transmitted "Specific Closing Instructions" to Placer Title as well as other closing documents that needed to be signed. On this same date, RPM transmitted a facsimile with various documents, including a loan application with the information typed on the form.

On May 12, 2005, the borrowers signed the closing documents at the offices of Placer Title. Lowe executed a promissory note (the note) for $350,000, secured by the property that designated NL as the "Lender." The borrowers also signed a deed of trust (the deed). The documents included the disclosure that the note was being sold and that Countrywide and Bank of America, National Association (Bank of America), as successor to Countrywide, would assume servicing the note.

Lowe admitted that on May 12, 2005, after she signed the note, she did receive a copy of the typed loan application. She signed this loan application on May 12, 2005, and it was missing "Section X," which stated that a face-to-face interview had been conducted. Additionally, the loan application sent by RPM contained fraudulent income amounts for Lowe "that someone placed in the application without [the borrowers'] approval or consent." The borrowers asserted in their FAC: "Lowe was quickly going through numerous documents and had no reason to think Defendants would have altered the income information she had provided or in any other way falsify documents. As a result Lowe was unaware Defendants had overstated her monthly income."

On May 16, 2005, the borrowers wired a payment of $137,222.71 to Placer Title to be placed into escrow. Placer Title recorded the deed on May 17, 2005.

From 2009 through 2011, the borrowers sought to modify their home loan. On June 16, 2011, the borrowers received a letter with the loan documents from Bank of America. The loan application included two copies of page three. The first copy of page three had Lowe's signature, which was forged, according to the FAC. "Section X" on page three stated that Lowe "met in a '[f]ace-to-face interview' with" Andrade. It showed the date of April 15, 2005, and a purchase price of $487,000, but this sale price, according to the FAC, "was not agreed to until April 26, 2005." The second copy of page three, the one actually signed by Lowe, did not include "Section X," and had the date of May 12, 2005. This section was redacted, according to the FAC, "to conceal from [the borrowers] the fraudulent information that Lowe had met face-to-face with Andrade, and that Andrade had not signed and dated the application." Other than the different dates and the missing "Section X," the two page threes contained identical information. On September 20, 2011, the borrowers received a copy of the appraisal, which they had not received previously. They noticed that it contained inaccurate information.

The FAC alleged that "[a]ny applicable statutes of limitations have been tolled until June 16, 2011[,] when [the borrowers] received a copy of the [loan] application" from Bank of America.

The FAC declared that on March 12, 2012, after the borrowers had filed their original complaint in this action, counsel for LaSalle provided the borrowers with the handwritten loan application dated April 15, 2005. This, according to the FAC, was the first time the borrowers discovered that the information contained in the handwritten application dated April 15, 2005, had been changed or added without their consent. Specifically, they discovered the following: The interest rate was changed after April 15, 2005, from 5.75 to 5.875 percent. The loan included the address of the property but that was not known until the offer was accepted on April 26, 2005. The legal description stated, "See Prelim," but the Preliminary Title Report was not ordered until April 27, 2005. The gross monthly income had numbers not provided by the borrowers. They also asserted that the amounts in the "Proposed" portion of the application regarding a mortgage payment was based on the purchase price and could not have been calculated until after April 15. Furthermore, the taxes listed were significantly lower than the amount actually paid by the borrowers. They alleged in their FAC that "Section VII clearly shows that originally $500,000 was written, and $487,000 was written over it, which had to occur after April 26, 2005." The application, according to the FAC, contained other errors, including the listing of Kanz's assets and inheritance even though he was not a co-borrower.

The borrowers also charged that they had not received any of the required disclosures as part of the loan process. The FAC requested unspecified monetary damages and the cancellation of the promissory note and deed.

Both the mortgage companies and Placer Title specially and generally demurred to the FAC.[3] On January 11, 2013, the trial court held the hearing on the demurrers, and issued its orders on January 14, 2013. The court sustained both demurrers against the FAC without leave to amend.

