

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TEODORO F. CABRERA et al.,

Plaintiffs and Appellants,

v.

CR TITLE SERVICES, INC. et al.,

Defendants and Respondents.

E058474

(Super.Ct.No. CIVDS1203391)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster,
Judge. Affirmed.

7 Day Lawyers and C. Keila Nakasaka for Plaintiffs and Appellants.

Wolfe & Wyman, Cathy L. Granger and Constance S. Trinh for Defendants and
Respondents.

I

INTRODUCTION

Plaintiffs Teodoro Cabrera and Maria Cervantes appeal from a judgment of
dismissal entered after the trial court sustained without leave to amend defendants’

demurrer to the second amended complaint (SAC). Defendants CitiMortgage, Inc., CR Title Services, Inc., and Mortgage Electronic Registration Services, Inc. (MERS) are the respondents on appeal.

On appeal, plaintiffs address only the first four causes of action of the first amended complaint (FAC). They have waived any argument regarding the SAC and the fifth and sixth causes of action. Plaintiffs have not shown they can state a claim against defendants. The trial court did not err in its rulings on the FAC and the SAC. We affirm the judgment.

II

FACTUAL AND PROCEDURAL HISTORY

A. The First Amended Complaint

Plaintiffs filed their original complaint on April 3, 2012. On April 13, 2012, plaintiffs filed the FAC, alleging the following causes of action: (1) for declaratory relief; (2) to set aside trustee's sale; (3) for cancellation of instruments; (4) to quiet title; (5) for violation of Commercial Code section 3301 and Business and Professions Code section 17200 et seq.; and (6) for fraud.

The FAC alleges that, on June 12, 2007, another defendant California Empire Bancorp, Inc. (not a party to this appeal), tricked plaintiffs into refinancing their home, a residential duplex, on Wabash Street in San Bernardino. The loan negotiations were conducted in Spanish but the documents were in English and the lender did not explain to plaintiffs the meaning of "adjustable mortgage rate" or properly qualify plaintiffs as borrowers. The principal amount of the loan was \$259,250.

On April 30, 2009, defendant CitiMortgage became a HAMP¹ servicer for Fannie Mae, charged with reviewing mortgage loans in default or at risk of default. CitiMortgage refused to evaluate plaintiffs' loan for modification.

On August 24, 2009, defendant MERS assigned the beneficial interest in the deed of trust. Defendants never mailed a notice of default or notice of trustee's sale to plaintiffs. Defendants did not respond to a "Qualified Written Request" mailed to defendants in December 2011. Defendants acted in violation of Penal Code section 532f. An expert audit of plaintiffs' loan documents disclosed multiple errors and violations.

On May 16, 2011, defendants served plaintiffs with a three-day notice to pay rent or quit. A trustee's deed upon sale of plaintiffs' property was recorded on June 3, 2011. On June 5, 2011, defendants mailed an unlawful detainer complaint to plaintiffs. On July 12, 2011, defendants served plaintiffs with a three-day notice to quit premises.

The first through fourth causes of action of the FAC seek to challenge the trustee's sale. The fifth and sixth causes of action challenge the underlying loan.

On August 24, 2012, defendants filed a demurrer to the FAC on the grounds that plaintiffs had failed to tender the amount owing on the loan. In addition, the subject property had been sold a year before the original complaint was filed. Finally, plaintiffs did not allege sufficient facts in the fifth and sixth causes of action and no actionable conduct was alleged against MERS.

¹ Home Affordable Mortgage Program.

On October 3, 2012, the trial court sustained the demurrer without leave to amend as to the first, second, third, and fourth causes of action. The trial court sustained the demurrer with leave to amend as to the fifth and sixth causes of action.

B. The Second Amended Complaint

Plaintiff filed a SAC which is almost exactly the same as the FAC although the court had sustained defendants' demurrer without leave to amend as to the first four causes of action. Defendants filed a demurrer and a motion to strike. Defendants also filed a request for judicial notice of plaintiffs' original trust deed, dated June 12, 2007, in which MERS held the beneficial interest; the adjustable rate rider and interest-only addendum, dated June 12, 2007; the assignment of MERS's beneficial interest to CitiMortgage, recorded September 10, 2010; the substitution of CR Title as trustee, recorded September 10, 2010; the notice of default in the amount \$37,891.96, recorded September 10, 2010, including a declaration of due diligence; the notice of trustee's sale recorded December 13, 2010; and the trustee's deed upon sale recorded June 3, 2011.

Plaintiffs did not oppose the motion to strike the first through fourth causes of action but they opposed the demurrer on the merits and as being a day late. The trial court sustained defendants' demurrer without leave to amend.

An order and judgment of dismissal was entered on February 5, 2013. Plaintiffs filed a notice of appeal in April 2013. The civil case information statement correctly states that plaintiffs are appealing from a judgment after dismissal after an order sustaining a demurrer. (Cal. Rules of Court, rule 8.204(a)(2)(B).)

