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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RENATO OPENIANO et al.,

Plaintiffs and Appellants,

v.

BANK OF AMERICA CORPORATION  
et al.,

Defendants and Respondents.

D060901

(Super. Ct. No. 37-2010-00100232  
CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Randa M. Trapp, Judge. Affirmed.

Plaintiffs and appellants Renato Openiano, Arturo Belenzo, Job Penetrante and Rey Openiano appeal from a judgment in favor of defendants and respondents Bank of America Corporation (Bank of America) and BAC Field Services Corporation (at times collectively Bank) entered after the trial court sustained without leave to amend Bank's demurrer to plaintiffs' second amended complaint for, inter alia, trespass and unlawful foreclosure. Plaintiffs, who are self-represented litigants, contend the appeal presents a

question of law as to whether a lender may enter a property by force and change the locks "without notice, without permission [and] without legal or court process, if the borrower is delinquent in making payment[.]" Because plaintiffs have not shown any basis for reversing the order sustaining Bank's demurrer without leave to amend, we affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

The facts are taken from well-pleaded material allegations of the operative second amended complaint as well as matters properly subject to judicial notice. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 734, fn. 2; *Thornton v. California Unemployment Ins. Appeals Bd.* (2012) 204 Cal.App.4th 1403, 1408.)

In April 2007, Anthony and Ruth Casabag purchased residential property located at 6455 Bullock Drive in San Diego County (the property). They obtained two loans from Countrywide Home Loans, Inc., doing business as America's Wholesale Lender, secured by deeds of trust on the property recorded on April 10, 2007.<sup>1</sup> The first deed of

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<sup>1</sup> Plaintiffs do not dispute that Bank is the proper party and the lender. In its respondent's brief, Bank states that Countrywide Home Loans, Inc., doing business as America's Wholesale Lender, is an indirect subsidiary of Bank of America Corporation. The deeds of trust identify America's Wholesale Lender as the "Lender" and Mortgage Electronic Registration Systems, Inc. as the lender's beneficiary and nominee. Plaintiffs appear to concede the existence and contents of the deed of trust, and there is authority for the proposition that under these circumstances, we may take judicial notice of the recorded deed, which is an official act of the executive branch. (*Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 194, citing Evid. Code, §§ 452, subd. (c), 459, subd. (a) & *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549 & *Cal-American Income Property Fund II v. County of Los Angeles* (1989) 208 Cal.App.3d 109, 112, fn. 2; but see *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117 [fact that a court may take judicial notice of a

trust contains a section 9 entitled "Protection of Lender's Interest in the Property and Rights Under this Security Instrument" (at times, section 9) that provides in part: "If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned 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, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or

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recorded deed does not mean it may take judicial notice of the factual matters stated therein[.]) Plaintiffs also have requested that we take judicial notice of two California appellate court opinions: *Eichhorn v. De La Canterra* (1953) 117 Cal.App.2d 50 and *Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1. We deny the request as an improper circumvention of appellate rules pertaining to the normal briefing process. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.) Even if we were to take judicial notice of these appellate decisions (see Evid. Code, § 451, subd. (a)), they are inapposite and would not change our opinion in this matter.

dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9."

At some point, the Casabags defaulted on their mortgage payments. In March 2009, Anthony Casabag, represented by Renato Openiano, a real estate agent working at Aguinaldo Realty, entered into a purchase agreement to sell the property to third parties. Renato Openiano also represented the third party buyers. Thereafter, Renato Openiano and Anthony Casabag purported to enter into month-to-month rental agreements with Job Penetrante, Rey Openiano, and Arturo Belenzo.

On September 15, 2009, a representative of BAC Field Services Corporation entered the property, pried open a side gate and side door locks and changed the front and rear door locks on the property. The representative—identified as "WSR"—posted a notice stating that the property had been secured to prevent entry by unauthorized persons. Bank sold the property via a trustee's sale three weeks later, on October 6, 2009.

Plaintiffs originally sued Bank in September 2010. In November 2010, they filed a first amended complaint asserting causes of action for trespass to land, "intrusion," violation of the Fair Employment and Housing Act (FEHA, Gov. Code, § 12900, et seq.), tortious interference with contract, negligence, unfair competition, intentional and negligent infliction of emotional distress, unlawful foreclosure, and "illegal eviction." Bank demurred to all of the first amended complaint's causes of action, and the trial court

sustained the demurrers as to all of them, granting plaintiffs leave to amend all but the cause of action for illegal eviction.

