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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MARTHA E. LOWE et al., Plaintiffs and Appellants, v. BANK OF AMERICA, N.A. et al., Defendants and Respondents.	A138791 (Alameda County Super. Ct. No. RG12616626)

Martha E. Lowe and Ralph Kanz (collectively, the borrowers) sued a number of parties, including Bank of America, N.A. (Bank of America), Mortgage Electronic Registration Systems, Inc. (MERS), and Wells Fargo Bank, N.A. (Wells Fargo;[1] collectively, the banks) and LaSalle Financial Services, Inc. (LaSalle Financial), Susan A. Thomas, and Susan M. Andrade (collectively, the LaSalle Defendants) for, among other things, fraud and negligent misrepresentation in connection with a loan application for a

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[1] In their brief in this court, the borrowers assert that Wells Fargo is not a party to this action. The first amended complaint named Wells Fargo as a defendant and the trial court's order sustaining the demurrer without leave to amend included Wells Fargo as a defendant. The borrowers have not provided this court with any document or proof that it has dismissed Wells Fargo from the lawsuit.

Counsel for the banks filed their demurrers in the trial court and their respondents' brief in this court on behalf of Wells Fargo Bank, as Trustee on behalf of Structured Adjustable Rate Mortgage Loan Trust Mortgage Pass-Through Certificates, Series 2005-15 (erroneously sued as Wells Fargo Bank, N.A.).

property the borrowers purchased in May 2005.[2] The borrowers' appeal follows the trial court's sustaining without leave to amend the separate demurrers of the banks and the LaSalle Defendants against the borrowers' pleading. We affirm.

BACKGROUND

The borrowers, a married couple, entered into a loan transaction in May 2005 to purchase a property in Oakland, California (the property).[3] In 2011, after receiving loan documents, they came to believe their loan application had been backdated, 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 banks and the LaSalle Defendants. All of the causes of action were based on alleged misrepresentations related to the loan for the property. The banks demurred; the LaSalle Defendants provided an unverified answer on April 19, 2012.

On June 5, 2012, the LaSalle Defendants filed a verified answer to the borrowers' complaint. Counsel for the LaSalle Defendants verified the answer on his clients' behalf and stated that his clients were "absent from" Contra Costa County, "the county in which" he had his office. The borrowers moved to strike the answer and also demurred to the answer. In support of their motion to strike, the borrowers requested that the trial court take judicial notice of documents showing that Andrade lived in Contra Costa County. They argued that these documents established that the verification was not proper because counsel for the LaSalle Defendants had falsely stated that his clients were absent from the county in which he had his office.

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[2] Other named defendants in this pleading included NL, Inc., RPM Mortgage, Inc., and Placer Title Company. The trial court sustained without leave to amend these defendants' demurrers to the borrowers' pleading and, after the borrowers appealed, we affirmed in our nonpublished opinion, *Lowe v. NL, Inc.* (Sept. 4, 2013, A138164) (*Lowe I*).

[3] The facts are from the pleadings.

On October 24, 2012, Judge Marshall Whitley sustained the banks' demurrer 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."

On this same date, October 24, 2012, the trial court denied the borrower's motion to strike, finding that the answer was sufficiently verified. The court sustained with leave to amend the borrowers' unopposed demurrer to the LaSalle Defendants' answer. The court instructed the LaSalle Defendants "to state facts in support of the defenses asserted."

The borrowers filed their verified first amended complaint (FAC) against the banks, the LaSalle Defendants, and others on November 14, 2012. The FAC included the following eight causes of action: fraud in the inducement (first cause of action) against Bank of America and the LaSalle Defendants; declaratory relief (second cause of action) against the banks; cancellation of instrument (third cause of action) against Bank of America, MERS, and the LaSalle Defendants; intentional and negligent misrepresentation (fourth and fifth causes of action) against Bank of America and the LaSalle Defendants; intentional and negligent misrepresentation (sixth and seventh causes of action) against Bank of America; and quiet title (eighth cause of action) against the banks.

