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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 FOUR

ERLINDA ABIBAS ANIEL ET AL., Plaintiffs and Appellants, v. AMERICAN HOME MORTGAGE SERVICING, INC. ET AL., Defendants and Respondents.	A141462 & A142729 (City and County of San Francisco Super. Ct. No. CGC-10-505131)

In this action challenging a nonjudicial foreclosure of rental property, Erlinda Aniel and her son, Marc Aniel, (the Aniels)[1] appeal from a stipulated judgment after the trial court granted certain defense motions in limine regarding the evidence that could not be presented at trial on the Aniels' cause of action fraud. Previously, the trial court had sustained demurrers dismissing, among other things, the Aniels' claim for wrongful foreclosure. We conclude the Aniels' first amended complaint failed to allege a viable cause of action for wrongful foreclosure and that the trial did not abuse its discretion in preventing evidence related to this claim at trial. Additionally, the trial court did not err in dismissing Erlinda as party for lack of standing. Finally, the Aniels challenge the trial court order awarding attorney fees to defendants and respondents American Home Mortgage Servicing, Inc. (AHMSI) and Deutsche Bank National Trust Company, as

[1] Because appellants have the same last name, for purposes of clarity, at times, we will refer to appellants by their first names.

Trustee for Harborview Mortgage Loan Trust, Mortgage Loan Pass-Through Certificates, Series 2007-5 (Deutsche Bank).[2] We reverse the attorney fee award and affirm the judgment in all other respects.

I. BACKGROUND

A. The Property, Loan, and Initial Default Notice

In April 2007, Marc Aniel borrowed $676,000 from Bayporte Enterprises, Inc. (Bayporte) to refinance the Aniels' rental property on Persia Avenue in San Francisco. The promissory note to repay this loan was secured by a deed of trust that was signed by Marc, as well has parents Erlinda and Fermin Aniel.[3] The deed of trust specified that Bayporte was the trustee and Mortgage Electronic Registration Systems, Inc. (MERS) was the beneficiary. It also provided that the underlying note could be sold without notice and that if the Aniels defaulted on their loan, the lender had the right to sell the underlying property.

By October 2008, the Aniels stopped making payments on the loan acquired by Marc. Later, they admitted that their rental income was insufficient to pay increased mortgage payments and their family's income had fallen because of the decline of the housing market.

On May 11, 2009, T.D. Service Company (T.D. Service) recorded a notice of default against the Persia Avenue Rental Property, in an attempt to institute foreclosure proceedings. The notice identified Deutsche Bank as the beneficiary of the deed of trust, named AHMSI as trustee, and named T.D. Service as the trustee's agent. However, as we shall see, Deutsche Bank had not yet become the beneficiary of the deed at the time of the May 2009 notice of default. Fermin and Erlinda Aniel were soon in bankruptcy and by December 2009, this initial foreclosure attempt was rescinded.

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[2] At times, we will refer to AHMSI and Deutsche Bank individually and collectively as defendants or respondents.

[3] Fermin Solis Aniel is not a party in the instant proceedings. He voluntarily dismissed his case without prejudice on December 20, 2012.

B. Assignments of the Deed of Trust and Foreclosure

On February 15, 2010, MERS executed an assignment of its beneficial interest in the deed of trust to AHMSI. T.D. Service recorded the assignment on April 14, 2010. On February 22, 2010, a second assignment on the same property was executed, conveying AHMSI's new beneficial interest to Deutsche Bank. T.D. Service also recorded this second assignment on April 14, 2010, a few seconds after recording the MERS-AHMSI assignment.

On March 1, 2010, T.D. Service filed a second notice of default against the Aniels' Persia Avenue rental property. This notice again identified Deutsche Bank as the beneficiary, AHMSI as trustee, and T.D. Service as the authorized agent for Deutsche Bank.

On June 2, 2010, T.D. Service recorded a notice of trustee's sale pursuant to the terms of the deed of trust. The notice also stated Power Default Services, Inc. (Power Default)—the entity formerly known as AHMSI—was the trustee and T.D. Service was the trustee's agent.[4] It appears that Power Default sold the property at a trustee's sale on October 2, 2012.[5]

C. Legal Proceedings

In May 2011, the Aniels filed a first amended complaint [6] against AHMSI, Deutsche Bank, Power Default, and MERS (collectively defendants), challenging the wrongful foreclosure of the Persia Avenue rental property. The complaint alleged five causes of action against defendants—fraud, wrongful foreclosure, negligence, request for injunctive relief, and quiet title. The gist of the Aniels' first amended complaint was that

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[4] In their opening brief, the Aniels state that the Persia Avenue rental property was sold at a trustee's sale on October 2, 2012 for $459,000. Documentation of the sale is not included in the record on appeal.

[5] Although the Aniels reference this fact in their opening brief, they fail to include in the record any documentation of the trustee sale.

[6] The Aniels filed their initial complaint in November 2010, before the trial court ruled on defendants' demurrer, the Aniels filed their first amended complaint.

the attempted foreclosure was fraudulent, because AHMSI tricked them into falsely promising to modify the loan if and only if, they defaulted. The Aniels also claimed that the recorded documents misrepresented the respective interests of AHMSI, Deutchse Bank, MERS and Power Default in the property, so they had no legal right to foreclose.

