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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RITU BALA, et al., Plaintiffs and Appellants, v. BANK OF AMERICA, N.A., et al., Defendants and Respondents.	B252302 (Los Angeles County Super. Ct. No. LC098641)

APPEAL from a judgment of the Superior Court of Los Angeles County, Huey Cotton, Judge. Affirmed.

Ritu Bala and Ajay Sood, in pro. per., for Plaintiffs and Appellants.

Bryan Cave, John W. Amberg and Richard P. Steelman, Jr., for Defendants and Respondents.

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SUMMARY[1]

Plaintiffs and Appellants Ritu Bala and Ajay Sood (hereafter Appellants), in pro. per.,[2] brought an action against their lender and other financial institutions arising from their 2010 default on a refinanced loan on their residence. Appellants contend on appeal that the trial court erred in sustaining without leave to amend Respondents' demurrer to their first amended complaint. We affirm.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

We take our facts from the operative first amended complaint (FAC) in this action.[3]

In November 2007, Appellants purchased their residence at 20212 Bassett Street, Winnetka, financing the purchase with a loan of $327,200 from defendant Bank of America, N.A.[4] secured by the property. This 2007 loan was for a 30-year term with a fixed rate of 6.5 percent interest for the entire term of the loan, but provided for interest only loan payments for the first 10 years, after which the loan would adjust to a principal

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[1] On this Court's own motion, rehearing was granted with respect to this Court's opinion filed on February 2, 2015. Oral argument before a newly comprised panel was heard on April 21, 2015.

[2] Although a self-represented litigant is not excused from complying with the rules governing appropriate pleading practice (see *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984–985 ["mere self-representation is not a ground for exceptionally lenient treatment"]), whenever possible, we do not strictly apply technical rules of procedure in a manner that deprives litigants of a hearing. (Cf. *Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 432 ["we carefully examine a trial court order finally resolving a lawsuit without permitting the case to proceed to a trial on the merits"].)

[3] Appellants filed two requests for judicial notice; the first on September 4, 2014, and the second on October 17, 2014. Respondents opposed both requests. We hereby grant both requests for the limited purpose of recognizing the existence of the documents, but not for the truth of any matters or facts stated therein.

[4] Bank of America was successor by merger of defendant BAC Home Loans Servicing, LP.

and interest loan for the remaining 20 years. With respect to this prior loan, Appellants alleged that the Bank of America loan officer, Gerardo Altamirano, overcharged Appellants loan fees and did not explain or disclose to Appellants the risk of monthly payments drastically going up after 10 years.[5] Because of the projected 37 percent increase in payment amount scheduled to occur in 2017, Appellants were "eager" to refinance the 2007 loan at the first opportunity and alleged that Bank of America knew or should have known that this hike in monthly payments would "compel" borrowers like Appellants to refinance at the first opportunity, costing borrowers "enormous fees and expenses" and entitling Bank of America to more profits.

In December 2009, an appraiser hired by Bank of America, Pamela Gurak, appraised the property's value as $335,000, but Appellants alleged upon information and belief that she did not exercise independent judgment and had to "adhere to B of A's instructions" or "they would stop giving her business." The property had been appraised six months earlier, in May 2009, at $295,000 and Appellants alleged upon information and belief that Bank of America "inflated the value by $40,000" in order to "qualify Plaintiffs under the Home Owners Affordability and Stability Plan" and "make profits and fees" for Bank of America.

In February 2010, Appellants were "shocked" when Bank of America increased "their monthly mortgage payment, for no reasons whatsoever" from $1,760 a month to $1,858 even though the original loan was a 30-year fixed and Appellants were at the time current on their payments.

Appellants refinanced on March 22, 2010 with a $341,750 loan,[6] obtained only "after great effort, by making numerous phone calls, filling out applications and by forwarding numerous documents." At refinancing, the principal on the original 2007

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[5] Despite Appellants' earlier description of the original loan as being for a fixed interest rate for the entire 30-year term of the loan, Appellants also alleged that the loan officer failed to disclose "the risk of interest rate adjustment after 10 years."