With regard to Placer Title, the trial court explained: "After an opportunity to amend, [the borrowers] still fail to state facts sufficient to constitute a cognizable cause or causes of action against [Placer Title]. The [FAC] continues to be uncertain without proper explanation as to the nature of and extent of [Placer Title's] liability[,] leaving [Placer Title] unable to answer." The court dismissed the action as to Placer Title.

The trial court ruled as follows with regard to the mortgage companies: "After an opportunity to amend, [the borrowers] still fail to state facts sufficient to constitute a cognizable cause or causes of action against [the mortgage companies]. Additionally, [the borrowers] failed to allege facts in support of (a) any cognizable cause(s) of action [that] are not barred by the applicable statute(s) of limitations, or (b) any cognizable cause(s) of action and reasons why the applicable statute(s) of limitations do not apply thereto." The court dismissed the mortgages companies from the action.

On March 7, 2013, the borrowers, in propria persona, filed their notice of appeal.

DISCUSSION

I. *Standard of Review*

The standard of review governing an appeal from the judgment after the trial court sustains a demurrer without leave to amend is well established. " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or

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[3] In the trial court, Placer Title did not specify that it was both generally and specifically demurring. However, in its memorandum of points and authorities in support of its demurrer, it asserted that the FAC failed to state a cause of action and that the FAC lacked specificity.

conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

An order sustaining a demurrer may be upheld on a ground not considered by the trial court " ' "as long as it comes within the four corners of the demurrer, namely, a failure to state a cause of action." ' [Citations.]" (*Gabriel v. Wells Fargo Bank, N.A.* (2010) 188 Cal.App.4th 547, 556.)

Additionally, we note that the borrowers appear in this court in propria persona, as they did in the trial court. " ' "When a litigant is appearing in propria persona, he [or she] is entitled to the same, but no greater, consideration than other litigants and attorneys [citations]. Further, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney [citation]." [Citations.]' [Citation.] In other words, when a litigant accepts the risks of proceeding without counsel, he or she is stuck with the outcome, and has no greater opportunity to cast off an unfavorable judgment than he or she would if represented by counsel." (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267.)

II. *Appealability*

Although not raised as an issue by any party, the borrowers are appealing from orders sustaining the demurrers, which are nonappealable orders. (See, e.g., *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 920, disapproved on other grounds in *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1074.) The existence of an appealable judgment or order is a jurisdictional prerequisite to an appeal. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.) A reviewing court must raise the issue on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by Code of Civil Procedure section 904.1.[4] (*Harrington-Wisely v. State of California* (2007) 156 Cal.App.4th 1488, 1494.) Thus, prior to addressing the merits of the borrowers' arguments, we must first determine whether we have jurisdiction over this appeal.

Some courts have deemed an order sustaining a demurrer without leave to amend to incorporate a judgment of dismissal in the interest of justice and to prevent delay. (*Beazell v. Schrader* (1963) 59 Cal.2d 577, 579-580.) In the present case, the trial court's orders reveal a clear intention to make a final ruling, as the court dismissed the mortgage companies and Placer Title from the lawsuit. (See *Randle v. City and County of San Francisco* (1986) 186 Cal.App.3d 449, 454.) The orders fully resolve all issues concerning the borrowers and the mortgage brokers and Placer Title. We therefore exercise our discretion to deem the minute orders that sustained the demurrers without leave to amend and dismissed the mortgage brokers and Placer Title as judgments of dismissal, and we will treat the notice of appeal as applying to the judgments. (See, e.g., *Beazell*, at pp. 579-580; *Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1098.)

III. ***The Fraud and Misrepresentation Claims***

A. ***The Pleading Requirements***

The borrowers set forth claims for fraud in the inducement (first cause of action), intentional or fraudulent misrepresentation (fourth cause of action), and negligent misrepresentation (fifth cause of action) against the mortgage companies and Placer Title. To establish a claim for fraud in the inducement or intentional or fraudulent misrepresentation, the plaintiff must prove: " '(1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the

[4] All further unspecified code sections refer to the Code of Civil Procedure.

defendant intended that the plaintiff rely on the representation; (5) the plaintiff *reasonably relied on the representation;* (6) the plaintiff was harmed; and, (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. [Citations.]' " (*Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434.) Negligent misrepresentation is similar to intentional misrepresentation but it lacks the element of intent to deceive and the plaintiff needs to allege the defendant lacked any reasonable ground for believing the statement to be true. (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184.)