According to the FAC, on April 15, 2005, the borrowers met with Thomas, a loan consultant at LaSalle Financial, and signed a loan application.[4] Lowe told Thomas that her annual income was $50,840 and Kanz reported a salary of "approximately $10,000." Thomas told the borrowers 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 Company (Placer Title), to complete a Preliminary Title Report and Escrow Transaction. On this same date, Katz also contacted LaSalle Financial and spoke with Thomas or 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 May 6, 2005, the borrowers executed a promissory note for $350,000 secured by a deed of trust on the property. On May 12, 2005, the borrowers signed the closing documents at the offices of Placer Title, which included the loan application. The borrowers alleged that the loan application was missing "Section X," which stated that a face-to-face interview had been conducted. Additionally, the FAC alleged that the loan application contained fraudulent income amounts for Lowe "that someone placed in the application without [the borrowers'] approval or consent." The FAC asserted that Lowe

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[4] 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.

went through the documents quickly and was not aware that her income had been overstated.

Lowe executed a promissory note (the note) for $350,000, secured by the property that designated NL, Inc. (NL) as the "Lender." The borrowers also signed a deed of trust (the deed of trust). The documents included the disclosure that the note was being sold and that Countrywide Home Loans Servicing, L.P. would assume servicing of the promissory note.

Placer Title recorded the deed of trust on May 17, 2005.

From 2009 through 2011, the borrowers sought to modify their home loan. On May 14, 2010, Bank of America offered borrowers a loan modification. The borrowers did not sign or return the loan modification agreement. On May 13, 2011, Lowe sent by facsimile a letter to Bank of America that requested the name, address, and phone number of the bank or investor that owned her mortgage 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 misstated or omitted features of the property, such as, failing to mention a spa/hot tub on the property, and it inaccurately stated the number of bedrooms for a compared sale.

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 the LaSalle Defendants 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 amount 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 disclosures required as part of the loan process. The FAC requested unspecified monetary damages and the cancellation of the promissory note and deed of trust.

The banks and the LaSalle Defendants separately demurred to the borrowers' FAC. On May 10, 2013, Judge Lawrence John Appel sustained both demurrers without leave to amend. The court found that the borrowers had not stated sufficient facts to state cognizable claims and the fraud and misrepresentation claims against Bank of America were time barred.[5] The court ruled that the borrowers were not entitled to declaratory relief in their second cause of action because they had not specified "an existing 'actual controversy' " between the banks and them. The court dismissed the entire action against both the banks and the LaSalle Defendants.

On May 28, 2013, the borrowers, in propria persona, filed their notice of appeal. The borrowers filed a request that we take judicial notice of pleadings and we granted their unopposed request on February 21, 2014.

DISCUSSION

I. *Appealability*

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.) 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.[6] (*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 banks and the LaSalle Defendants. (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 banks and the LaSalle Defendants. We therefore exercise our discretion to deem the

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[5] The court's order stated that the first, fourth, and fifth causes of action were barred by the statute of limitations. The court did not expressly rule on the Bank of America's statute of limitations defense to the sixth and seventh causes of action.

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

minute orders that sustained the demurrers without leave to amend and dismissed the banks and the LaSalle Defendants 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.)

II. *The Borrowers' Motion to Strike*

The borrowers contend that the trial court "erred" in denying their motion to strike the answer of the LaSalle Defendants because the answer was not properly verified. They maintain that counsel verified the answer on behalf of his clients but the verification was improper because he falsely stated that his clients were absent from Contra Costa County, the county in which counsel for defendants had his office. They assert that the trial court should have granted their request to take judicial notice of documents showing Andrade lived in Contra Costa County.

The borrowers filed a verified complaint and therefore the answer had to be verified. (See § 446.) "[T]he failure to verify a pleading—even where the verification is required by statute—is a mere defect curable by amendment. [Citations.]" (*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 915, fn. omitted.) Counsel for the LaSalle Defendants, on behalf of his clients, filed a verified answer and stated, "The defendants are absent from the county in which I have my office, and for that reason I am making this verification on their behalf." Counsel's office was in Contra Costa County.

Section 446, subdivision (a) states, "Every pleading shall be subscribed by the party or his or her attorney. . . . [W]here a pleading is verified, it shall be by the affidavit of a party, unless the parties are absent from the county where the attorney has his or her office, or from some cause unable to verify it, or the facts are within the knowledge of his or her attorney or other person verifying the same. . . ."