[6] The Loan was secured by a Deed of Trust recorded against the property with Bank of America as beneficiary and defendant ReconTrust Company, N.A., as trustee.

loan was $325,000 so, according to Appellants, Bank of America made an additional $16,750. During the origination of this refinance loan, Appellants allege that Bank of America employees Brandon Sherman and Matthew Jacobsmeyer misrepresented and concealed the fees and costs of the refinance loan and the fact that the loan was not in Appellants' "best interests." Specifically, Appellants' "monthly payments went down marginally by just $29, whereas B of A made fees and profits of more than $16,750." Appellants allege that under the Home Owners Affordability and Stability Plan, Bank of America was permitted to charge Appellants fees "not exceeding $1,000" and therefore had defrauded Appellants as well as the federal program.

In November 2010, nine months after obtaining the new refinance loan, Appellants apparently stopped making monthly payments on the 2010 loan. On February 28, 2011, ReconTrust recorded a Notice of Default.

Appellants alleged that Respondents violated Civil Code section 2923.5 by never contacting them about loss mitigation on the refinance loan prior to recording the Notice of Default. Although Appellants acknowledge that section 2923.5 in effect in 2011 only "applies to loans made from January 1, 2003, to December 31, 2007" and the refinance loan was made outside this time period in March 2010, Appellants argue that their original 2007 loan did fall under the section and should be deemed enforceable and in effect because the refinanced loan was "without effect" as it was tainted by fraud.

On March 14, 2011, beneficiary Bank of America recorded a Corporation Assignment of Deed of Trust, assigning all beneficial interest under the Deed of Trust to its former servicing subsidiary, defendant BACHLS. On June 7, 2011, ReconTrust recorded a Notice of Trustee's Sale. Appellants alleged that the Corporation Assignment of Deed of Trust and the Notice of Trustee's Sale were signed by "robo-signers" and are prima facie evidence of fraud.

On June 20, 2011, Appellants filed their first lawsuit.[7] During the pendency of that prior lawsuit, Bank of America agreed to review Appellants for a loan modification. On September 22, 2011, Appellants voluntarily dismissed the first lawsuit without prejudice. On April 11, 2012, Bank of America offered Appellants a loan modification which required three trial payments to be made at which point "permanent modification documents will be generated" providing for a monthly payment of $1,828 for a term of 40 years at a rate of 4.625 percent interest. The $31,168 for missed payments from November 1, 2010 to April 1, 2012, as well as payment of various foreclosure and other fees and escrow shortages, would be paid over time as well. Appellants rejected the modification, alleging that the offered modification was not a reasonable and good faith effort as Bank of America did not lower Appellants' interest rate or reduce the principal amount.

On October 11, 2012, Appellants filed the instant, second lawsuit asserting essentially the same claims from the first suit, namely, that Bank of America employees had misrepresented that Appellants qualified for the loan, artificially inflated the appraised value of the property, and misrepresented that they had the right to foreclose on the property by recording "false documents with the Los Angeles County Recorder" when they failed to comply with section 2923.5. The Appellants also allege that respondents breached a purported oral agreement to give them a loan modification and did not make a reasonable and good faith effort to modify Appellants' 2010 loan.

Respondents demurred to the complaint on April 26, 2013, with a hearing scheduled for July 8, 2013. Appellants did not file an opposition to the demurrer; instead on July 5, 2013, three days before the scheduled hearing on the demurrer, Appellants filed the operative FAC, which contained nearly identical causes of action to the original complaint.

On August 9, 2013, Respondents demurred to the FAC on the ground that it failed to state a claim for relief. Appellants filed an opposition on August 19, 2013. At the

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[7] The original lawsuit alleged 10 causes of action seeking various unspecified damages, rescission of the loan documents, and an injunction against foreclosure.

hearing on September 5, 2013, the trial court issued its tentative ruling on Respondents' demurrer to the FAC and called the matter for hearing. After hearing oral argument, the trial court adopted its tentative ruling as the order of the court, sustaining Respondents' demurrer to the FAC in its entirety without leave to amend. On October 11, 2013, the trial court entered its order dismissing the FAC with prejudice.

Appellants timely filed their notice of appeal on November 1, 2013.

DISCUSSION

I. Judicial Notice

Preliminarily, we address Appellants' contention that the trial court improperly took judicial notice of "extrinsic" evidence and considered the truth of the judicially noticed documents. To the extent the trial court took judicial notice of and relied upon recorded documents, the grant of judicial notice was proper. A court may take judicial notice of the "fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265.) "Where, as here, judicial notice is requested of a *legally operative* document—like a contract—the court may take notice not only of the fact of the document and its recording or publication, but also facts that clearly derive from its legal effect." (See *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 754.)