III

DISCUSSION

Plaintiffs' appellate brief does not comply with California Rules of Court, rule 8.204(a)(1)(C.) For example, pages 4 through 11 of their opening brief simply repeat the allegations of the complaint verbatim but without any citations. There are also no record citations included in plaintiffs' summary of the proceedings in the lower court.

“When an appellant’s brief makes no reference to the pages of the record where a point can be found, an appellant court need not search through the record in an effort to discover the point purportedly being made.” (*In re S.C.* (2006) 138 Cal.App.4th 396, 406-407.) “It is the duty of counsel to refer the reviewing court to the portion of the record which supports appellant’s contentions on appeal. . . . If no citation ‘is furnished on a particular point, the court may treat it as waived.’” (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) In spite of these defects, in the interests of justice, we will address plaintiffs’ contentions based on our independent review of the record.

1. Standard of Review

The trial court’s judgment or order “is presumed correct and prejudicial error must be affirmatively shown.” (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187.) In reviewing a trial court’s order sustaining a demurrer without leave to amend, we independently review the complaint to determine whether it alleges facts sufficient to state a cause of action under any legal theory and whether the trial court abused its discretion in denying leave to amend. (*Cantu v. Resolution Trust Corp.* (1992)

4 Cal.App.4th 857, 879.) We treat the demurrer as admitting all material facts—including matters that may be judicially noticed—but not contentions, deductions or conclusions of fact or law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

2. *The First, Second, Third, and Fourth Causes of Action*

After the trial court sustained the demurrer without leave to amend on the first through fourth causes of action of the FAC, it granted plaintiffs leave to amend the fifth and sixth causes of action. Defendants are wrong that, under these circumstances, plaintiffs waived their right to appeal the ruling on the first through fourth causes of action of the FAC. There was no right to appeal from that ruling: “Orders sustaining demurrers are not appealable. (Code Civ. Proc., § 904.1; *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 457.) An appeal can be taken after entry of such an order only after the court enters an order of dismissal. (*Beazell v. Schrader* (1963) 59 Cal.2d 577, 579.)” (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695.) Instead, when a demurrer is sustained without leave to amend, the right of appeal lies from the judgment or order of dismissal. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1032, fn. 1.) When a demurrer is sustained without leave to amend on some, but not all, causes of action, plaintiffs may appeal on the judgment when it is entered. (Code Civ. Proc., § 472c.)

Nevertheless, although plaintiffs are entitled to raise these issues on appeal, they do not offer any salient argument or authority to support their contention that the trial court erred in sustaining defendants’ demurrer without leave to amend as to the first, second, third, and fourth causes of action. Instead, they incorrectly argue, with no

citation to the record, that defendants demurred to the original complaint, not the FAC, and the court should have entered defendants' default for failure to file an answer. To the contrary, the record shows defendants filed the demurrer after they were served with the FAC. Plaintiffs admit as much in their brief. Plaintiffs also wrongly argue that defendants filed a late demurrer to the SAC. However, the demurrer was timely filed on November 20, 2012, less than 35 days after the SAC was served by mail on defendants. (Code Civ. Proc., §§ 471.5, 1013.)

Otherwise, plaintiffs' arguments on appeal consist of boilerplate references to general legal principles governing demurrers, declaratory relief, trustee's sales, and quiet title actions with little effort made to apply the law to the facts. On the merits, the first, second, third, and fourth causes of action collectively fail because plaintiffs have not alleged the requisite tender. Plaintiffs seek to set aside the foreclosure sale conducted in June 2011 based on allegations of defects in the notices of default and trustee's sale. In order to have standing for such relief, plaintiffs must have tendered the outstanding balance of the loan, which they do not allege they have done. Before a borrower can bring a cause of action to challenge a foreclosure, the borrower must pay the entire loan amount before the sale. (*United States Cold Storage v. Great Western Savings & Loan Assn.* (1985) 165 Cal.App.3d 1214, 1222.) A valid and viable tender of payment of indebtedness is essential based on the rationale that "if plaintiffs could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to plaintiffs." (*FPCI RE-HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1022; *Karlsen v. American Savings & Loan Association* (1971) 15

Cal.App.3d 112, 116-117.) Here plaintiffs failed to allege that they made a viable tender to cure their default or offered to pay the full amount of indebtedness before the foreclosure sale took place.

The cause of action for declaratory relief fails because there is no actual controversy. (*Otay Land Co. v. Royal Indemnity Co.* (2008) 169 Cal.App.4th 556, 562.) The subject property was sold to a third party bona fide purchaser for value, leaving plaintiffs with no recourse. No actual controversy exists between plaintiffs and defendants because a validly-noticed foreclosure sale terminated plaintiffs' right to challenge the foreclosure sale: "A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender." (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831; Civ. Code, § 2924.) A conclusive presumption that the sale was conducted regularly and properly arises and precludes an attack on a trustee's sale to a bona fide purchaser. (*Homestead Savings v. Darmiento* (1991) 230 Cal.App.3d 424, 436.)