"If an answer is not sufficiently verified . . . , it may be stricken out . . . , or judgment on the pleadings may be ordered. [Citation.] This rule has been applied where there was no verification of the answer at all [citations], and also where the verification showed on its face that it was not made by a proper person [citation], but it should not be extended to cases where it is necessary to inquire into the truth of the verifying affidavit in order to show the insufficiency of the verification. If a verification appears to be made by a person authorized by law to do so and complies in form and substance with the statutory provisions, it must be regarded as sufficient to install and support the answer as a pleading." (*French v. Smith Booth Usher Co.* (1942) 56 Cal.App.2d 23, 29; see also *Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 20-21 [motion to strike portions of verified answer was without merit because it required the judge to determine "what is true and untrue"].)

Here, the trial court did not abuse its discretion in denying the borrowers' motion to strike. The verification on its face does not show that the proper party did not make the verification. (See § 446, subd. (a); *French v. Smith Booth Usher Co., supra,* 56 Cal.App.2d at p. 29.) Additionally, we note that the borrowers' evidence that Andrade lived in Contra Costa did not establish the falsity of counsel's statement that his clients were absent from Contra Costa County.

Furthermore, the trial court sustained with leave to amend the borrowers' demurrer to the answer of the LaSalle Defendants. Thus, even if the motion to strike should have been granted, the borrowers suffered no prejudice because the court found the original answer defective and it was not permitted to stand.

The borrowers appear to claim that they suffered prejudice as a result of the trial court's refusal to strike the answer. They claim that an unverified answer constitutes an admission of all of the material allegations of the complaint (see *DeCamp v. First Kensington Corp.* (1978) 83 Cal.App.3d 268, 282) and they would have been entitled to a default judgment.

The borrowers are mistaken. A trial court may not enter a default judgment when the complaint's allegations do not state a cause of action. (*Taliaferro v. Davis* (1963) 216 Cal.App.2d 398, 408-414.) No judgment can rest on such a complaint, as a defendant in default " 'admits only facts that are well pleaded.' " (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 829.) Here, the trial court clearly found the pleading stated no cognizable cause of action. Additionally, the defective answer was to the borrowers' original pleading, which was superseded by the borrowers' filing of their FAC. The filing of the FAC would have vacated any default since " 'the original complaint . . . dropped out of the case and ceased to have any effect as a pleading or as a *basis for a judgment.*' " (*Tidwell v. Henricks* (1954) 124 Cal.App.2d 64, 66.)

The borrowers have not demonstrated that the trial court abused its discretion in denying their motion to strike the answer. Moreover, they have failed to show that the refusal to strike the answer had any prejudicial effect. Absent prejudice, the trial court's decision cannot be reversed. (Cal. Const., art. VI, § 13; see also *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573-574.)

III. *The Demurrers Against the FAC*

A. *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 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.)

B. ***The Fraud and Misrepresentation Claims***

1. ***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 Bank of America and the LaSalle Defendants, and intentional and negligent misrepresentation (sixth and seventh causes of action) against Bank of America. 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 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.)

2. *Failure to State Sufficient and Specific Facts to Show Reliance and Damages*

With regard to their first cause of action against Bank of America and the LaSalle Defendants, 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. The borrowers alleged that they were provided a redacted version of the loan application, which did not include "Section X," on page three, which contained the allegedly false information that Lowe had met face-to-face with Andrade. The borrowers alleged in their FAC that RPM Mortgage, Inc. (RPM) or "another party" redacted this section.

The borrowers also alleged that the appraisal contained incorrect information. A comparison property in the appraisal stated that it had two bedrooms when it actually had three bedrooms and the appraisal omitted or misstated features of the property. For example, the appraisal did not state that the property had a spa/hot tub and it incorrectly stated that there was no dampness under the house. The borrowers maintained that they first received a copy of the appraisal on September 22, 2011.