Allegations in a fraud action "must be specifically pleaded. This means: (1) general pleading of the legal conclusion of fraud is insufficient; and (2) every element of the cause of action for fraud must be alleged in full, factually and specifically, and the policy of liberal construction of pleading will not usually be invoked to sustain a pleading that is defective in any material respect." (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331.)

B. ***Failure to State Sufficient and Specific Facts***

With regard to their first cause of action, the borrowers asserted in their FAC that their application for the loan was forged, backdated, and falsified to inflate their income to permit them to qualify for a loan from NL. The borrowers alleged that they were provided a redacted version of the loan application. The redacted information on page three, in "Section X," contained the false information that Lowe had met face-to-face with Andrade. The borrowers alleged in their FAC that RPM or "another party" redacted this section. The loan application also contained fraudulent income amounts for Lowe that "someone placed in the application without" the borrowers' approval or consent.

The borrowers also alleged that the appraisal contained incorrect information related to the number of bedrooms and other features of the property. At one point in their pleading the borrowers claimed that they "were not given an opportunity to review the [a]ppraisal before signing documents at closing." They maintained that they first received a copy of the appraisal on September 22, 2011.

The borrowers further declared in their FAC that the mortgage companies and Placer Title falsely represented that the borrowers qualified for a loan in the amount of $350,000 and knew that the appraisal over valued the property. The borrowers also charged that that they were told that they qualified for a loan at 5.75 percent interest but received a loan at 5.875 percent interest.

None of the abovementioned allegations supports a claim for fraud or misrepresentation. Many of the allegations failed to identify the particular person or entity making the misrepresentation—e.g., RPM or "another party" redacted "Section X" and "someone" put false information regarding their incomes. More importantly, the fraud claim is fatally flawed because the pleading did not include allegations that the borrowers reasonably relied on these misrepresentations. The borrowers claimed that their incomes were inflated, that the mortgage rate was increased, and that they were permitted to qualify for a loan in the amount of $350,000 when they did not actually qualify for such a loan. The borrowers, however, admitted that they received a copy of their loan application and that application included all of this information. Lowe's initials were on pages one and two of the loan application, below the interest rate of 5.875 percent and the allegedly inflated income figures. In their FAC, they also admitted that Andrade contacted them and told them that they would not qualify for the loan initially discussed, and that they should apply for a loan at 5.875 percent. Additionally, they confirmed in their FAC that they were able to make their mortgage payments. They claimed that they "have never been late with, or missed a mortgage payment, an amount of at least $1700 per month for over seven years . . . ." Nothing in their pleading suggested how they relied on any of the alleged inaccuracies in the appraisal report.

The borrowers incorporated and relied on the same alleged misrepresentations as pleaded in the first cause of action in the fourth and fifth causes of action. The only additional claims made in these causes of action were that the mortgage companies and Placer Title prepared and provided the note and deed for signature. These causes of action, too, were silent regarding any reasonable reliance by the borrowers on any alleged misrepresentations in the note and deed.

Accordingly, we conclude that the borrowers have failed to set forth with specificity reasonable reliance on any of the alleged misrepresentations.

C. *Insufficient Facts to State a Cause of Action Against Placer Title*

An additional basis for affirming Placer Title's demurrer against the fraud and misrepresentation claims is that, as the escrow holder, it had no liability for incorrect information in the loan application and other closing documents.[5] Other than acknowledge that Placer Title was a trustee on the deed, the allegations in the FAC concerned Placer Title's role as the escrow holder. The FAC stated that Placer Title received the check and funds to be deposited into escrow, prepared a preliminary title report, and provided the borrowers with the documents to sign in its office.