The Aniels alleged that Erlinda contacted AHMSI to request a loan modification. According to the first amended complaint, an AHMSI customer representative in India told Erlinda that they did not qualify for a loan modification because they were current on their payments. The Aniels alleged that "AHMSI told the Plaintiffs that they had to be in default of their mortgage to establish a hardship in order to qualify for a loan modification." Because of the Aniels' reliance on AHMSI's promise to modify the loan, they stopped making payments on the loan. The Aniels renewed their request for a loan modification, but were turned down. Instead, the first amended complaint alleged, "In reality, AHMSI was acting in its own self-interest in attempting to foreclose the property and gain a profit windfall in any proceeds from a foreclosure. AHMSI never had any authority to modify the loan."

The first amended complaint alleged that defendants had no interest in the loan or standing to foreclose, but acted "in concert" in defrauding the Plaintiffs in order to steal and foreclose Plaintiffs' property. It also alleged that AHMSI never had authority to modify the loan, that Deutsche Bank could not validly substitute Power Default as the trustee because Deutsche Bank was not a beneficiary of the deed at the time of the substitution, that MERS had no authority to assign its beneficial interest in the deed to AHMSI because Bayporte had dissolved prior to MERS transferring its beneficial interest to AHMSI, that the assignment to AHMSI was executed by a "robo-signer," and that the transfer of the deed from AHMSI to Deutsche Bank was invalid for various reasons, including that the "chain of title . . . was defective from the beginning" of the assignment of the deed from MERS to AHMSI and from AHMSI to Deutsche Bank, to the recording the instruments "four seconds apart."

The court sustained the demurrer of Power Default and MERS as to five causes of action in the first amended complaint without leave to amend. As to AHMSI and

Deutsche Bank, the court sustained the demurrer to the first amended complaint without leave to amend to all causes of action except for the fraud cause of action, which was sustained with leave to amend if the Aniels could "plead in good faith and with the required specificity fraud based on a promise to modify Plaintiffs' loan."

In September 2011, the Aniels filed their second amended complaint asserting a single cause of action for fraud against AHMSI and Deutsche Bank.[7] The second amended complaint alleged that Erlinda contacted AHMSI in September 2008 to request a loan modification. According to the second amended complaint, an AHMSI customer service representative "from a call center in Pune, India," verbally told Erlinda that "Plaintiffs must stop making timely monthly mortgage payments in order to constitute a hardship," and once they stopped making these payments, "AHMSI would accept a loan modification application from the Plaintiffs." The customer service representative told the Aniels that they "must call AHMSI after 90 days of non-payment in order to receive a loan modification application." In reliance on those representations, the Aniels stopped making the minimal monthly payments on the loan. In January 2009, Erlinda "informed a different representative of AHMSI through [its] customer service center in Pune, India, that Plaintiffs were already in default and requested to modify their loan." AHMSI promised to send the Aniels a loan modification application; AHMSI never sent the Aniels an application, despite their repeated requests for an opportunity to modify their loan. Instead, the second amended complaint alleges, "In reality, each and every representation AHMSI made to the Plaintiffs was in fact FALSE[,]" and "AHMSI wanted Plaintiffs to default on their loan in order to foreclose the property." It was further alleged that AHMSI wanted to "foreclose the defaulted property so they could add on their own fees and costs on the debt." AHMSI demanded that the Aniels "cure the default and refused to discuss any modification requests."

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[7] Despite the fact that the trial court had sustained the demurrers of MERS and Power Default without leave to amend, the Aniels named them as defendants in the second amended complaint.

The Aniels further alleged that "Defendants made false representations and promises to the Plaintiffs regarding material facts, including but not limited to, AHMSI's authority and ability to modify the loan, Deutsche Bank's standing as the Lender of the loan, [that] Plaintiffs would be considered and be approved for a loan modification, and that Plaintiffs must stop making payments on the loan." According to the second amended complaint, AHMSI knowingly made the false representations to "entice[ ] Plaintiffs to default in order to foreclose the property and collect on proceeds received from [the] subsequent sale of the property." Deutsche Bank, "as a Lender," was alleged to be "responsible for all actions made by AHMSI" and "liable for any damages caused to the Plaintiffs as result of AHMSI [.]" The court overruled the demurrer by AHMSI and Deutsche Bank and the matter was set for trial.

In January 2014, trial was scheduled for the fraud cause of action against AHMSI and Deutsche Bank. Defendants brought a number of motions in limine. Two of them are related to this appeal: No. 1, seeking to exclude evidence relating to the Aniels' wrongful foreclosure claim, which was not a cause of action at trial, as the trial court had sustained the demurrer to the first amended complaint as to all defendants without leave to amend. No. 7 sought to exclude Erlinda Aniel from presenting evidence of purported fraud based on lack of standing. The trial court granted both motions.

On January 30, 2014, Marc Aniel "stated orally on the record that the Court's evidentiary exclusions prevented him from proving the damages element of his claim for fraud." Based on the rulings of the trial court granting defendants' motions in limine, "the parties stipulated on the record to entry of judgment against plaintiff Marc Jason Aniel to facilitate his and Erlinda Abibas Aniel's appeal of the Court's rulings." As a result, the parties agreed "that judgment be entered in favor of Defendants and against Plaintiffs Erlinda Aniel and Marc Jason Aniel and that Plaintiffs Erlinda Aniel and Marc Jason Aniel take nothing by way of their claims against Defendants."

Following the stipulated judgment, defendants filed a motion seeking attorney fees as the prevailing parties in the amount of $190,939.60. The court granted the motion and awarded $75,500 in attorney fees to defendants.

The Aniels appealed from the judgment and separately appealed from the order awarding attorney fees. The appeals were consolidated for decision.