The borrowers further declared in their FAC that the banks and the LaSalle Defendants falsely represented that the borrowers qualified for a loan in the amount of $350,000 and knew that the appraisal overvalued the property. The borrowers also charged 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. Furthermore, the fraud claim is fatally flawed because the pleading did not include allegations that the borrowers reasonably relied on these misrepresentations. "[T]he mere assertion of 'reliance' is insufficient. The plaintiff must allege the specifics of his or her reliance on the misrepresentation to show a bona fide claim of actual reliance. [Citation.]" (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.)

The FAC set forth various mistakes in the appraisal and alleged that the appraisal overvalued the property. This conclusory statement that the property was overvalued is insufficient. Nothing in the FAC suggested how the borrowers detrimentally relied on any of the alleged inaccuracies in the appraisal report.

The borrowers also claimed that the loan application contained errors. In their FAC, 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 5.87 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 5.87 percent. Moreover, 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 . . . ."

The borrowers incorporated and relied on the same alleged misrepresentations as pleaded in the first cause of action in the fourth, fifth, sixth, and seventh causes of action. The only additional claims made in the fourth and fifth causes of action were that Bank of America and the LaSalle Defendants prepared and provided the note and deed of trust for signature. In the sixth and seventh causes of action against the Bank of America, the borrowers alleged that Bank of America misrepresented the identity of the investor on the loan. These causes of action, too, were silent regarding any reasonable reliance by the borrowers on these misrepresentations. Additionally, the borrowers did not allege that knowing the "investor" on the note would impact or have any effect on their obligations or rights.

The borrowers also have failed to allege facts demonstrating that they suffered injury or damages as a result of the alleged fraud.[7] Actual damages are an essential element of claims for fraud and negligent misrepresentation. (See, e.g., *Gil v. Bank of America, N.A.* (2006) 138 Cal.App.4th 1371, 1381; *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239-1240 & fn. 4.) The borrowers alleged that they were damaged because they had to use their savings to pay for property taxes and home improvements and this money came from their savings rather than from their regular income. Even if the loan application or appraisal had been completely accurate, the borrowers would not have escaped paying their property taxes or spending money for any desired home improvements. None of the alleged "damages" resulted from the alleged misrepresentations.

The borrowers also alleged that they would not have agreed to the loan had they known about the mistakes in the loan application, but they do not assert that they did not wish to qualify for a loan at 5.875 percent, that they could have qualified for a loan with better terms or at a better rate, or that obtaining this loan resulted in any injury. In fact, their FAC makes it clear that they expressly agreed to a loan at 5.875 percent and that they have been able to make their mortgage payments.

Accordingly, we conclude that the borrowers have failed to set forth with specificity reasonable reliance on any of the alleged misrepresentations and they have failed to allege damages.[8]

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[7] The borrowers argue that they do not need to allege actual damages because one of the remedies they are seeking is rescission and they cite *Rodes v. Shannon* (1963) 222 Cal.App.2d 721, 727. The court in *Rodes* observed that the principal was entitled to rescind the sale without having to show any damage because the principal's agent acted in a manner adverse to his principal. (*Id.* at pp. 725-727.) *Rodes* did not involve causes of action for fraud or misrepresentation and, as stated above, damages is an essential element of a claim for fraud or misrepresentation.

[8] We need not consider Bank of America's additional argument that the borrowers' claims fail because the bank did not have a duty of care to them.

3. ***Statute of Limitations***

Another basis for sustaining the demurrers against the borrowers' fraud and misrepresentation claims was that these claims were barred by the statute of limitations.[9] 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 claim that the banks concealed the false information on page three of the loan application. 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 (*Fuller*).) 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.)

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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9 The LaSalle Defendants did not argue that the claims were time barred and therefore we consider this argument only as it applies to Bank of America. The trial court found that the statute of limitations barred the first, third, and fifth causes of action against the Bank of America. The court did not expressly rule on the application of the statute of limitations to the sixth and seventh causes of action.

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 v. Canon Business Solutions, 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 Bank of America 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, 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 that had redacted the assertion that Lowe met face-to-face with Andrade and an unredacted page three. This allegedly false information caused them to examine “more carefully” the loan application, which they had received in 2005, and discover the other errors, including that the original loan application had Lowe’s forged name and had been backdated.