To the extent the trial court took judicial notice of the December 2009 appraisal by Gurak, the trial court did not err because there is no genuine dispute regarding the authenticity of this document and courts may take judicial notice of the contents of documents referred to in the complaint, but not attached to the complaint. (See, e.g., *Pac. Employers Ins. Co. v. State* (1970) 3 Cal.3d 573, 575, fn. 1.)

II. Standard of Review

We review the trial court's decision de novo. (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415.)

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. '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." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The court "may disregard allegations that are contrary to law or to a fact of which judicial notice may be taken." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 8:136.1, p. 8–102.2; *Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955.) Furthermore, "[w]here the demurrer is to an amended complaint, the reviewing court may properly consider factual allegations in the prior complaints." (Eisenberg et al., *supra*, ¶ 8:136.1b, p. 8–102.2; *People ex rel. Gallegos v. Pacific Lumber Co*. (2008) 158 Cal.App.4th 950, 957.)

"The plaintiff has the burden of showing that the facts pleaded are sufficient to establish every element of the cause of action and overcoming all of the legal grounds on which the trial court sustained the demurrer, and if the defendant negates any essential element, we will affirm the order sustaining the demurrer as to the cause of action. [Citation.] We will affirm if there is any ground on which the demurrer can properly be sustained, whether or not the trial court relied on proper grounds or the defendant asserted a proper ground in the trial court proceedings." (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031; *Sui v. Price* (2011) 196 Cal.App.4th 933, 938.)

III. Fraud

The trial court dismissed Appellants' fraud cause of action, holding:

"The fraud claim is not stated with the required particularity. Further, [Appellants] allege as part of the fraud claim that the lender artificially inflated the appraisal to sell [Appellants] a loan they could not afford. . . . There is no duty owed to insure that the borrower can afford the loan he is accepting. The loan transaction is at arm's length. . . . Moreover, the appraisal is done for the benefit of the lender and not the borrower.

"Regarding any false representations that the lender would modify the loan, Exhibit P appears to reflect that the lender did in fact agree to modify the loan.

"Finally, the claim is time barred since the original loan was made in 2007."

"'To establish a claim for 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.'"" (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 605-606; *Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434, italics omitted.)[8]

Appellants contend that they pled fraud with particularity. First, Appellants contend that Bank of America committed fraud with respect to 2007 loan because

[8] To the extent Appellants argue that the trial court erred because it cited *Nymark v. Heart Fed. Sav. & Loan Ass'n* (1991) 231 Cal.App.3d 1089, 1096 for the proposition that a lender does not owe a borrower a duty of care when duty of care is not an element of fraud, the trial court's reference to *Nymark* does not support the conclusion that the trial court imposed on Appellants a requirement to establish a duty of care. Rather the trial court appears to have been addressing Appellants assertion as part of their fraud claim that Bank of America inflated the appraisal in order to qualify Appellants for a loan they could not afford.

Altamirano represented that Appellants would be refunded overcharged fees. The cited exhibit, however, shows only that Appellants contacted Altamirano asserting they had been overcharged and asking for the status of a refund from his manager and Altamirano responding that he would “get you an answer today.” Moreover, even assuming arguendo, that Altamirano’s January 31, 2008 email, had fraudulently represented that Appellants would in fact receive a refund, Appellants would have discovered this statement was false when they did not receive the refund and the claim is barred by the three-year statute of limitations. (Civ. Code, § 338(d).)

Second, Appellants contend that Altamirano misrepresented that interest rates were likely to go up and it was a good time to take a loan. “‘It is hornbook law that an actionable misrepresentation must be made about past or existing facts; statements regarding future events are merely deemed opinions.’” (*Neu–Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 309–310.) Thus, even assuming a claim based on Altamirano’s statements prior to the 2007 loan are not time-barred, such statements regarding future value and interest rates are opinions only and not actionable.

Third, Appellants allege that Bank of America fraudulently increased their payment amount without any basis. Specifically, in the FAC, Appellants alleged that in February 2010, they were “shocked” when Bank of America increased “their monthly mortgage payment, for no reasons whatsoever” from $1,760 a month to $1,858 even though the original loan was a 30-year fixed and Appellants were at the time current on their payments. But, the attached exhibit cited by Appellants states that it was “an escrow analysis for your loan” and “We have identified you as a customer in the process of refinancing your loan with us.” The exhibit advises Appellants that the escrow portion of their payment was changing, listing $98 as the projected new “Total monthly escrow payment” to pay for tax and insurance and cover a projected shortage, and lists the “Principal and/or interest” portion of the loan payment as remaining at $1,760, bringing the projected “Total monthly home loan payment effective 03/2010” to $1,858. Thus, the exhibit contradicts Appellants’ claim that their loan payment amount was changed.