II. DISCUSSION

A. The Aniels' Appellate Briefs Do Not Comply With the California Rules of Court.

At the outset, we address the adequacy of the Aniels' briefs. Marc Aniel is a member of the California State Bar representing himself and his mother in this appeal. We find his appellate briefs woefully inadequate. The opening brief and reply brief do not contain a single citation to the record in violation of California Rules of Court, rule 8.204(a)(1)(C) [all appellate briefs must "[s]upport any reference to a matter in the record by a citation . . . of the record . . ."]. "A violation of the rules of court may result in the striking of the offending document, the waiver of the arguments made therein, the imposition of fines and/or the dismissal of the appeal. [Citations.] . . . The appellate court is not required to search the record on its own seeking error." (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.)

Marc Aniel is not exempt from the appellate rules because he is representing himself and his mother on appeal in propria persona. "Under the law, a party may choose to act as his or her own attorney. [Citations.] '[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]' [Citation.] Thus, as is the case with attorneys, pro. per. litigants must follow correct rules of procedure. [Citations.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

Disregarding the rules of appellate procedure even by an unrepresented layperson is always problematic; when an attorney representing himself flouts them so pervasively, it is inexplicable. Were we to take one of the steps permitted in response to such conduct—disregarding the noncomplying portions—we would, in effect, toss out the entire opening and reply briefs. However, after considering the issues raised, we shall go ahead with a review on the merits as best we can under the circumstances. We do so reluctantly, because we do not wish to encourage the view attorneys can get away with

disregarding the rules. But because the record in this case is fairly abbreviated, the rule violation does not burden our court as much as it would if the proceedings below had been lengthier.

B. Standards of Review

In this appeal, we review whether the trial court erred in sustaining the demurrers, granting the in limine motions, and awarding attorney fees to defendants as the prevailing parties. Our standard of review varies for each question.

For purposes of analyzing the demurrers, our review of the trial court's rulings are well settled. "We review de novo the trial court's order sustaining a demurrer." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1468.) In doing so, this court's only task is to determine whether the complaint states a cause of action. (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 824.) " ' "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.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

" 'Broadly speaking, an appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion.' (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.)" (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639.) This deferential standard of review applies to our review of the trial court's determination whether evidence is relevant (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281) and whether evidence should be excluded in limine. (*Hernandez*

v. Paicius (2003) 109 Cal.App.4th 452, 456 [disapproved on another ground, *People v. Freeman* (2010) 47 Cal.4th 993, 1006-1007, fn. 4.)

On review of an order granting attorney fees, the amount of the award is reviewed for an abuse of discretion. "However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law." (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142; *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) Where, as here, the material facts relevant to the award of attorneys' fees are undisputed and the issue is whether the prevailing party is entitled to attorneys' fees under Civil Code section 1717, the issue is a question of law we review de novo. (See *id*. at p. 1176; see *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 929.) In other words, "it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo. [Citation.]" (*Carver v. Chevron U.S.A., Inc., supra,* 97 Cal.App.4th at p. 142.)

C. The Cause of Action for Wrongful Foreclosure Fails Because the Aniels Did Not Allege Tender or Prejudice.

1. The Nonjudicial Foreclosure Process.

We begin with a general overview of the nonjudicial foreclosure process. A nonjudicial foreclosure sale is a "quick, inexpensive[,] and efficient remedy against a defaulting debtor/trustor." (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830 (*Moeller*).) To preserve this remedy for beneficiaries while protecting the rights of borrowers, Civil Code "sections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust."[8] (*Moeller, supra,* 25 Cal.App.4th at p. 830.) Under a deed of trust, the trustee holds title and has the authority to sell the property in the event of a default on the

[8] All statutory references are to the Civil Code unless otherwise specified.

mortgage. (See *Haynes v. EMC Mortgage Corp.* (2012) 205 Cal.App.4th 329, 333-336.) To initiate the foreclosure process, "[t]he trustee, mortgagee, or beneficiary, or any of their authorized agents" must first record a notice of default. (§ 2924, subd. (a)(1).) The notice of default must identify the deed of trust "by stating the name or names of the trustor or trustors" and provide a "statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred" and a "statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy [the] obligation . . . that is in default." (§ 2924, subd. (a)(1)(A)-(C).) After three months, a notice of sale must then be published, posted, mailed, and recorded in accordance with the time limits prescribed by the statute. (§§ 2924, subd. (a)(3), 2924f.)

" '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.' " (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154.)

"The 'traditional method' to challenge a nonjudicial foreclosure sale 'is a suit in equity . . . to have the sale set aside and to have the title restored.' [Citation.] Three elements must be proven: '(1) the trustee . . . caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a . . . deed of trust; (2) the party attacking the sale suffered prejudice or harm; and (3) the trustor . . . tenders the amount of the secured indebtedness or was excused from tendering.' " (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 10-11 (*Ram*).)

The Aniels devote much of their legal argument to the first element, arguing that they alleged sufficient facts that the transfer of their loan was fraudulent and the subsequent sale of the Persia Avenue Rental Property was therefore invalid. Their claim is based on two primary allegations: The assignments of the deed of trust were "fabricated and bogus" and the notice of default was ineffective because it was recorded

before the substitution of trustee occurred. They argue at length that they properly alleged that respondents were not authorized to initiate foreclosure proceedings. We need not exhaustively address these arguments, because the Aniels' cause of action fails for a separate and independent reason.