In April 2011, plaintiffs filed their second amended complaint setting out the same causes of action. They alleged Bank's September 15, 2009 forcible entry on their property constituted a trespass, intrusion, wrongful foreclosure and wrongful eviction,<sup>2</sup> and interfered with the lease agreements between Renato Openiano and Job Penetrante, Rey Openiano, and Arturo Belenzo; the purchase agreement between Casabag and the third parties; and the Casabags' listing agreement with Renato Openiano. Alleging that all of the plaintiffs have the same Filipino national origin, plaintiffs alleged defendants' entry interfered with their rights under Government Code sections 12955 and 12955.1. Plaintiffs' remaining causes of action for negligence, unfair competition, and intentional and negligent infliction of emotional distress are all based on defendants' act of entering the property on September 15, 2009.

Bank again demurred to the second amended complaint. It argued the Casabags had expressly agreed, by signing the deeds of trust, to permit their lender to enter the property to secure, preserve and protect it from damage—including by changing the locks—in case of neglect, vacancy or default. Bank argued plaintiffs' consent negated essential elements of their claims for trespass, intrusion, tortious interference with contract and wrongful foreclosure. As for the other claims, Bank argued plaintiffs failed to allege sufficient facts to state causes of action.

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<sup>2</sup> Plaintiffs do not challenge on appeal the trial court's order sustaining without leave to amend Bank's demurrer to their wrongful eviction cause of action.

The trial court sustained Bank's demurrers without leave to amend. Granting the parties' requests for judicial notice, it ruled plaintiffs did not have actionable claims for trespass, intrusion, tortious interference with contract, and wrongful foreclosure because the Casabags had consented to their lender's entry on the property upon default. As to the remaining causes of action, it ruled plaintiffs did not allege facts showing Bank discriminated against them because of their national origin; did not allege facts showing Bank owed them a duty of care; had not alleged unfair, fraudulent, or unlawful acts by Bank; and had not alleged that Bank's conduct was extreme and outrageous, or done with the intention or reckless disregard of the probability of causing emotional distress. The court ordered the case dismissed. Plaintiffs filed the present appeal.

## DISCUSSION

### I. *Demurrer Standard of Review*

"In determining whether plaintiffs properly stated a claim for relief, our standard of review is clear: ' "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.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer. '[W]e are not limited to plaintiffs' theory of recovery . . . .' " (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) We review de novo whether the complaint alleges facts sufficient to state a cause of action. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10; *CPF Agency Corp. v. Sevel's 24 Hour Towing Service* (2005) 132 Cal.App.4th 1034, 1042.) " 'A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground.' " (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.)

If judicially noticeable facts render an otherwise facially valid complaint defective, the complaint is subject to demurrer. (See *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) And, "[w]here written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint and may be considered on demurrer." (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800.) "[F]acts appearing in exhibits attached to the complaint . . . , if contrary to the allegations in the pleading, will be given precedence." (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627; *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.)

## II. *Basic Principles of Appellate Review Require the Judgment Be Affirmed*

As a threshold matter, we hold that settled principles of appellate review require that we affirm the judgment. Dispositive here is the presumption of correctness of the trial court's judgments or orders and requirement that plaintiffs affirmatively show error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799.) Where plaintiffs do not support issues with pertinent or cognizable legal argument we may deem them abandoned without discussion. (*Dietz*, at p. 799; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.) "It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. 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." (*Dietz*, at p. 799.)

Further, it is plaintiffs' obligation to tailor their appellate arguments to the appropriate standard of review. (*People v. Foss* (2007) 155 Cal.App.4th 113, 126 ["When an appellant fails to apply the appropriate standard of review, the argument lacks legal force"].) Finally, self-represented litigants, as plaintiffs are here, are entitled to the same, but no greater, consideration than other litigants and are held to the same rules of procedure. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Plaintiffs' decision to act as their own attorneys does not warrant exceptional treatment. (*Id.* at p. 985.)

The above-referenced principles lead us to conclude plaintiffs have not presented sufficient arguments or legal authority to justify reversal. Disregarding the applicable legal principles for appellate review of an order sustaining a demurrer, plaintiffs advance

substantive arguments, including that Bank's conduct was unlawful, discriminatory, unreasonable, extreme or outrageous. Their arguments on appeal do not focus on the elements of each of their causes of action or the second amended complaint's allegations and their sufficiency. Even where our review is de novo, appellants must present pertinent arguments on their behalf, or face forfeiting the issues. Without pertinent argument as to how the allegations of the second amended complaint are sufficient to state a cause of action, we have no basis to conclude that pleading is sufficient to survive Bank's demurrer. On that ground alone, we affirm the judgment.