Fourth, Appellants contend that Sherman and Jacobsmeyer fraudulently represented that Bank of America was entitled to $16,500 in fees and costs when the federal regulation prohibited Bank of America from charging more than $1,000. Appellants cite to an executive summary of the Homeowner Affordability and Stability Plan but this summary indicates that a government paid incentive of $1,000 would be paid to servicers for each eligible modification, not that fees charged to borrowers were limited to $1,000.

Fifth, Appellants contend that the December 2009 appraisal by Gurak was fraudulently inflated. "Statements regarding the appraised value of the property are not actionable fraudulent misrepresentations." (*Graham, supra*, 226 Cal.App.4th at p. 606.) Appraisals are an opinion on market value of a property and moreover, are intended to protect the lender's interest in having adequate security for the loan. (*Id.* at p. 607.) Accordingly, "[s]ince the appraisal is a value opinion performed for the benefit of the lender, there is no representation of fact upon which a buyer may reasonably rely." (*Ibid*.)

Sixth, Appellants contend that the robo-signing of the Notice of Trustee's Sale and Corporate Assignment of Deed of Trust constitute "fraud on its face," citing to various state litigation against the practice of "robo-signing." Appellants, however, do not dispute that they were in default of the 2010 refinance loan and did not cure the default or allege any other defect in the documents or their representations. Thus, there is no showing of prejudice or damage from the robo-signing of the Notice of Trustee's Sale or the Corporate Assignment of Deed of Trust. (See *Mendoza v. JPMorgan Chase Bank, N.A.* (2014) 228 Cal.App.4th 1020, 1037 [noting that countless courts have found that where a plaintiff alleges a document is void due to robo-signing yet does not contest the validity of the underlying debt and is not a party to the assignment, the plaintiff does not have standing to contest the alleged fraudulent transfer].)

Seventh, Appellants allege that Bank of America misrepresented the "payment shock" that would occur when the 10 years of interest-only payments ended on their 2007 loan. Appellants, however, refinanced the 2007 loan after two-and-a-half years and never experienced the "payment shock." To the extent that Appellants contend that the threat of "payment shock" caused them to refinance their loan at "the first opportunity," any such damage is at best speculative.

IV. Wrongful Foreclosure

The trial court dismissed Appellants' wrongful foreclosure cause of action, noting that the 2010 loan "falls outside of the statutory time periods covered by Civ. Code § 2923.5 and 2923.6" and rejecting Appellants' attempt to rescind or disclaim the 2010 refinanced loan so that the sections could be applied to the 2007 loan. The trial court rejected Appellants' claim for two reasons; first, Appellants had failed to tender the amounts owing on the loan,[9] and second, Appellants were offered a loan modification.

Here, there is no dispute that the 2010 loan did not fall within the statutory period covered by sections 2923.5 and 2923.6. Instead, Appellants argue that the "March 2010 loan was a fraud." We have already addressed, and rejected Appellants' claims of fraud. Moreover, Appellants were offered a loan modification. Although the offered modification was not what they hoped for, the statute does not create a duty for the lender to agree to a loan modification, let alone require a lender to make loans on terms dictated by the borrower. (See *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282, fn. 17; *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526; *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1617.)

V. Breach of Oral Contract

The trial court dismissed Appellants' claim that Bank of America breached an oral agreement to modify the 2010 loan, finding that the exhibits show that Bank of America did offer to modify the loan and that the oral contract was barred by the statute of frauds. On appeal, Appellants do not challenge the trial court's finding that the statute of fraud bars their oral contract claim.

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[9] Appellants contend that the trial court improperly raised the issue of tender without giving Appellants an opportunity to address the issue in violation of their due process rights. Failure to tender, however, was only one of the reasons given by the trial court for its decision.