2. The Aniels Did Not Allege Tender or Any Valid Exception to Tender.

"Because the action is in equity, a defaulted borrower who seeks to set aside a trustee's sale is required to do equity before the court will exercise its equitable powers. [Citation.] Consequently, as a condition precedent to an action by the borrower to set aside the trustee's sale on the ground that the sale is voidable because of irregularities in the sale notice or procedure, the borrower must offer to pay the full amount of the debt for which the property was security. [Citations.] 'The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower].' " (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112 (*Lona*).) It is apparently undisputed that the Aniels did not offer to pay the full amount of the debt.

There are four exceptions to the tender requirement: "First, if the borrower's action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt. [Citations.] [¶] Second, a tender will not be required when the person who seeks to set aside the trustee's sale has a counterclaim or setoff against the beneficiary. In such cases, it is deemed that the tender and the counterclaim offset one another, and if the offset is equal to or greater than the amount due, a tender is not required. [Citation.] [¶] Third, a tender may not be required where it would be inequitable to impose such a condition on the party challenging the sale . . . . [¶] Fourth, no tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee's deed is void on its face." (*Lona*, *supra*, 202 Cal.App.4th at pp. 112-113.) As we shall explain, the Aniels cannot avoid the tender requirement under these exceptions or for any other reason.

The Aniels first claim they were not required to tender the balance of the loan because their "action attacks the validity of the underlying debt." We are not persuaded

for at least two reasons. First, there are no allegations in the first amended complaint that challenge the underlying loan. Second, the Aniels cannot change the nature of a cause of action and then claim they have established an exception to one of its elements. The cases the Aniels cite do not support their argument. (See, e.g. *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424 [if the action challenges the underlying debt, tender not required as it would be affirmation of the debt].)

They also contend that they are entitled to the exception that excuses a borrower from tender where it "would be inequitable to impose" such a condition. The Aniels point to nothing in the instant case that would make it inequitable to require them to tender in full payment of the debt prior to this lawsuit challenging the foreclosure proceedings. Indeed, it is hard to imagine why, in a case where a lender foreclosed on a property due to the borrowers' default, it would be inequitable to require the debtors to tender the amount owed on the debt where the only challenged irregularities relate to documents designating the trustee to effectuate the foreclosure.

The Aniels further contend the tender rule does not apply to a sale that is void because it was obtained by fraud. (*Lona, supra*, 202 Cal.App.4th at p. 113, citing *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 878.) Courts have applied this exception where a sale is found to be "void as opposed to merely voidable." (*Dimock, supra,* 81 Cal.App.4th at p. 876; cf. *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 18-19 [affirming sustaining of demurrer in wrongful foreclosure].) Recently in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, the California Supreme Court held a plaintiff has standing to bring a wrongful foreclosure claim based on an alleged void loan assignment. (*Id.* at pp. 935-943.) But the high court expressly limited its holding to *postforeclosure* challenges. (*Id.* at p. 934.) The court acknowledged the judicial decisions disallowing the use of a lawsuit to preempt a nonjudicial foreclosure, and specifically stated that it was not addressing this issue. (*Id.* at pp. 933-934; see *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815 (*Saterbak*).) The Aniels' reliance on *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*) is similarly misplaced. The *Glaski* plaintiff challenged the

foreclosure sale *after* it occurred, and the *Glaski* court did not state or suggest a preemptive lawsuit is an authorized action. (*Id.* at pp. 1086, 1092-1101; see *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 743.)

Moreover, even if this was a postforeclosure challenge the Aniels would not be excused from the tender rule. Their wrongful foreclosure claim is based on their assertion that the various assignments of the note and deed of trust violated the pooling service agreement governing the mortgage trust, including that the mortgage trust closed before the note and deed of trust were transferred into this trust. However, numerous courts have recognized that a transfer of a secured loan in violation of the terms of the securitized trust (such as a transfer after the trust's closing date) is at most a voidable, rather than a void, transaction that a homeowner/borrower has no standing to challenge. (See *Saterbak, supra,* 245 Cal.App.4th at pp. 814-815; *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 43; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810-817; *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1256-1260.) Although the *Glaski* court expressed a contrary view (*Glaski, supra*, 218 Cal.App.4th at pp. 1095-1097), we find *Glaski* unpersuasive on this point (*Saterbak, supra*, 245 Cal.App.4th at p. 815, fn. 5; see *Kalnoki, supra,* 8 Cal.App.5th at p. 43; *Mendoza, supra,* 6 Cal.App.5th at pp. 810–817).

The Aniels also appear to ground their wrongful foreclosure claim on the allegation that certain foreclosure documents (including the loan assignment and substitutions of trustee) were signed by individuals without actual authority to do so. After *Yvanova*, the courts have held a challenge to a signatory's authority shows at most a voidable, and not a void, transaction, and thus is not a legal basis for a borrower's wrongful foreclosure claim. (See, e.g., *Kalnoki, supra,* 8 Cal.App.5th at p. 46; *Mendoza, supra,* 6 Cal.App.5th at p. 820; see also *Maynard v. Wells Fargo Bank, N.A.* (S.D. Cal. 2013) 2013 WL 4883202, at *8–*9.)

But even assuming the Aniels sufficiently alleged standing, and even assuming that the transfer of their mortgage somehow excused them from the tender requirement, their claim fails for the independent reason that they did not allege prejudice.