*III. Bank's Demurrer Was Properly Sustained Without Leave to Amend Because the Second Amended Complaint Fails to Allege Facts Sufficient to State a Cause of Action*

Though we may rest our decision on plaintiffs' failure to provide pertinent legal argument on the issues presented by their appeal, we will proceed to address each of their causes of action to determine whether the second amended complaint contains allegations that state a claim. Because plaintiffs are self-represented, their pleading is not a model of clarity, and it improperly includes legal conclusions and arguments responding to Bank's demurrer. However, it is plain that the vast majority of plaintiffs' ten causes of action are based on Bank's entry onto their property on September 15, 2009, which plaintiffs allege was not authorized by either the Casabags or the deed of trust.

On this point, plaintiffs argue that section 9 of the deed of trust concerning the lender's rights in fact does not give the lender consent to enter the property and change the locks, or forcibly oust its "lawful occupants," that is, tenants Job Penetrante, Rey Openiano, and Arturo Belenzo, unless the borrower has abandoned the property. They

maintain Bank engaged in improper "self-help" and cannot establish the defense of consent as a matter of law. Plaintiffs advance a series of arguments based mainly on two cases: *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004 and *Wells Fargo v. Tyson* (N.Y. 2010) 897 N.Y.S.2d 610, the latter of which held a bank liable for trespass and entered a judgment in favor of the plaintiff borrower.

Neither of these authorities is pertinent to the adequacy of plaintiffs' second amended complaint's allegations, and they do not compel reversal. As Bank points out, the judgment in *Wells Fargo v. Tyson, supra*, 897 N.Y.S.2d 610 was reversed on appeal on grounds the bank, which had commenced a foreclosure action against the defendant borrower, was neither a party to, nor had notice of, the action and thus the lower court was not authorized to issue a judgment against it. (*Wells Fargo v. Tyson* (N.Y.A.D. 2011) 917 N.Y.S.2d 914, 915.) This reversal operates to vacate the underlying judgment. (See *Chudnowsky v. Re-Mo Holding Corp.* (N.Y.Sup. 1949) 89 N.Y.S.2d 110, 112 [general rule is that on reversal, the judgment is reversed as if it had never been rendered or existed]; *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939, 944, fn. 4 [effect of an unqualified reversal is to vacate the judgment as if no judgment had been entered].) But even if *Tyson* was citable authority, the lower court's decision was based on materially different terms in the bank's trust deed in that the borrower's abandonment was an express condition precedent to the lender's entry, and the

court held no evidence of abandonment existed.<sup>3</sup> (*Wells Fargo v. Tyson, supra*, 897 N.Y.S.2d at pp. 614-615.) The provision at issue here, section 9, does not limit conditions to the lender's entry on the borrower's abandonment, but includes the borrower's "fail[ure] to perform the covenants and agreements contained in this Security Instrument . . . ." And plaintiffs in this case admit that condition precedent was met, namely, that the Casabags had defaulted on their mortgage payments.

Nor is *Spinks v. Equity Residential Briarwood Apartments, supra*, 171 Cal.App.4th 1004 apposite. Characterizing Bank as a "non-owner," plaintiffs cite *Spinks* for the proposition that an "'owner' may not take possession of his property without legal process." They argue that, as in *Spinks*, the Bank here improperly resorted to self-help "without any legal or court process . . . ." *Spinks*, however, involved the appellate court's reversal of a summary judgment in a landlord's favor; the Court of Appeal held there were triable issues of material fact as to whether the plaintiff, whose employer had agreed to provide her with housing and entered into a lease agreement with the defendant for an

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<sup>3</sup> The lender's position in that case was that it had an "unfettered" right under the mortgage to enter the premises at any time as it saw fit. (*Wells Fargo v. Tyson, supra*, 897 N.Y.S.2d at p. 614.) The court presumed that the lender relied on a paragraph in the mortgage that stated: "If . . . I have abandoned the Property, then Lender may do and pay for whatever is reasonable and appropriate to protect Lender's interest in the Property . . . Lender's actions may include but are not limited to: (a) protecting and/or assessing the value of the Property; (b) securing and/or repairing the Property; . . . Lender can also enter the Property to make repairs, change locks . . . and take any other action to secure the Property." (*Id.* at p. 614.) The *Tyson* court held: "This section presupposes that defendant has abandoned the property. It logically follows then that abandonment would be a strict prerequisite to plaintiff's right of entry upon and within the premises. Here, defendant's testimony plainly reveals that he has not abandoned the property in any manner whatsoever and therefore the required condition precedent to plaintiff's entry does not exist." (*Id.* at pp. 614-615.)

apartment where she would live, was a third party beneficiary of the lease. (*Id.* at pp. 1019, 1030.) The court relied on evidence specific to that case raising issues as to whether plaintiff was the person who would reside in the unit and benefit from the lease, including evidence showing she was allowed to move into the apartment, she had to provide personal information to the lessor, she completed a walk-through on the unit's condition, and she was given a resident handbook spelling out the rules of occupancy. (*Id.* at pp. 1029-1030.) The court concluded based on the evidence in that case that summary judgment was not properly granted on the plaintiff's claims for statutory and tort-based wrongful eviction and trespass. (*Id.* at pp. 1039-1043.)