The statute of frauds requires any contract subject to its provisions to be memorialized in a writing subscribed by the party to be charged or by the party's agent. (Civ. Code, § 1624; *Secrest v. Security National Mortgage Loan Trust 2002–2* (2008) 167 Cal.App.4th 544, 552.) An agreement to modify a contract is subject to the statute of frauds. (Civ. Code, § 1698.) Likewise, a contract or promise to loan money or to extend credit in an amount greater than $100,000 is also subject to the statute of frauds. (Civ. Code, § 1624, subd. (a)(7).) Accordingly, the statute of fraud bars the claim.

VI. Breach of Implied Covenant of Good Faith and Fair Dealing

The trial court dismissed Appellants' claim for breach of implied covenant of good faith and fair dealing reasoning that Appellants had failed to identify any specific term of the contract that was frustrated and noting that the relationship between a bank and commercial borrower does not constitute a special relationship for purposes of the covenant of good faith and fair dealing.

The implied covenant of good faith and fair dealing "'is limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create obligations not contemplated by the contract.'" (*Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094.) The California Supreme Court has stated that a contract action to enforce the implied covenant cannot be brought "to protect some general public policy interest not directly tied to the contract's purpose." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 373.) Accordingly, a plaintiff raising a claim for the breach of the implied covenant must allege a reasonable relationship between the defendant's allegedly wrongful conduct and the express terms or underlying purposes of the contract. (*Ibid.*)

Here, Appellants rely on their general allegations of fraud and malfeasance but have not attempted to identify an express term or underlying purpose of a contract to which the alleged wrongful conduct relates. Moreover, to the extent Appellants' claim of breach of the implied covenant of good faith and fair dealing is based on the alleged oral contract, such a claim fails because we have already found the oral contract to be barred by the statute of frauds. "Without a contractual underpinning, there is no independent claim for breach of the implied covenant." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1994) 21 Cal.App.4th 1586, 1599.)

VII. Breach of Fiduciary Duty

The trial court dismissed Appellants' breach of fiduciary duty claim because "the lender/borrower relationship is not fiduciary." Appellants argue, however, that Bank of America acted like a mortgage broker not merely a lender and cite *Smith v. Home Loan Funding, Inc.* (2011) 192 Cal.App.4th 1331. In *Smith*, the loan officer "shopped" the loan to other lenders and represented to the borrower that he would "shop the best loan" for her. (*Id.* at pp. 1335-1336.) Here, there are no allegations that Bank of America loan officers stated that they would "shop" other lenders to find Appellants the best loan possible. Rather, Appellants conclusorily allege that "Bank of America N.A.'s loan officers acted like brokers," that its website announced various loan programs and that loan officers would provide consultations, that the loan officers made misrepresentations or failed to explain risks and options, Appellants relied on the misrepresentations, and Appellants believed the loan officers were acting in Appellants' best interest. These allegations, however, are insufficient to show that Bank of America acted like a mortgage broker.

VIII. Violations of Business and Professions Code Section 17200

The trial court dismissed Appellants' Business and Professions Code section 17200 claim, holding that Appellants "had not alleged standing to bring this claim, i.e. injury in fact and a loss of money or property as a result of defendant's unfair business practice."

A plaintiff alleging unfair business practices under Business and Professions Code section 17200 must state with "reasonable particularity the facts supporting violation." (*Khoury v. Maly's of California, Inc*. (1993) 14 Cal.App.4th 612, 619.) Thus, a demurrer is properly sustained as to this cause of action when the complaint does not identify any particular section of the statutory scheme which was violated and fails to describe with any reasonable particularity the facts supporting violation. (*Id.* at p. 619.)

Here, the FAC alleges that defendants' representations and advertising were false and misleading and allowed defendants to derive substantial profit. The FAC, however, does not describe the manner in which defendants' representations or advertising were false or misleading nor how they caused Appellants' injury.

IX. Void Contract Based on "Unconscionableness" (*sic*)

As to Appellants' eighth cause of action, the trial court stated that "[i]t is unclear what claim [Appellants] are attempting to state. Unconscionability is generally an affirmative defense." The trial court assumed Appellants were attempting to cancel their loan or assert a claim to quiet title.

On appeal, Appellants argue that the trial court should have refused to enforce the unconscionable terms of the 2007 loan and 2010 refinance loan, arguing the "2007 loan is one-sided, oppressive and overly-harsh because it was an interest-only loan" and the 2010 loan "violated the federal regulations that authorized them to charge only $1,000 in fees and costs" and because Bank of America "manipulated the Fannie Mae's desktop underwriting software."