"[I]t is generally held that no liability attaches to the escrow holder for his [or her] failure to do something not required by the terms of the escrow or for a loss incurred while obediently following his [or her] escrow instructions." (*Lee v. Title Ins. & Trust Co.* (1968) 264 Cal.App.2d 160, 162-163; see also *Blackburn v. McCoy* (1934) 1 Cal.App.2d 648, 655.) If the escrow holder fails to carry out an instruction it has contracted to perform, the injured party has a cause of action for breach of contract. (*Amen v. Merced County Title Co.* (1962) 58 Cal.2d 528, 532.) An escrow holder "has no general duty to police the affairs of its depositors"; rather, an escrow holder's obligations are "limited to faithful compliance with [the depositors'] instructions." (*Claussen v. First American Title Guaranty Co.* (1986) 186 Cal.App.3d 429, 435-436.) Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions. (*Lee v. Title Ins. & Trust Co.*, *supra*, 264 Cal.App.2d at p. 162.)

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[5] Placer Title filed a respondent's appendix and the borrowers argue that we should not consider respondent's appendix because it contains documents filed in the superior court after the trial court ruled on Placer Title's demurrer and these documents are "unnecessary for proper consideration of the issues." (See Cal. Rules of Court, rule 8.124(b)(3)(A).) We consider only those documents in respondent's appendix that are necessary to our determination of the merits of the appeal.

Here, the FAC did not allege clear evidence that Placer Title committed any fraud and an escrow holder's duty does not extend to notifying the parties of any suspicious fact.

D. ***Statute of Limitations***

The trial court also properly sustained the mortgage companies' demurrer against the borrowers' fraud and misrepresentation claims on the basis that they were barred by the statute of limitations.[6] All of the allegations in the FAC focused on the origination of the loan, which closed in May 2005, and this lawsuit was not filed until February 16, 2012.

The statute of limitations for fraud or mistake is three years. (§ 338, subd. (d).) A cause of action does not accrue, however, until "the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (§ 338, subd. (d).)

The borrowers acknowledge that they filed their lawsuit more than three years after they purchased their home in 2005. They maintain, however, that the statute of limitations was tolled under the delayed discovery and fraudulent concealment rules. (See § 338, subd. (d).) They contend that the trial court abused its discretion in sustaining the demurrer because "[g]enerally, statute of limitations issues raise questions of fact that must be tried . . . ." (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1374.)

Although the statute of limitations is a factual issue, it can be subject to demurrer if the pleading discloses that the statute of limitations has expired regarding one or more causes of action. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962.) If a demurrer demonstrates that a pleading is untimely on its face, it becomes the plaintiff's burden "even at the pleading stage" to establish an exception to the limitations period. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1197 (*Aryeh*).)

The three-year statute of limitations may be tolled under the delayed discovery or fraudulent concealment rule. A cause of action accrues under the discovery rule when

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6 Placer Title also argues that the claims are time barred. It did not, however, demurrer on this basis in the trial court and never raised it as an affirmative defense in the trial court.

the " 'plaintiff either (1) actually discovered his injury and its negligent cause or (2) could have discovered injury and cause through the exercise of reasonable diligence . . . .' [Citations.]" (*Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 407, italics omitted.) Fraudulent concealment tolls the statute of limitations if a defendant's deceptive conduct "has caused a claim to grow stale." (*Aryeh, supra*, 55 Cal.4th at p. 1192.) In support of this doctrine, a plaintiff must allege the supporting facts—i.e., the date of discovery, the manner of discovery, and the justification for the failure to discover the fraud earlier—with the same particularity as with a cause of action for fraud. (*Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 900-902.)

The borrowers insist that they had no duty to investigate because the mortgage brokers had a fiduciary relationship with them and a duty to make a full and complete disclosure of all material facts. (See *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921.) Even if we presume a fiduciary relationship existed between the mortgage companies and the buyers, the duty to investigate was relaxed, not eliminated. (See *ibid.*) " 'If the plaintiff and defendant are in a confidential relationship[,]' " the duty to investigate arises when " 'the plaintiff becomes aware of facts which would make a reasonably prudent person suspicious' " and the plaintiff " 'may then be charged with knowledge of facts that would have been discovered by such an investigation.' " (*Ibid.*)

The borrowers contend that they had no reason to become suspicious until June 16, 2011, when they received the loan application from Bank of America that included a page three with the redaction and an unredacted page three that included the assertion that Lowe met face-to-face with Andrade. This allegedly false information caused them to examine "more carefully" the loan application, which they had received in 2005, and discover the other errors.