Plaintiffs' quiet title cause of action is also deficient because none of these defendants claim any adverse interest in the subject property. (Code Civ. Proc., § 761.020.) MERS assigned its beneficial interest to CitiMortgage in September 2010. CitiMortgage sold the property at a foreclosure sale in May 2011. Defendants' previous interest in the property no longer exists. Plaintiffs cannot allege the existence of an adverse claim against property that has been sold. Plaintiff also cannot state a cause of action to quiet title without tendering the full amount of the debt for which the property

was security. (*Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 476; *Mix v. Sodd* (1981) 126 Cal.App.3d 386, 390.)

3. *The Fifth and Sixth Causes of Action*

Plaintiffs offer no arguments whatsoever about the viability of the fifth cause of action for violation of Commercial Code section 3301 and Business and Professions Code section 17200 or the sixth cause of action for fraud. We briefly address why those claims also fail.

Commercial Code section 3301 does not apply to nonjudicial foreclosures. California law does not require that the original note be in possession of the party initiating a nonjudicial foreclosure: “California’s statutory nonjudicial foreclosure scheme (§§ 2924-2924k) does not require that the foreclosing party have a beneficial interest in or physical possession of the note. (*Debrunner v. Deutsche Bank Nat. Trust Co.* (2012) 204 Cal.App.4th 433, 440-441 [‘We . . . see nothing in the applicable statutes that precludes foreclosure when the foreclosing party does not possess the original promissory note.’]; *Lane v. Vitek Real Estate Industries Group* (E.D.Cal.2010) 713 F.Supp.2d 1092, 1099 [California ‘does not require a beneficial interest in both the Note and the Deed of Trust to commence a non-judicial foreclosure sale’].) Section 2924, subdivision (a)(1) specifically permits the ‘trustee, mortgagee, or beneficiary, or any of their authorized agents’ to institute foreclosure by recording a notice of default. (See *Debrunner*, at p. 440; *Lane*, at p. 1098.)” (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 511-512.)

As to the claim under Business and Professions Code section 17200, plaintiffs must make specific allegations about conduct that violates antitrust law or public policy. (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1147; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940.) Plaintiffs allege defendants employed deceptive refinancing practices with the ulterior motive of foreclosing on the subject property, recording false and misleading documents without the authority to do so, violating Civil Code section 2923.5, and failing to respond to a qualified written request. These allegations do not relate to a specific constitutional, statutory, or regulatory provision; nor do the allegations support any conduct that violates antitrust law.

There are also no allegations under section 17200 that members of the general public are likely to be deceived in any manner. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211.) The general public had no involvement with plaintiffs' loan or the corresponding foreclosure sale. The SAC is devoid of any factual allegations to support the fraudulent prong of an unfair business practices claim.

The sixth cause of action does not meet the strict pleading requirements for the elements of fraud: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage. (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 807.) Every element of a fraud cause of action must be pled in full, factually and specifically. (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331.) In any event, a fraud claim is barred by the three-

year statute of limitations when the alleged conduct occurred in June 2007 and the original complaint was filed in April 2012, almost five years later. (Code Civ. Proc., § 338.)

Plaintiffs accuse defendants of negotiating in Spanish although the loan documents were in English but plaintiffs do not allege how, when, where, and by what means and by whom misrepresentations were made. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.) Based on the foregoing, plaintiffs have failed to meet the heightened burden for pleading a cause of action for fraud.

4. Amendment

Plaintiffs have the burden to show a complaint may be amended. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) It is an abuse of discretion to deny leave to amend only if an amendment is potentially effective. (*CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1542.) If the plaintiff cannot show an abuse of discretion, the trial court's order sustaining the demurrer without leave to amend must be affirmed. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1498.)

Whether below or on appeal, plaintiffs have not asked for leave to amend or shown any reasonable possibility of curing defects by amendment after filing three versions of the complaint. In *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 312-314, a private antitrust action, defendants brought demurrers to each successive complaint over the course of two years. The matter was dismissed on demurrer to the fourth amended complaint after plaintiffs failed to allege an unlawful business practice and injury. In *Titus v. Canyon Lake Property Owners Assn.* (2004) 118

Cal.App.4th 906, plaintiff was denied leave to amend a fourth time. The trial court here could not have reasonably concluded that there was any possibility of curing the defects of the complaint if plaintiffs were granted a fourth opportunity. Under these circumstances, after three attempts to state a claim, it was well within the court's discretion to sustain the demurrer without leave to amend. (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1371.)

IV

DISPOSITION

The trial court did not abuse its discretion in sustaining the demurrers to the FAC and the SAC without leave to amend. We affirm the judgment.

Defendants, the prevailing party, shall recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.