Generally, unconscionability is "'recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" (*Shadoan v. World Sav. & Loan Assn.* (1990) 219 Cal.App.3d 97, 102.) Here, Appellants' allegations "do not sufficiently allege lack of choice, lack of negotiation or surprise regarding the terms of the loan to demonstrate procedural unconscionability." (*Graham*, *supra*, 226 Cal.App.4th at p. 617.) Moreover, as to the 2007 loan, at least one court has held that "[w]e cannot conclude an allegation of the existence of an interest-only loan or an adjustable rate mortgage, without more, shocks the conscience or is so oppressive or favorable to defendants as to render the loan unconscionable." (*Id.* at p. 618.)

X. Violation of Rosenthal Fair Debt Collection Practices Act

The trial court found that there was "no California case on point about whether the Rosenthal Fair Debt Collection Practices Act applies as to foreclosures" but based on cases addressing an analogous federal act, concluded that the Rosenthal Act was "inapplicable to foreclosures."

Appellants bear the burden of showing how the alleged facts are sufficient to establish every element of their cause of action. (*Martin*, *supra*, 173 Cal.App.4th at p. 1031; see *Sui*, *supra*, 196 Cal.App.4th at p. 938.) On appeal, Appellants do not address the trial court's conclusion that the Rosenthal Act is inapplicable to foreclosures and therefore do not advance any argument that this conclusion is erroneous.[10] We therefore treat their challenge to the trial court's ruling sustaining the demurrer to the Rosenthal Act claim as waived. (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862 ["'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived'"]; *Paulus v. Bob Lynch Ford, Inc*. (2006) 139 Cal.App.4th 659, 685 ["'"Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived"'"].) "We are not bound to develop [Appellants'] arguments for them." (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830; *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1502.)

XI. Negligence and Negligent Lending

The trial court dismissed Appellants' negligence and negligent lending claims because Appellants "have not alleged a breach of a recognized legal duty."

To state a cause of action for negligence, Appellants must plead and prove that a legal duty to use reasonable care was owed to him. (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339.) "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Nymark*, *supra*, 231 Cal.App.3d at p. 1096.)

[10] We note there appears to be support for the trial court's conclusion that foreclosing under a trust deed is not debt collection under the Rosenthal Act. (*Sipe v. Countrywide Bank* (E.D.Cal. 2010) 690 F.Supp.2d 1141, 1151; accord, *Velasco v. Homewide Lending Corp*. (C.D.Cal. June 21, 2013, No. SACV 13–00698–CJC(RNBx)) U.S.Dist. Lexis 87880.)

Appellants argue, however, that Bank of America exceeded "'its conventional role as a mere lender of money,'" when it intentionally misrepresented the inherent risks of their 2007 interest only loan, charged $16,750 in prohibited fees, robo-signed documents, harassed Appellants by raising their monthly payment amount without any reason, failed to respond to Appellants' telephone calls, inflated the appraisal of the property with the sole purpose to qualify Appellants and enable Bank of America to make $16,500 in fees, and downgrading the underwriting standards.

These allegations do not plead that Bank of America exceeded its role as a lender in connection with the loans; rather, they allege fraud and other malfeasance—which claims we have addressed. Thus, the general *Nymark* rule applies. Accordingly, Appellants cannot allege a duty of care to state a negligence cause of action.

XII. Intentional Infliction of Emotional Distress

The trial court dismissed Appellants' claim for intentional infliction of emotional distress, holding that Appellants "failed to allege any extreme or outrageous conduct supporting the cause of action."

"The California Supreme Court has set a 'high bar' for what can constitute severe distress. [Citation.] 'Severe emotional distress means "'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'"'" (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1376.)

On appeal, Appellants argue that they have asserted the intentional tort of fraud and therefore have a valid cause of action for intentional infliction of emotional distress. However, as discussed above we have concluded that Appellant has failed to state a claim for fraud. Moreover, Appellants have not pled facts which indicate extreme and outrageous conduct.

XIII. Declaratory Relief

The trial court held that Appellants' claim for declaratory relief was "unavailable because [Appellants] have not alleged a claim upon which to rest their entitlement to declaratory relief."

Appellants do not indicate any dispute or controversy other than those addressed in their other causes of action, which we have addressed. "'[D]eclaratory relief does not lie in a case in which a complaint makes no case on the merits and would merely produce a useless trial.'" (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1156.)