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 in their possession. They maintain that, similarly to the situation in *Fuller,* *supra,* 216 Cal.App.4th 955, there was no " 'red flag' as a matter of law putting" them on notice of the fraud. (See *id.* at p. 966.)

In *Fuller, supra,* 216 Cal.App.4th 955, the couple purchased a home in 2006 and sued the lenders in 2010 for misrepresentation and fraudulent concealments regarding the appraisal and loan terms. (*Id.* at p. 958.) The Court of Appeal concluded that the statute of limitations did not start to run until late 2009 when the homeowners sought a loan modification and learned the true terms of their loan and appraisal. (*Id.* at pp. 963-966.) The court noted that "ordinarily a party to a contract cannot justifiably claim unawareness of the express provisions of the contract" but this was not the basis of the homeowners' claims. (*Id.* at pp. 964-965.) Rather, their claims were based on the mortgage broker's failure to explain that the terms of the loans might possibly increase the risk of foreclosure and the lenders' failure to inform the buyers that their appraisals were improperly based on outdated home sales, which differed in value, square footage, number of rooms, and other amenities to the home they purchased. (*Id.* at p. 959.) Nothing the homeowners received served as "any sort of 'red flag' as a matter of law putting plaintiffs on notice that their home was overvalued for the amount of indebtedness, that their 'best' loan was in fact more unfavorable than it needed to be, that their broker had siphoned off part of their closing costs, that they would not be able to seek to reduce their payments through refinancing, and that they would face foreclosure as a result." The court concluded that a demurrer was improper because the "allegations establish[ed] with adequate specificity nondisclosures and misrepresentations from a broker . . . , and the absence of any circumstances to trigger plaintiffs' reasonable inquiry into *available* facts revealing the true nature of the loans." (*Id.* at p. 966.)

Here, the borrowers might not have had any *actual* suspicion of wrongdoing until 2011, but, unlike the homeowners in *Fuller,* facts were available to them in 2005 that put them on notice of the misrepresentations in the loan. The borrowers admitted in their FAC that they received the loan application and note when they signed the closing documents on May 12, 2005. 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. The sole information that the borrowers allegedly did not receive in 2005 was "Section X" on page three, which stated that a face-to-face interview had been conducted and identified the person who had conducted the interview, and the appraisal of the property. The alleged minor mistakes in the appraisal and the "false" statement that a face-to-face interview had occurred were not material to the loan application.

The borrowers did not allege that they were denied an opportunity to read the loan documents. Instead, the reason for the late discovery, according to the FAC, was that "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." Here, unlike the situation in *Fuller*, the alleged misrepresentations were the express provisions in the loan documents signed and received by the borrowers in 2005. "A cardinal rule of contract law is that a party's failure to read a contract, or to carefully read a contract, before signing it is no defense to the contract's enforcement." (*Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal.App.4th 866, 872.)

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. Indeed, they do not allege that they were unaware of the interest rate, payment schedule, or other terms set forth in the note and deed of trust.

A reasonably prudent person in the borrowers' position would have become aware of the alleged wrongdoing when he or she received the loan documents in 2005 and when he or she 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 the borrowers' requesting all of the documents and their discovery Section X had been redacted from their loan application and the appraisal contained some inaccurate or incomplete data.

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 against Bank of America are therefore time barred.

C. *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 banks and the LaSalle Defendants. (See Civ. Code, § 3412.)[10] In their eighth cause of action, they alleged a quiet title action against the banks. (See § 761.020.)[11] 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 of trust. Since we have concluded that the borrowers failed to state a claim for relief under a fraud theory, they

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[10] 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."

[11] Section 761.020 reads: "The complaint shall be verified and shall include all of the following: [¶] (a) A description of the property that is the subject of the action. In the case of tangible personal property, the description shall include its usual location. In the case of real property, the description shall include both its legal description and its street address or common designation, if any. [¶] (b) The title of the plaintiff as to which a determination under this chapter is sought and the basis of the title. If the title is based upon adverse possession, the complaint shall allege the specific facts constituting the adverse possession. [¶] (c) The adverse claims to the title of the plaintiff against which a determination is sought. [¶] (d) The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint shall include a statement of the reasons why a determination as of that date is sought. [¶] (e) A prayer for the determination of the title of the plaintiff against the adverse claims."

cannot state cognizable causes of action for cancellation of instrument and quiet title based on fraud.[12]

The third cause of action against the Bank of America is also based on the alleged misrepresentation and fraud by NL and RPM. The borrowers alleged that NL and RPM were agents of Bank of America. Even if we presume that the borrowers sufficiently pled that NL and RPM were the agents of the Bank of America, this cause of action fails. In *Lowe I, supra,* A138164, we affirmed the trial court's findings that the borrowers had failed to state a cognizable claim for fraud or misrepresentation against NL and RPM.