Unlike the present case, *Spinks* does not involve construction of language in a deed of trust granting a mortgage lender particular rights, and it sheds no light on whether plaintiffs' allegations in this case are sufficient to state causes of action for trespass, wrongful eviction, or any other theory encompassed in plaintiffs' second amended complaint. Plaintiffs and Bank are not parties to a lease agreement that would give rise to a contract claim for breach of the implied covenant of quiet enjoyment. (See *Ginsberg v. Gamson* (2012) 205 Cal.App.4th 873, 896-897.) Plaintiffs do not challenge the validity of Bank's trustee's sale, raise procedural irregularities in the nonjudicial foreclosure (Civ. Code, §§ 2924-2924i; see *Lona v. Citibank* (2011) 202 Cal.App.4th 89, 101-102 [summarizing procedure leading up to nonjudicial foreclosure]), or contest Bank's authority to foreclose. Under basic principles pertaining to deeds of trusts, Bank was entitled to exercise its rights to secure the property during the pendency of a sale, even where tenants were occupying the property. " Real property is transferable even though

the title is subject to a mortgage or deed of trust, but the transfer will not eliminate the existence of that encumbrance. Thus, the grantee takes title to the property subject to all deeds of trust and other encumbrances, whether or not the deed so provides. This means that the property may be sold on foreclosure of that deed of trust if the debt is not paid, even though the property is no longer owned by the original debtor.' " (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 438-439, citing 2 Bernhardt, Cal. Mortgage and Deed of Trust Practice (Cont.Ed.Bar 3d ed. 2002) § 9.119, p. 667 & 4 Miller & Starr, Cal. Real Estate (3d ed. 2000) Deeds of Trust and Mortgages, § 10:208, p. 635.)

Plaintiffs additionally point to another provision of the deed of trust, paragraph 7, which permits the lender or its agent to make reasonable entries upon and inspections of the property. The provision states in part: "If it has reasonable cause, Lender may inspect the interior of the improvements of the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause." Plaintiffs argue Bank was required to provide notice before entering the property but did not, and therefore plaintiffs could not be deemed to consent to its entry. The provision, however, by its plain terms permits inspections regardless of the borrower's default; it does not govern the lender's rights in the case of default. Plaintiffs' reliance on this provision of the deed of trust does not save their causes of action.

Finally, though not entirely clear, plaintiffs seem to suggest the deed of trust is a contract of adhesion, and that ambiguities therefore should be construed against the lender. Despite this argument, plaintiffs neither explain where the deed of trust is ambiguous, nor do they propose a construction that we should place on the language of

the deed that would render their causes of action sufficient to state a claim. We perceive none. The point does not compel reversal of the judgment.

*A. Trespass and Intrusion Causes of Action*

Plaintiffs' second amended complaint alleges trespass and intrusion occurred on or about September 15, 2009, "as evidenced by the . . . notice posted by BAC Field Services Corp. in the inside window of the [property], whereby the locks to the side gate and the rear door was damaged [*sic*], as evidenced by the actual pictures taken at the scene at that time, and the changing of the front and rear door locks." Plaintiffs allege the "plaintiff tenants are the occupants of this property at the time of the trespass and this intrusion was not authorized by the owner of this property at that time, plaintiff seller." (Capitalization omitted.)

"The essence of the cause of action for trespass is an "unauthorized entry" onto the land of another.' [Citation.] '[A] trespass may occur if the party, entering pursuant to a limited consent, i.e., limited as to purpose or place, proceeds to exceed those limits by divergent conduct on the land of another. "A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with." ' " (*Cassinovs v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1778, in part citing *Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 16, 17.) "Where there is a consensual entry, there is no tort, because lack of consent is an element of the wrong." (*Civic Western Corp.*, at p. 17.)

The tort of intrusion, or invasion of privacy requires that the plaintiff prove

" '(1) intrusion into a private place . . . (2) in a manner highly offensive to a reasonable person.' " (*Folgelstrom v. Lamps Plus, Inc.* (2011) 195 Cal.App.4th 986, 992, quoting *Schulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 231.) " 'Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.' " (*Folgelstrom*, at p. 992, quoting *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 37.) And "[t]he tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place . . . ." (*Schulman v. Group W Productions, Inc.*, at p. 232.) A plaintiff's voluntary consent to the defendant's invasive actions can negate a plaintiff's reasonable expectations of privacy, as well as the element of offensiveness, for purposes of the tort of intrusion. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 293 ["consent to an impending intrusion can 'inhibit reasonable expectations of privacy'"]; *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 1000-1001 [" 'If voluntary consent is present, a defendant's conduct will rarely be deemed "highly offensive to a reasonable person" so as to justify tort liability' "]; *Hill v. National Collegiate Athletic Assn.*, at p. 26.)