IX. Rescission

The trial court dismissed Appellants' claim for rescission, stating that "rescission requires tender of amounts borrowed."

Rescission allows a party to a contract to be "relieved of the burdens and [to] procure restitutionary redress respecting a contract which was defective at its inception because consent was not freely or knowingly given." (*Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304, 317, fn. 16.) A party may rescind a contract if, among other things, that party's consent "was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party." (Civ. Code, § 1689, subd. (b)(1).) To obtain rescission, however, the party must "[r]estore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so." (§ 1691, subd. (b).) This rule, that the complainant is required to restore to the defendant everything of value received in the transaction, applies even in cases where the plaintiff "was induced to enter into the contract by the fraudulent representations of the defendant." (*Fleming v. Kagan* (1961) 189 Cal.App.2d 791, 796.)

Thus, a party seeking to rescind a deed of trust must tender the amount owed on the debt. (See, e.g., *Karlsen v. American Savings & Loan Assn.* (1971) 15 Cal.App.3d 112, 117 ["A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust"]; *Touli v. Santa Cruz County Title Co.* (1937) 20 Cal.App.2d 495, 499–500 [reversing judgment extinguishing a deed of trust without repayment of the underlying debt pursuant to Civil Code section 1691 rescission requirements].) There was no valid and viable tender in this case. The FAC failed to allege that Appellants returned or offered to return everything of value they received, that is, the loan principal. On appeal, Appellants state that in the event of rescission, they "will return to Respondents the loan amount, minus Appellants' damages as a result of fraud" and seem to include within that amount the 20 percent down payment they made at the time of the purchase (which went to the seller of the property) as well as the cost of home improvements. In this context, we find no error in the trial court's sustaining of the demurrer to this cause of action.[11]

XV. Leave to Amend

If the trial court sustains a demurrer without leave to amend, if a plaintiff seeks leave to amend, he must demonstrate how the complaint could be amended to state a valid cause of action. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) "'To satisfy that burden on appeal, a plaintiff "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." [Citation.] . . . The plaintiff must clearly and specifically set forth the "applicable substantive law" [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action.'" (*Rossberg v. Bank of America, N.A.*, *supra*, 219 Cal.App.4th at p. 1491.)

Appellants have not met their burden to show how they could amend any of the causes of action in their FAC. Appellants conclusorily state that they can "present more document and facts," "can present regulations, relevant directives and announcements of the Federal and State Governments," and "can present more evidence." Appellants also allege that they received discovery materials with additional evidence to bolster their

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[11] At oral argument, Appellants argued that the tender requirement did not apply based on cases cited in their brief. Those cases, however, involved exceptions to the tender requirement in the wrongful foreclosure context, not the rescission context. (See *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1053; *Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1454-1455.)

claims but fail to relate the new evidence to elements of a cause of action. As a result, there is no basis on which to grant leave to amend.

At oral argument, Appellants contend that they qualified for the federal Home Affordable Modification Program (HAMP) and could amend their complaint to state that they were qualified for and entitled to a loan repayment modification under HAMP. We disagree. First, under HAMP the loan must have originated before January 2009. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 786-787 [summarizing HAMP].) Appellants' refinance loan was made in 2010.[12] Second, courts have held that borrowers are not intended third-party beneficiaries of HAMP contracts and have no right to enforce HAMP loan modification provisions. (See *Pfeifer*, *supra*, 211 Cal.App.4th at p. 1282, fn. 17; *Hoffman v. Bank of America, N.A.* (N.D.Cal. June 30, 2010) 2010 WL 2635773, at *7; *Williams v. Geithner* (D.Minn. Nov. 9, 2009) 2009 WL 3757380, at **2-3.)[13]

XVI. Discovery Dispute

Appellants allege that they were prejudiced by Respondents' delayed response to discovery requests. Because Appellants do not cite to any portion of the record showing that this issue was previously raised with the trial court, we decline to consider it in the first instance on appeal.

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[12] Although their original loan was made in 2007, they had already refinanced and paid off this 2007 loan with the 2010 refinance. As previously discussed, we reject Appellants' arguments to "revive" the 2007 loan.

[13] Appellants' reliance throughout their reply brief and at oral argument on *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915 is misplaced because *Bushell* addressed a lender's obligations where a borrower has made payments required under a trial modification plan offered under HAMP, which did not occur in the instant case.

DISPOSITION

The judgment is affirmed. Respondents to recover costs.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.