The borrowers' argument is essentially that the statute of limitations was tolled until they had reason to know that they should have looked more carefully at the loan documents. It is true that they might not have had an *actual* suspicion of wrongdoing until 2011, but they admitted in their FAC that they received the loan application and note when they signed the closing documents on May 12, 2005. Thus, for example, the purportedly inflated income figure and the increased interest rate were in the loan application (on page two) that they received in May 2005, and Lowe's initials were on that page. They never alleged that they were denied an opportunity to read the documents. Rather, they declared: "Lowe was quickly going through numerous documents and had no reason to think Defendants would have altered the income information she had provided or in any other way falsify documents." Thus the sole information that they allegedly did not receive in 2005 was "Section X" on page three.

Furthermore, the borrowers claimed in their FAC that they have been paying their mortgage and the amounts required under the loan. They therefore had constructive, if not actual, knowledge of the interest rate.

A reasonably prudent person in the borrowers' position would have become aware of the alleged wrongdoing when she or he received the loan documents in 2005 and when she or he made mortgage payments at the increased interest rate. The borrowers are thus charged with the knowledge of the contents of the documents provided to them. (See *Lee v. Escrow Consultants, Inc., supra,* 210 Cal.App.3d at p. 921.) The "false" information in the documents would have made a reasonably prudent person suspicious and a diligent investigation would have resulted in their requesting all of the documents and the discovery that "Section X" had been redacted from their loan application.

We thus conclude that the allegations in the FAC established that the borrowers could have discovered all of the misrepresentations connected to the loan process through due diligence in 2005. The borrowers' fraud and misrepresentation claims are therefore time barred.

IV. *The Cancellation of Instrument and Quiet Title Claims*

In their third cause of action, the borrowers set forth a claim for cancellation of instrument against the mortgage companies and Placer Title. (See Civil Code, § 3412.)[7]

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[7] Civil Code section 3412 provides: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

In their eighth cause of action, they alleged a quiet title action against NL. For both of these claims, the borrowers incorporated by reference their allegations related to their fraud claims and, again, set forth allegations of misrepresentation related to the signing of the note and deed. Since we have concluded that the borrowers failed to state a claim for relief under a fraud theory, they cannot state cognizable causes of action for cancellation of instrument and quiet title based on fraud.

V. *The Declaratory Relief Claim*

The borrowers requested declaratory relief against NL in their second cause of action. They asserted that Bank of America had communicated inconsistent information to them regarding the current holder on the note. They sought "a judicial determination of the identity" of the owner of the note and a declaration to have NL provide the original note with the assignment.

" 'The fundamental basis for declaratory relief is the existence of an *actual, present controversy* over a proper subject.' [Citation.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) Here, there is no present controversy as alleged in the FAC. (See §§ 1060, 1061.) The FAC alleged that NL disclosed in 2005 that the note was being sold and that Bank of America would assume servicing the note. The borrowers did not allege that there was any dispute as to the identity of the servicer of the loan; nor did they maintain that they had been unable to make their monthly mortgage payments. To the contrary, they declared that they have made all of their monthly payments and that Bank of America is their servicer. Accordingly, there is no present controversy between NL and the borrowers.

VI. *The Borrowers Cannot Amend to State a Cognizable Legal Claim*

The borrowers claim that the trial court should have provided them with another opportunity to amend their pleading to allege facts sufficient to cure the defects in their FAC. (See § 472c.) The burden is on the borrowers to demonstrate that the trial court abused its discretion in sustaining the demurrer without leave to amend. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The borrowers must show "in what manner" they can amend their complaint "and how that amendment will change the legal effect" of their pleading. (*Ibid.*) "[L]eave to amend should *not* be granted where . . . amendment would be futile." (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685.)