As to these causes of action, plaintiffs argue, based on *Wells Fargo v. Tyson*, *supra*, 897 N.Y.S.2d 610, that the deed of trust did not give consent to the lender to enter the property and change locks. As we have explained, this argument does not convince us of the sufficiency of the second amended complaint's allegations. Nevertheless, reviewing the pleading de novo, we conclude in view of plaintiffs' admission that they had defaulted on their mortgage payments, Bank has negated these claims by a judicially

noticeable fact, namely, section 9's express grant of the lender's right to enter the property and change the locks in the event of the borrower's default. We conclude Bank has demonstrated the trespass and intrusion causes of action are barred by the defense of consent. Moreover, the same facts compel us to conclude that Bank's conduct as a matter of law was neither highly offensive nor an egregious breach of social norms to constitute an actionable invasion of privacy. Because plaintiffs have had one opportunity to amend their pleading, we conclude they cannot state a cause of action as a matter of law, and the trial court properly sustained Bank's demurrer as to these claims without leave to amend.

*B. FEHA Cause of Action*

Plaintiffs attempt to allege a cause of action for national origin housing discrimination under FEHA, specifically Government Code sections 12955, subdivision (g), 12955.1, and 12955.7.<sup>4</sup> Alleging generally that all of the plaintiffs are from the Philippines, they further allege Bank's entry and eviction of the tenants " 'interfered with any person in the exercise or enjoyment of . . . any rights granted or protected by 129555 [sic] or 129555.1 [sic]' " and plaintiffs suffered severe emotional distress and damages as a result. On appeal, plaintiffs point additionally to Government Code section 12920, generally declaring national origin discrimination to be against public policy, and

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<sup>4</sup> "[Government Code s]ection 12955 makes a variety of discriminatory housing practices unlawful. Subdivision (e) of the statute . . . makes it unlawful '[f]or any person, bank, mortgage company or other financial institution that provides financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate against any person or group of persons because of . . . national origin . . . in the terms, conditions, or privileges relating to the obtaining or use of that financial assistance.' " (*Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1410.)

12955.8, which allows two kinds of proof of discrimination: discriminatory intent or discriminatory effect.<sup>5</sup> In part, the latter statute requires that national origin (or other protected characteristic) be a "motivating factor" to show an intent to discriminate. (Gov. Code, § 12955.8, subd. (a).)

Plaintiffs contend the demurrer to this cause of action was improperly sustained because they were discriminated against because of their national origin. As we have stated, such a substantive argument ignores our framework of appellate review on a demurrer. Plaintiffs also recite the various statutes, and argue that Bank, which they maintain was not the legal owner of the property, violated FEHA when it caused forcible entry, detainer and eviction of the tenants and "took possession of the property on or

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<sup>5</sup> At the time of Bank's foreclosure sale, Government Code section 12955.8 provided in part: "(a) Proof of an intentional violation of this article includes, but is not limited to, an act or failure to act that is otherwise covered by this part, that demonstrates an intent to discriminate in any manner in violation of this part. A person intends to discriminate if . . . national origin [or] ancestry . . . is a motivating factor in committing a discriminatory housing practice even though other factors may have also motivated the practice. An intent to discriminate may be established by direct or circumstantial evidence. [¶] (b) Proof of a violation causing a discriminatory effect is shown if an act or failure to act that is otherwise covered by this part, and that has the effect, regardless of intent, of unlawfully discriminating on the basis of . . . national origin [or] ancestry . . . . A business establishment whose action or inaction has an unintended discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of this part if the business establishment can establish that the action or inaction is necessary to the operation of the business and effectively carries out the significant business need it is alleged to serve. In cases that do not involve a business establishment, the person whose action or inaction has an unintended discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of this part if the person can establish that the action or inaction is necessary to achieve an important purpose sufficiently compelling to override the discriminatory effect and effectively carries out the purpose it is alleged to serve."

about September 15, 2009, when th[e] property was still owned by the Casabags." These arguments do not demonstrate in any way how plaintiffs' conclusory allegations state a cause of action for national origin discrimination in housing under FEHA.