3. The Aniels Did Not Allege Prejudice.

Whether a plaintiff has alleged a void or voidable sale does not matter where plaintiff has failed to allege prejudice. "[Prejudice] is required not only for small deficiencies, but for big ones as well." (*Ram, supra,* 234 Cal.App.4th at pp. 20, 23 (conc. opn. of Humes, J.).) In *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, disapproved on other grounds in *Yvanova, supra,* 62 Cal.4th at p. 939, footnote 13, our colleagues in Division One of this court explicitly held that prejudice is required for a borrower to proceed on a claim that a foreclosure was carried out by an entity that was not properly assigned the deed of trust: "[A] plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests . . . . Even if [a nominee beneficiary] lacked authority to transfer the note [to the entity that eventually foreclosed], it is difficult to conceive how [the borrower] was prejudiced by [the] purported assignment . . . ." (*Fontenot, supra,* 198 Cal.App.4th at p. 272, citations omitted.) "This holding recognized that the entity prejudiced in such a case is not the borrower, but rather the proper beneficiary that was entitled to recourse on the loan. Similarly, relying on *Fontenot, Herrera* [*v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, disapproved on other grounds in *Yvanova, supra,* 62 Cal.4th at p. 939, fn. 13] held that an allegation of prejudice was required even if the purported beneficiary lacked authority to foreclose or execute a substitution of trustee. (*Herrera,* at pp. 1505-1507.)" (*Ram, supra,* 234 Cal.App.4th at p. 20 (conc. opn. of Humes, J.).)

The Aniels argue that they sufficiently established prejudice because they lost the rental property in a foreclosure sale and their credit was damaged. But this harm goes to the consequences of a foreclosure in general, not to harm caused by having one entity, rather than another, carry out the foreclosure. Prejudice in the context of a wrongful foreclosure action is the harm inflicted by wrongdoing that interferes with a borrower's ability to pay on a note or leads to a foreclosure that would not have otherwise occurred. (E.g., *Herrera v. Federal National Mortgage Assn., supra,* 205 Cal.App.4th at pp. 1507-

1508.) The Aniels' cause of action for wrongful foreclosure fails because they have not alleged such prejudice.

4. The Aniels Have Not Shown that the Failures of the Wrongful Foreclosure Cause of Action Can Be Cured.

When a demurrer is sustained without leave to amend, we decide whether there is a reasonable possibility that the pleading could have been amended to cure the defects. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010.) " ' "The burden of proving such reasonable possibility is squarely on the plaintiff." ' " (*Ibid*.) The abuse of discretion standard governs our review of that question. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) A request for leave to amend and the showing necessary to cure defects in a pleading may be made for the first time on appeal. (Code Civ. Proc., § 472c, subd. (a); *Bergeron v. Boyd* (2014) 223 Cal.App.4th 877, 890-891.) But to satisfy the burden on appeal of showing a reasonable possibility that an amendment will cure the defects, a plaintiff must not only set forth the legal basis for amendment, but " 'must show in what manner [it] can amend [its] complaint and how that amendment will change the legal effect of [its] pleading.' " (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*), quoting *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Plaintiff must set forth "factual and specific, not vague or conclusionary" allegations that sufficiently state all required elements of the challenged causes of action. (*Rakestraw*, *supra*, 81 Cal.App.4th at pp. 43-44.) "Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend." (*Id.* at p. 44.)

The Aniels have argued the trial court erred by sustaining the demurrer, but have not addressed how the first amended complaint could be amended. There is no basis to conclude the trial court abused its discretion in sustaining defendants' demurrer without leave to amend. (*Rakestraw*, *supra*, 81 Cal.App.4th at p. 44.)

D. The Sufficiency of the Cause of Action for Fraud as to AHMSI and Deutsche Bank is not Subject to Review; The Cause of Action for Fraud as to MERS and Power Default Fails for Lack of Particularized Pleading.

The Aniels claim they sufficiently alleged a claim of fraud, but "[i]n the event that the complaint is found to not state a cause of action," they claim they should be permitted to amend the first amended complaint and the second amended complaint. This argument fails for at least two reasons.

1. The Sufficiency of the Fraud Cause of Action Against AHMSI and Deutsche Bank is Not at Issue.

The sufficiency of the fraud cause of action against AHMSI and Deutsche Bank is not properly before this court. The trial court sustained the demurrer of AHMSI and Deutsche Bank to the first amended complaint with leave to amend as to the fraud cause action. If a demurrer is sustained with leave to amend, plaintiffs may either seek a writ or amend the complaint. (*California Ammonia Co. v. Macco Corp.* (1969) 270 Cal.App.2d 429, 433.) Where, as here, the plaintiffs opt to amend the complaint, the amended complaint supersedes the original complaint. (*Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1144; see; *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1372.) Therefore, any error in the order sustaining the demurrer will be waived and cannot be reviewed later on appeal. (*Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1307.) Because the Aniels opted to amend the fraud cause of action in the second amended complaint, any challenge to the sufficiency of allegations in the first amended complaint are waived. Also, the trial court overruled the demurrer by AHMSI and Deutsche Bank to the second amended complaint and the matter proceeded to trial on the fraud cause of action. Amending the second amended complaint is not warranted under these circumstances.

2. The Aniels Have Not Shown that the Failures of the Fraud Cause of Action Against MERS and Power Default in the First Amended Complaint Can Be Cured.