The borrowers have not demonstrated that they can amend the causes of action in their FAC to state any legal claim. The borrowers have not shown how they could amend the fraud and misrepresentation claims (first, fourth, and fifth causes of action) to toll the application of the three-year statute of limitations. This three-year statute of limitations also bars the third cause of action for cancellation of an instrument and the eighth cause of action for quiet title. "Since there is no statute of limitations governing quiet title actions as such, it is ordinarily necessary to refer to the underlying theory of relief to determine which statute applies. [Citations.]" (*Muktarian v. Barmby* (1965) 63 Cal.2d 558, 560.) Here, the gravamen of the quiet title action against the mortgage companies in the eighth cause of action is fraud, and thus the applicable statute of limitations is three years under section 338, subdivision (d). (See *Ankoanda v. Walker-Smith* (1996) 44 Cal.App.4th 610, 615.) Ordinarily a suit to set aside or cancel an instrument is governed by section 343, a four-year statute of limitations. However, when fraud or mistake is involved, as in this case, the three-year statute of limitations applies. (See *Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319, 1326.) As already discussed, the borrowers had actual notice of inaccurate information in the documents in 2005, and these claims are time barred.

The time for the remaining cause of action for declaratory relief has also lapsed since it is based on the original loan and allegations of fraud. Additionally, the borrowers have provided no argument as to how they could amend this cause of action to allege a justiciable controversy.

The borrowers also argue that they pled the elements necessary to state claims for breach of a fiduciary duty against the mortgage companies and Placer Title and breach of contract against NL. They now wish to amend their pleading to add these causes of action. With regard to breach of a fiduciary duty, the borrowers claim that the mortgage companies breached a fiduciary duty under Financial Code section 4979.5, subdivision

(a) by forging, backdating, and redacting the loan applications.[8] Notwithstanding the authorities discussed above at pages 11 through 12, they contend that Placer Title had a fiduciary duty and violated it by presenting to them a loan application with a redaction on page three.

Even if we presume (albeit highly unlikely) that some type of fiduciary relationship existed, for the reasons already discussed with regard to the statute of limitations and the fraud and misrepresentation claims, a claim based on breach of a fiduciary duty claim is time barred. "To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action. [Citations.] '[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.' [Citation.]" (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23.) Here, the gravamen of the FAC is fraud and the three-year statute of limitations applies.

Although the borrowers' proposed claim for breach of contract against NL is not entirely clear, they appear to be renaming their request for declaratory relief as a breach of contract claim. They contend that the deed identified NL as the lender and that they sent NL a letter requesting a "Beneficiary Statement" as described in Civil Code section 2943, subdivision (a)(2). They complain that NL responded that it had sold the loan and never provided them with a "Beneficiary Statement."

To the extent that the borrowers' claim is comprehensible, they seem to be contending that NL breached the deed by failing to provide them with a "Beneficiary Statement." It is completely unclear what provision in the deed obligated NL to provide such information. Furthermore, the borrowers cannot state a cognizable claim for breach of contract because they have not explained how the pleading can be amended to allege damages. As already discussed, the borrowers have been making their monthly mortgage

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[8] Financial Code section 4979.5 concerns the fiduciary duty between a consumer and a broker, and the FAC included no allegation that the mortgage companies provided them with a brokerage service.

payments. Thus, they cannot demonstrate how this alleged breach has resulted in any damages.

In the present case, the borrowers were permitted an opportunity to amend their complaint. Rather than curing the defects in their pleading, they filed a FAC that was essentially identical to the original complaint. They have not demonstrated how they could amend their pleading to state a cognizable cause of action and we therefore conclude that the trial court did not abuse its discretion when it sustained the demurrers without leave to amend.

DISPOSITION

The orders are affirmed. The borrowers are to pay the costs of appeal.

Brick, J.*

We concur:

Haerle, Acting P.J.

Richman, J.

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* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.