We are cognizant that it is our role on this appeal to liberally construe plaintiffs' pleadings. (*Wilson v. Hunek* (2012) 207 Cal.App.4th 999, 1007.) But the second amended complaint includes no facts from which we may reasonably infer that Bank was aware of plaintiffs' national origin, or acted out of a motivation to discriminate against them because of that characteristic. (See *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 355 [prima facie case of discrimination includes as an element some "other circumstance [that] suggests discriminatory motive"]; *Scotch v. Art Institute of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986, 1004.) And, the fact that Bank possessed the right under the deed of trust to enter the property upon the borrower's default shows on the face of the second amended complaint a legitimate nondiscriminatory reason for its action, namely, securing the property. (*Scotch v. Art Institute*, at p. 1004.) Plaintiffs have already been given an opportunity to amend and cure their pleading. We conclude on this record, plaintiffs are not capable of alleging facts sufficient to state a cause of action against Bank for national origin discrimination in housing under FEHA. The trial court properly sustained Bank's demurrer without leave to amend as to this cause of action.

### *C. Tortious Interference with Contract*

The elements of a cause of action for intentional interference with contract are:  
" (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of

the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.' " (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at pp. 55-56; *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) An action will lie for the intentional and unjustifiable interference with a contractual relationship either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification or privilege. (*Marin v. Jacuzzi* (1964) 224 Cal.App.2d 549, 553; *Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 35.)

Plaintiffs allege generally that when Bank's representative entered the property on September 15, 2009, the "property was legally leased and was being occupied by . . . Belenzo, . . . Penetrante, [and] Rey Openiano . . . ." They allege Bank of America knew about the lease agreements because it received copies through its negotiators while the property was being approved by Bank under short sale, and that it acknowledged the existence of the purchase and listing agreements through communications with Renato Openiano. Plaintiffs continue: "And the trespass and other tortuous [*sic*] acts that were committed on or about September 15, 2009, that was perpetrated by, on behalf or under the direction or authorization, or was caused in any manner to be acted upon by Bank of America, is the primary cause of these 'tortuous [*sic*] interference with the contract[.]' It is safe to infer that B.A.C. Field Services representative 'WSR' could not have known what property to commit this alleged tortuous [*sic*] acts but for the instruction or information given by Bank of America. It would be 'impossible' for this 'WSR' representative to be able to pick out this Bullock property as the property to pick from the

hundreds of thousands of homes in San Diego county alone but for the information provided by Bank of America."

These allegations do not set out sufficient facts supporting a cause of action for interference with contract. First, the lease agreement with Belenzo shows Renato Openiano did not enter into it until September 30, 2009, *after* the defendants' entry onto the property. Thus, to the extent the cause of action is based on that contract, the document attached to the second amended complaint contradicts plaintiffs' allegation that Bank knew of its existence. (*Barnett v. Fireman's Fund Ins. Co.*, *supra*, 90 Cal.App.4th at p. 505.)

But as a whole, plaintiffs' allegations make it clear that Bank took its actions after the Casabags had defaulted on their payments. This, combined with the judicially noticed fact of Bank's right to enter upon default, establishes Bank's justification to act in its own legitimate interests as the lender, which defeats the cause of action. (Accord, *Martin v. Jacuzzi*, *supra*, 224 Cal.App.2d at p. 554 [face of complaint affirmatively established privilege on the part of a general manager, defeating claim for interference with contractual relations]; *Imperial Ice Co. v. Rossier*, *supra*, 18 Cal.2d at p. 36 [if conduct is justified, presence of malice is immaterial].) Further, while plaintiffs are not required to allege independent wrongful conduct on Bank's part (see *Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at p. 56 [interference with an existing contract is a " 'wrong in and of itself' "]), they are required to allege facts showing, or from which a court may infer, that Bank intentionally interfered with plaintiffs' various lease and purchase agreements for the property. (See, e.g., *Herron v. State Farm Mutual*

*Ins. Co.* (1961) 56 Cal.2d 202 [cause of action for interference stated where complaint alleged insurer told attorney's clients they did not need a lawyer to make satisfactory settlement of claims, inducing termination of contingent fee agreement]; *Collins v. Vickter Manor, Inc.* (1957) 47 Cal.2d 875, 879-880 [cause of action for interference stated where it was alleged defendants "with full knowledge of plaintiffs' contract with the corporation, 'wrongfully, intentionally, and without justification,' prevented the corporation from depositing in the escrow 'those documents necessary in order to close said escrow' "].) Plaintiffs have not met this pleading requirement. At most, the second amended complaint, together with matters properly subject to judicial notice, shows Bank acted as permitted under the terms of the deed of trust. A lender has a right to foreclose under a deed of trust when a borrower defaults in payment (Civ. Code, § 2924; *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830); and when the lender lawfully pursues his own interests, " 'the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper.' " (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at p. 56, quoting Rest.2d Torts, § 766, com. j, at p. 12.) In view of the deed of trust language granting Bank the right to enter and change the locks on the property upon default, any incidental interference with plaintiffs' other existing or prospective contractual relationships concerning the property was not improper. Plaintiffs have not alleged facts sufficient to demonstrate Bank engaged in intentional acts designed to induce a breach or disruption of the purchase or lease agreements.