As to MERS and Power Default, the trial court sustained the demurrer to the first amended complaint without leave to amend as to all causes of action. Although the Aniels filed a second amended complaint realleging the fraud cause of action against MERS and Power Default in the second amended complaint, the Aniels did not have leave to do so. Nevertheless, realleging the fraud cause of action against MERS and Power Default did not render the Aniels' challenge to the first amended complaint moot; the cause of action in the second amended complaint against MERS and Power default was void due to the court sustaining their demurrer to the same cause of action in the previous complaint and denying the Aniels leave to reallege the claim. The operative complaint as to MERS and Power Default is the first amended complaint.

The Aniels contend that they sufficiently alleged a cause of action for fraud by alleging that the loan was wrongly transferred and respondents misrepresented the "ownership interest" in the deed of trust and promissory note. Again, we disagree.

"The elements of intentional misrepresentation, or actual fraud, are: '(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage.' " (*Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1474; see also §§ 1709, 1710.) " 'Fraud actions . . . are subject to strict requirements of particularity in pleading. The idea seems to be that allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense. Accordingly, the rule is everywhere followed that fraud must be specifically pleaded. The effect of this rule is twofold: (a) General pleading of the legal conclusion of "fraud" is insufficient; the facts constituting the fraud must be alleged. (b) Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy of liberal construction of the pleadings . . . will not ordinarily

be invoked to sustain a pleading defective in any material respect.' " (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.) "This particularity requirement necessitates pleading *facts* which 'show how, when, where, to whom, and by what means the representations were tendered.' " (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.)

In sustaining the demurrer to the Aniels' fraud cause of action, the trial court implicitly concluded that the Aniels had failed to meet this heightened pleading standard. We agree. The Aniels generally alleged that they justifiably relied on respondents' "false representations" of ownership during the foreclosure proceedings. They alleged that in reliance on those representations they could not sell their property and the property's value continued to drop. On appeal, the Aniels summarize these general allegations. But none of these allegations plead with any particularity how the foreclosure resulted from any reliance the Aniels may have placed on respondents' alleged conduct. Specifically, they do not aver that respondents' conduct caused them to do something that resulted in a foreclosure that was otherwise avoidable.

The Aniels contend they can amend the first amended complaint to assert a valid claim of fraud. They do not however set forth any factual and specific allegations to back up this claim. The conclusionary allegations that they can allege that the multiple assignments of the deeds were falsely executed by "Robo-Signers" are not sufficient to support the possibility of amendment. (*Rakestraw, supra,* 81 Cal.App.4th at p. 44.) Thus, there is no basis for finding that the trial court abused its discretion when it sustained the demurrer without leave to amend. (*Ibid.*)

E. The Trial Properly Dismissed Erlinda Aniel Because She Lacked Standing to Pursue the Fraud Claim.

The Aniels concede that Erlinda, as a non-signatory to the loan, would not have standing to assert a breach of contract claim. The Aniels claim that "[w]hile [Erlinda] may not be personally liable or lacks standing to modify" the terms of the loan, she has "an interest in the property and mortgages that encumber the property." It is well established, however, that a person who is not a party to a contract does not have standing

either to seek its enforcement or to bring tort claims based on the contractual relationship. (See, e.g., *MEGA Life & Health Ins. Co. v. Superior Court* (2009), 172 Cal.App.4th 1522, 1525, 1528-1532 (*MEGA Life*) [holding husband who was not a party to deceased wife's health insurance policy had no separate fraud claim based on the policy]; *Hatchwell v. Blue Shield of California* (1988) 198 Cal.App.3d 1027, 1034 ["Someone who is not a party to the contract has no standing to enforce the contract or to recover extra-contract damages for wrongful withholding of benefits to the contracting party"]; see, e.g., *Cabrera v. Countrywide Fin.*, No. 11-cv-4869 SI, 2012 WL 5372116, at *8 (N.D. Cal. Oct. 30, 2012) [dismissing claims for violations of unfair competition law and other claims for lack of standing because only plaintiff's husband was a signatory to the mortgage]; *Brockington v. J.P. Morgan Chase Bank, N.A.*, No. 08-cv-05795 RMW, 2009 WL 1916690, at *2-3 (N.D. Cal. July 1, 2009) [holding plaintiff who was not a party to the loan transaction had no standing as an alleged "equitable owner" of the property to challenge defendant's conduct in connection with extending mortgage loan to plaintiff's daughter, or to assert claim for unlawful concealment of facts in such transaction]; *Cleveland v. Deutsche Bank Nat. Trust Co.*, No. 08-cv-0802, 2009 WL 250017, at *2 (S.D. Cal. Feb. 2, 2009) [dismissing claims for fraud, violation of TILA, RESPA, UCL, and other claims for lack of standing because the borrower to the loan was plaintiff's wife]).

We realize that Erlinda signed the deed of trust as a joint tenant with her son and thus stood to lose the equitable interest that she had in the Persia Avenue rental property in the event of default on her son's loan. This interest alone, however, does not give rise to a tort claim in this case. "The crucial issue in any analysis of tort liability is whether the defendant breached a duty owed to the plaintiff. The question is one of law for the court to determine. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 313.)" (*MEGA Life*, *supra*, 172 Cal.App.4th 1522, 1529.) The gist of the Aniels' claim is that AHMSI, through its agents, breached a duty to Erlinda not to misrepresent the loan modification procedure and AHMSI's intention to modify the loan and thereby incurred liability to her. They are wrong.