D. *The Declaratory Relief Claim*

The borrowers requested declaratory relief against the banks in their second cause of action. They asserted that Bank of America 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.

" '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 Countrywide/Bank of America would assume servicing the note.

The borrowers did allege that they have been unable to learn the name, address, and phone number of the holder of the note and that Bank of America has not provided definitive proof of the holder of the note. They claimed in their FAC that MERS provided information that contradicts Bank of America's information. They asserted: "Without such a declaration [the borrowers] will be unable to negotiate more favorable terms on their current mortgage as [Bank of America] has refused to negotiate in good faith, and it is not clear [Bank of America] is working at the behest of the Note holder.

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[12] We need not consider the banks' contention that the borrowers' third and eighth causes of action fail because the borrowers have not tendered the amount of the indebtedness.

Without such a determination [the borrowers] suffer and will continue to suffer as they are unable to communicate with the investor/note holder."

Elsewhere in their FAC, the borrowers' allegations indicate that they know the holder of their loan. They alleged that Bank of America sent them a letter on July 31, 2012, and this letter identified the investor as Wells Fargo; Bank of America provided an address and phone number for Wells Fargo. On September 17, 2012, the borrowers "accessed the MERS Servicer ID system and it showed the investor on the Note as 'Wells Fargo as Trustee.' "

The FAC makes it clear that the borrowers know the servicer of their loan. Indeed the borrowers were sent a proposed loan modification from Bank of America on May 14, 2010, which the borrowers rejected. Additionally, the borrowers declared that they have made all of their monthly mortgage payments. Thus, the facts, as alleged in the FAC, establish that the borrowers know the servicer of their loan.

As the trial court found, the borrowers "have not specified an existing 'actual controversy' between them and [Bank of America, Wells Fargo, or MERS] that is necessary and appropriate for judicial determination."

IV. *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, fifth, sixth, and seventh 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 banks and the LaSalle Defendants. They now wish to amend their pleading to add these causes of action. They contend that the banks and the LaSalle Defendants had a fiduciary duty and violated it by presenting to them a loan application with a redaction on page three and by forging, backdating, and altering the loan application.

Even if we presume 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 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.

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.

V. *Challenge to Judge Whitley*

The borrowers contend that Judge Whitley failed to disclose a conflict, which tainted the entire proceedings. They maintain that he failed to disclose that he received a loan from RPM shortly after this case was assigned to him and he also did not disclose that MERS was a party to his deed of trust or that Wells Fargo had subordinated its loan to him as part of the same transaction. They claim that he was obligated to disclose his alleged conflict (see § 170.1) and his failure to rule on their request for judicial notice connected to their motion to strike the answer of the LaSalle Defendants "brings all his actions in this case into question."

The borrowers raised for the first time their challenge to Judge Whitley in their reply brief in this court. To raise an issue for the first time in a reply brief is to waive the issue on appeal. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.)

Furthermore, Judge Appel, not Judge Whitley, sustained the demurrers against the borrowers' pleading without leave to amend. Judge Whitley permitted the borrowers to amend their complaint. As already discussed, the fact that there was no ruling in the trial court on the borrowers' request for judicial notice in support of their motion to strike the answer of the LaSalle Defendants had no significance. Judge Whitley ruled that the answer by the LaSalle Defendants was defective; thus, that answer was not permitted to stand. Subsequently, the borrowers filed their FAC and the original answer ceased to have any effect. The borrowers suffered no prejudice from any of Judge Whitley's rulings.

DISPOSITION

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

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Kline, P.J.

We concur:

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Richman, J.

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Stewart, J.