#### D. *Negligence and Negligent Infliction of Emotional Distress*

The second amended complaint alleges that defendants committed negligence by entering the property and changing the locks, which caused the tenants' eviction while the property was "still legally owned" by the Casabags. On appeal, plaintiffs argue defendants committed forcible detainer under Code of Civil Procedure section 1160 by their actions, and also "tortiously interfered with the deed of trust" when they "forcibly took possession of the subject property without any legal or court process few weeks [*sic*] before the scheduled trustee sale date of October 6, 2009." (Some capitalization omitted.)

Plaintiffs' causes of action for negligence and negligent infliction of emotional are both simple negligence claims. There is no independent tort of negligent infliction of emotional distress. (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875-876.) "The elements of an action for negligence are the existence of *duty* (the obligation to other persons to conform to a standard of care to avoid unreasonable risk of harm to them); *breach of duty* (conduct below the standard of care; *causation* (between the defendant's act or omission and the plaintiff's injuries), and *damages*." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 500; see *Catsouras*, at p. 876.) The existence of a legal duty of care is a prerequisite to establish a claim for negligence, and whether such a duty exists is primarily a question of law. (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1095 (*Nymark*).

Plaintiffs' negligence claim fails for the absence of a legal duty of care. Bank's actions did not exceed the scope of its rights in the standard lender-borrower relationship.

" [A]bsent special circumstances . . . a loan transaction is at arm's length and there is no fiduciary relationship between the borrower and lender.' [Citation.] A commercial lender pursues its own economic interests in lending money." (*Perlas v. GMAC Mortg., LLC* (2010) 187 Cal.App.4th 429, 436; see *Resolution Trust Corp. v. BVS Development, Inc.* (1994) 42 F.3d 1206, 1214 ["Under California law, a lender does not owe a borrower or third party any duties beyond those expressed in the loan agreement, except[] those imposed due to special circumstance or a finding that a joint venture exists"].) " [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.' " (*Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 206; see also *Nymark, supra*, 231 Cal.App.3d, at p. 1096; *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 35 ["Liability to a borrower for negligence arises only when the lender 'actively participates' in the financed enterprise 'beyond the domain of the usual money lender' "].)<sup>6</sup> Plaintiffs provide no authority for the proposition that Bank's alleged conduct with regard to its entry onto the property to change locks following the borrowers' default exceeds the conventional role of a lender. Here, Bank's rights are embodied in the terms of the deed of trust, and its actions as alleged in the

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<sup>6</sup> We acknowledge that *Nymark* stated only a general rule, and assessed the existence of a duty by applying a test involving the balancing of various factors, including: " "[1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." " (*Nymark, supra*, 231 Cal.App.3d at p. 1098.)

second amended complaint cannot violate any duty exposing it to tort liability. We conclude plaintiffs cannot state a claim for negligence.

E. *Violation of the UCL: Business and Professions Code Section 17200 et seq.*

"Business and Professions Code section 17200 et seq. prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of conduct. It embraces ' ' ' "anything that can properly be called a business practice and that at the same time is forbidden by law." ' ' ' ' " (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143, fn. omitted.) The UCL " 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. [Citation.] In addition, under [Business and Professions Code] section 17200, 'a practice may be deemed unfair even if not specifically proscribed by some other law.' " (*Ibid.*)

Here, plaintiffs premise their UCL claim on their trespass, intrusion, and wrongful foreclosure claims. Because they have not met the pleading requirements for those claims, we conclude the trial court properly granted Bank's demurrer to the UCL cause of action. (See *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 718 [where allegations of borrowed violation of law fail, they will not constitute an unlawful business activity under the UCL].) Furthermore, absent allegations that Bank threatened an incipient violation of the antitrust law, or violated the policy or spirit of an antitrust law (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1366; *Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1008), we cannot conclude that Bank's exercise of its

rights to the deed of trust to enter the property and change its locks was "unfair" within the meaning of the UCL.

F. *Intentional Infliction of Emotional Distress*

The elements of a claim for intentional infliction of emotional distress are: " "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. . . ." . . .' [Citation.] The defendant must have engaged in 'conduct intended to inflict injury or engaged in with the realization that injury will result.' " (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) "The conduct must be of a nature that it is especially calculated to cause mental distress of a very serious kind." (*Ess v. Eskaton Properties, Inc.* (2002) 97 Cal.App.4th 120, 129.)