Again, "[t]he elements of a cause of action for fraud are well established and not in dispute: 1) a misrepresentation or actionable concealment of fact; 2) knowledge of falsity or the duty of disclosure; 3) intent to defraud or induce reliance; and 4) actual reliance by the plaintiff. (Civ. Code, § 1709; *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.) The plaintiff must allege and prove that [s]he actually relied upon the misrepresentations, and that in the absence of fraud, would not have entered into the contract or other transaction. [Citation.]" (*Mega Life, supra*, 172 Cal.App.4th at p. 1530.)

We will assume, for the sake of argument, that AHMSI's agent directed the alleged misrepresentations and/or concealments at Erlinda, and that it was intended that she should believe them to be true. We will also assume that Erlinda did in fact assume that the statements by AHMSI's agent were true when she discussed the matter with her family. The fatal difficulty is that Erlinda was a stranger to the loan, and any reliance by her could not have caused *her* to "alter [her] position to [her] injury or risk." (Civ.Code, § 1709.) Put another way, AHMSI simply owed no duty to Erlinda because she was not a party to the loan. The trial court did not err in dismissing Erlinda as a plaintiff.

Even assuming the trial court erred by ruling Erlinda lacked standing and in its interpretation of the agreement, "we cannot undo the effect of the ruling or the ensuing judgment on the ground that the court may have misapplied [the law] as long as any other correct legal reason exists to sustain" its decision. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) Here, the trial court also determined that Erlinda lacked standing because, at that time, she was in bankruptcy proceedings, and any causes of action she had on the Persia Avenue rental property became part of the bankruptcy estate.

The Aniels do not dispute that any cause of action Erlinda had relating to the Persia Avenue rental property was properly part of the bankruptcy estate. Instead, they claim that the bankruptcy trustee has since released its interest in the lawsuit, making Erlinda's lack of standing on this ground moot. According to the opening brief, the trustee, did not release its interest in the property until June 2014—more than four months after the trial court entered judgment in this case. Post-judgment events cannot

negate a trial court's ruling that was proper when made. (See, e.g. *In re Zeth S.* (2003) 31 Cal.4th 396, 405, 413-414; *Daly-Murphy v. Winston* (9th Cir.1987) 837 F.2d 348, 351).

F. The Trial Court Did Not Abuse Its Discretion in Granting Respondents' Motion to Exclude Evidence of Wrongful Foreclosure Because It Was Not Relevant.

The trial court granted respondents' motion to exclude evidence pertaining to their purported lack of standing to pursue foreclosure. The items excluded were the assignments of the deed of trust recorded in 2010 and 2011. The Aniels contend that in granting respondents' motion in limine, the trial court abused its discretion by "essentially eliminate[ing] any chance" they had to prove damages and intent to defraud. They further contend this in limine ruling prevented them from "properly litigating their case." We disagree.

" 'Although not expressly authorized by statute, [a motion *in limine*] is recognized in decisions as a proper request which the trial court has inherent power to entertain and grant.' " (*Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 451.) The motion "is made to exclude evidence before the evidence is offered at trial, on grounds that would be sufficient to object to or move to strike the evidence." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 26.) "The scope of such motion is any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." (*Clemens, supra,* 1193 Cal.App.3d at p. 451.) "The law vests wide discretion in the trial court to decide the relevance of proffered evidence. [Citation.] The trial court is also vested with broad discretion in ruling on the admissibility of evidence. [Citation.] . . .; the court's ruling will be upset only if there is a clear showing of an abuse of discretion." (*Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 519-520 (*Smith*); accord, *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431 (*Tudor*); *People v. Adams* (1980) 101 Cal.App.3d 791, 799.) There was no abuse of discretion here.

To recap, the sole issue before the trial court was the Aniels' claim that respondents wrongfully induced them to stop payment on the loan for purposes of profiting from their eventual default. The wrongful foreclosure cause of action, with its

claims of unauthorized activity, improper assignments and related issues, was not before the court. Instead, the surviving cause of action at trial was fraud, which required evidence of: 1) a misrepresentation or actionable concealment of fact; 2) knowledge of falsity or the duty of disclosure; 3) intent to defraud or induce reliance; and 4) actual reliance by the plaintiff. (Civ. Code, § 1709; *Small v. Fritz Companies, Inc., supra,* 30 Cal.4th at p. 173.)

Evidence Code section 210 defines relevant evidence as "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Despite the Aniels claims to the contrary, the so-called "standing" evidence was simply irrelevant to establish fraud. The challenged evidence related to the 2010 and 2011 assignments of the deed. These documents have no tendency in reason to prove any alleged fraud concerning the loan modification. It is undisputed that Marc Aniel stopped making payments on the loan in September 2008. Even if there could be some minimal relevance, the Aniels could not have relied on these documents recorded in 2010 and 2011 to stop making the loan payments in September 2008. The trial court did not abuse its discretion in excluding evidence relating to the 2010 and 2011 assignments of the deed of trust because it was not relevant to the Aniels' fraud claim.

G. The Attorney Fee Award Was Not Authorized by Contract or Statute.

The Aniels contends the trial court erred in awarding attorney fees to respondents. We agree that the award of attorney fees was not authorized under the note, deed, or section 1717 because the Aniels' claim sounded in tort and was not "on the contract."

1. The Attorney Fee Provision

The deed contained the following provision:[9] "If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument [or] (b) there is a legal proceeding that might significantly affect Lender's interest in the Property . . . then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument . . . . Lender's action can include, but are not limited to . . . appearing in court; and . . . paying reasonable attorneys' fees to protect its interest in the Property and/or its rights under this Security Instrument . . . ." Respondents contend the deed provided for the award of attorney fees, the Aniels' claims arose out of the deed, and, under section 1717, they are therefore entitled to fees.

2. Applicable Legal Principles

"As a general rule, each party to litigation must bear its own attorney fees, unless otherwise provided by statute or contract. (Code Civ. Proc., § 1021.) 'The determination of the legal basis for an award of attorney fees is a question of law which we review de novo. [Citation.]' [Citation.]" (*Hyduke's Valley Motors v. Lobel Financial Corp.* (2010) 189 Cal.App.4th 430, 434.)

Section 1717 provides in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in

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[9] The note also contained an attorney fee provision: "If the Note Holder has required me to pay immediately in full . . . the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees." However, neither party discusses the language of this provision on appeal. Instead, they focus their discussion on the fee provision in the deed of trust. As we will explain, any claim by respondents for attorney fees provided in the note fails on the merits.

addition to other costs. [¶] Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract." (§ 1717, subd. (a).)

However, "section 1717 has a limited application. It covers only contract actions, where the theory of the case is breach of contract, and where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce that contract. Its only effect is to make an otherwise unilateral right to attorney fees reciprocally binding upon all parties to actions to enforce the contract." (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342, italics omitted.) Thus, by its terms, section 1717 operates only when an action is "on the contract." " 'California courts construe the term "on a contract" liberally. " 'As long as the action "involve[s]" a contract it is " 'on [the] contract' " within the meaning of section 1717. [Citations.]' [Citations.]" [Citation.]' [Citations.]" (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 821.) As one court has explained it, "[a]n action (or cause of action) is 'on a contract' for purposes of section 1717 if (1) the action (or cause of action) 'involves' an agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement, and (2) the agreement contains an attorney fees clause." (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 241-242.)

While whether a claim is "on a contract" is liberally construed, section 1717 does not apply to tort claims. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 615, 617, 619 (*Santisas*); *Arthur L. Sachs, Inc. v. City of Oceanside* (1984) 151 Cal.App.3d 315, 322.) Causes of action sounding in tort are designed to redress the breach of a duty imposed by law and owed to society, without regard to any duties owed by one party to another under a contract. (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 711 (*Exxess*).) It "is well settled that '. . . an action for fraud seeking damages sounds in tort, and is not "on a contract" for purposes of an attorney fee award, even though the

underlying transaction in which the fraud occurred involved a contract containing an attorney fee clause.' [Citations.]" (*Loube v. Loube* (1998) 64 Cal.App.4th 421, 430.) Even if the parties have a contractual relationship, "[a] tort action for fraud arising out of a contract is not . . . an action 'on a contract' within the meaning of [section 1717]." (*Stout v. Turney* (1978) 22 Cal.3d 718, 730.)

When evaluating whether an action or cause of action is "on a contract," courts consider factors such as "the pleaded theories of recovery, the theories asserted and the evidence produced at trial, if any, and also any additional evidence submitted on the motion in order to identify the legal basis of the prevailing party's recovery." (*Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, 377.)

3. Analysis

The Aniels' claim revolved around the note and deed, but "a cause of action does not warrant a recovery under . . . section 1717 *merely* because a contract with an attorney's fees provision is part of the backdrop of the case." (*Perry v. Robertson* (1988) 201 Cal.App.3d 333, 343.) While the Aniels had previously challenged the means and methods respondents used to foreclose the Persia Avenue rental property, the matter proceeded to trial on a single fraud cause of action. The Aniels contended respondents fraudulently induced them to let the loan go into default so that they could profit from the subsequent foreclosure. (See e.g., *Perry*, *supra*, 201 Cal.App.3d at pp. 342-343 [describing line of cases that denied attorney fees under section 1717 where prevailing party recovered on a legal theory of fraud in the inducement of a contract; such actions seek to avoid the contract, and the duty not to commit such fraud is "precontractual, it is not an obligation undertaken by the entry into the contractual relationship"]; see also *Exxess, supra,* 64 Cal.App.4th at p. 709 [claims for constructive fraud and breach of fiduciary duty were not brought to enforce terms of a lease and were not "on the contract" within the meaning of section 1717].)

The Aniels' fraud action did not seek to define or interpret the terms of the note and deed, or to determine or enforce the parties' rights or duties under those contracts. The crux of the Aniels claims was that an AHMSI customer service representative

allegedly told Erlinda that the loan needed to be in default before the loan modification process could begin. Adjudication of those claims as alleged did not hinge on whether the note and deed were otherwise valid, or respondents' respective obligations under the note and deed. A claim based on a breach of a noncontractual duty is a tortious action rather than a contractual one. (*Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1178.) " '[T]ort claims do not "enforce" a contract' and are not considered actions on a contract for purposes of section 1717." (*Kangarlou*, *supra*, 128 Cal.App.4th at p. 1178; *Hyduke's Valley Motors v. Lobel Financial Corp.*, *supra*, 189 Cal.App.4th at p. 436 [fact that complaint pleaded breach of contract cause of action was not dispositive; section 1717 did not apply because gravamen of action was not to enforce anyone's rights under the contract containing attorney fee provision].)

Although respondents prevailed on the sole cause of action at trial, the fraud claim was not on the contract. As a result, the trial court erred in awarding attorney fees to respondents because the award was not authorized by statute or contract.

III. DISPOSITION

The trial court order awarding attorney fees to respondents is reversed. In all other respects the judgment is affirmed. Each party to bear their own costs on appeal.

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REARDON, J.

We concur:

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RUVOLO, P. J.

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STREETER, J.