Plaintiffs' second amended complaint, which again bases this claim on Bank's September 15, 2009 entry on the property, does not allege facts sufficient to state a cause of action. "At most, this was a creditor/debtor situation, whereby the defendants were exercising their rights under the loan agreements. There are no allegations that in conducting the foreclosure proceedings any of the defendants threatened, insulted, abused or humiliated [plaintiffs]." (*Wilson v. Hynek, supra*, 207 Cal.App.4th at p. 1009.)

Outrageous conduct for purposes of an intentional infliction of emotional distress claim is conduct " 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.] An assertion of legal rights in pursuit of one's own economic

interests does not qualify as 'outrageous' under this standard." (*Yu v. Signet Bank/Virginia* (1999) 69 Cal.App.4th 1377, 1398; contra, *Ragland v. U.S. Bank Nat. Assn.*, *supra*, 209 Cal.App.4th at pp. 203-204 [plaintiff stated a cause of action for intentional infliction of emotional distress against a bank by alleging the bank induced her to skip a loan payment, refused to accept later payments, and then sold her home at foreclosure].) Because Bank's actions pursuant to the deed of trust cannot be outrageous as a matter of law, plaintiffs cannot state a claim for intentional infliction of emotional distress.

#### G. *Wrongful Foreclosure*

With regard to their claim for wrongful foreclosure, plaintiffs allege defendants "committed wrongful foreclosure when it [*sic*] caused the forceful repossession of the subject property on or about September 15, 2009, when the property was scheduled for trustee sale on October 6, 2009 in violation of Civil Code section 2494." Plaintiffs allege defendants' conduct was "outrageous" and caused them damages in an amount to be proven at trial.

To state a cause of action to set aside a foreclosure, plaintiffs must plead "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." (*Lona v. Citibank, N.A.*, *supra*, 202 Cal.App.4th at p. 104; see *Sierra-Bay Fed. Land Bank Assn.*

*v. Superior Court* (1991) 227 Cal.App.3d 318, 337 [to set aside sale, "debtor must allege such unfairness or irregularity that, when coupled with the inadequacy of price obtained at the sale, it is appropriate to invalidate the sale"; "debtor must offer to do equity by making a tender or otherwise offering to pay his debt"]; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109 ["appellants are required to allege tender of the amount of the [Bank's] secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure"].) "[A]n action to set aside [a foreclosure] sale, unaccompanied by an offer to redeem, would not state a cause of action which a court of equity would recognize." (*Copsey v. Sacramento Bank* (1901) 133 Cal. 659, 662.)

Though plaintiff Openiano alleges he has been assigned all of the Casabags' rights as well as that of the plaintiff tenants for claims other than punitive damages and emotional distress, plaintiffs have not alleged, as they must, that they made a full tender of the arrearages to set aside the foreclosure sale. (*Stebly v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526.) "As a general rule, if the funds necessary to reinstate or pay off a defaulted loan secured by a deed of trust are received by the lender prior to the foreclosure sale, the foreclosure sale is invalid and may be set aside, even if the purchaser was an innocent third party." (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1047.) Nor do the allegations of the second amended complaint contain any facts showing it would be inequitable to require such a tender. (*Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424 [tender not required where person who purchased plaintiff's property at foreclosure sale was plaintiff's own foreclosure consultant who represented he would assist her in avoiding foreclosure].)

#### IV. *Plaintiffs Have Not Shown the Failures of Their Pleading Can Be Cured*

A request for leave to amend and the showing necessary to cure the defects may be made for the first time on appeal. (Code Civ. Proc., § 472c, subd. (a); *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) But to satisfy the burden on appeal of showing a reasonable possibility that an amendment will cure the defects, plaintiffs must not only set forth the legal basis for amendment, but " 'must show in what manner [they] can amend [their] complaint and how that amendment will change the legal effect of [their] pleading.' " (*Rakestraw, supra*, at p. 43, quoting *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Plaintiffs must set forth "factual and specific, not vague or conclusionary" allegations that sufficiently state all required elements of the challenged causes of action. (*Rakestraw*, 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.)

Plaintiffs have argued the trial court erred in sustaining Bank's demurrer, but have not addressed how the second amended complaint could be amended to cure the perceived defects. Plaintiffs have therefore forfeited any challenge to the court's failure to grant them leave to amend. (*Rakestraw*, at p. 44; see *Whittemore v. Owens Healthcare-Retail Pharmacy, Inc.* (2010) 185 Cal.App.4th 1194, 1199.)

DISPOSITION

The judgment is affirmed.

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O'ROURKE, J.

WE CONCUR:

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NARES, Acting P. J.

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McINTYRE, J.