

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 THREE

JOHN M. HEURLIN et al.,

Plaintiffs and Appellants,

v.

CITIMORTGAGE INC., et al.,

Defendants and Respondents.

G048922

(Super. Ct. No. 30-2012-00564406)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory Munoz, Judge. Affirmed in part and reversed in part.

John M. Heurlin and Debra M. Heurlin, in pro. per., for Plaintiffs and Appellants.

Locke Lord, Nina Huerta, and Susan J. Welde for Defendants and Respondents.

* * *

Plaintiffs John M. Heurlin and Debra M. Heurlin appeal from a judgment dismissing their action against defendants CitiMortgage, Inc., and Citibank N.A. (collectively Citi)¹ after the court sustained without leave to amend Citi's demurrer to plaintiff's operative complaint on the ground the complaint failed to state any cause of action against Citi. This case is a textbook example of a plaintiff taking a relatively few and perhaps even improbable alleged facts, attempting to wrap some 12 legal theories around them, resulting in an excessively long and overcharged complaint. It is also a textbook example of a defendant attempting to accomplish more than is possible with a demurrer. The result after our independent review is to pare the complaint down to two causes of action and remand for defendant to answer those causes of action and proceed to an adjudication on an evidentiary basis. Thus, the dismissals of the causes of action for breach of contract and unfair competition are reversed. The judgment of dismissal is affirmed as to all other causes of action.

FACTS

Accepting "as true all material allegations of the complaint" (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 929), we draw the following facts from plaintiffs' second amended complaint (SAC).

Plaintiffs' 2003 home mortgage loan from Citi called for a monthly payment of \$1,679.91. From July 2003 through April 2010, plaintiffs "made the required payment, paid taxes and paid for insurance or were excused from compliance" due to Citi's breach of the agreement.

¹ References to Citi refer to either CitiMortgage, Inc., or Citibank N.A., or both entities.

Sometime in 2009, Citi unilaterally increased plaintiffs' payment from \$1,679.91 to around \$2,290.² On the date of the increase, plaintiffs had fully complied with the terms of the agreement and, at that time, the tax payments were current and the home was fully insured. From January 2009 through April 2010, plaintiffs continued to make monthly payments of \$1,679.91 to Citi.

In April 2010, Cal-Western Reconveyance Corporation (CWRC), acting as Citi's agent or an authorized trustee, served on plaintiffs a notice of default demanding a payment of \$10,079.46. Plaintiffs demanded an accounting from Citi and CWRC (collectively defendants), but received no response.

In August 2010 (four months after service of the notice of default), plaintiffs paid Citi the full amount of the notice of default, i.e., \$10,079.46, in the form of a cashier's check, which was cashed by Citi.

In August 2010, defendants served a notice of trustee sale on plaintiffs. Plaintiffs again demanded an accounting, but defendants refused to communicate with them.

² In its respondents' brief, Citi alleges it increased plaintiffs' monthly payments after Citi paid delinquent property taxes on plaintiffs' house, as permitted under the deed of trust. Citi refers in its brief to "the judicially noticeable evidence that [plaintiffs] were in arrears on their property taxes" The "evidence" is a secured prepetition tax liability form certified by an Orange County deputy tax collector on April 18, 2008, which was submitted for use in plaintiffs' bankruptcy proceedings pursuant to plaintiffs' bankruptcy petition filed in October 2008. The tax liability form, however, is silent as to plaintiffs' tax liability, if any, in 2009, when Citi increased plaintiffs' monthly payment. Thus it does not rebut the allegations of the complaint. Moreover, "[w]hen judicial notice is taken of a document . . . the truthfulness and proper interpretation of the document are disputable." (*StorMedia, Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9.)

In September 2010, a CWRC employee informed plaintiffs the reinstatement amount was around \$34,000.

Plaintiffs “tendered” to Citi’s attorney of record all sums due from April 2010 through May 2011, including the mortgage amount of \$1,679.91.

In May 2011, John Heurlin learned he would be laid-off from his teaching position effective June 2011.

In May 2011, plaintiffs applied to “the Save-Your-Home California program” (the Program), a public benefit program under which federal money is provided to help homeowners who have recently lost their employment. The requirements of the Program are that “the person applying must be recently unemployed, must be not more than 90 days past due *on his or her mortgage payments* as of the date of application, and agree to reimburse the program if certain additional events occur.”

At the time they applied, plaintiffs fully qualified for public benefits under the Program. They were turned down, however, due to a credit report which showed plaintiffs were “more than 90 days past due.” Plaintiffs immediately demanded that Citi correct the erroneous credit report; plaintiffs provided Citi with the requested documents, such as “proof of tax payment.” Citi refused to corroborate the information in its possession that plaintiffs were *not* more than 90 days in arrears on their mortgage payments.

In June 2011, the Program administrator informed plaintiffs “that the sole basis for the denial of benefits was [that Citi had] declined [Unemployment Mortgage Assistance] benefit payments due to ‘[plaintiffs’] monthly mortgage payment exceeding the maximum benefit assistance amount of \$3,000.’”

In April 2012, plaintiffs filed their complaint against Citi and other defendants, and later amended it twice after the court (1) sustained, with leave to amend, Citi's demurrer to the original complaint, except as to the causes of action for bad faith, unfair trade practices, and the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961 et seq.; RICO), as to which the demurrer was overruled, and (2) sustained, with leave to amend, Citi's demurrer to the first amended complaint, except as to the causes of action for an accounting and for unfair trade practices, as to which the demurrer was overruled.

Plaintiffs filed their SAC alleging the same causes of action against Citi as did the original and first amended complaints. Plaintiffs contended they were entitled to an order that they be admitted to the Program, together with damages stemming from the wrongful denial of Program benefits.

Citi demurred on grounds the SAC failed to allege facts sufficient to state a cause of action.

The court sustained Citi's demurrer without leave to amend as to the first through twelfth causes of action, i.e., all of the claims against Citi.

DISCUSSION

Standard of Review

“Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal.” (*Filet Menu, Inc. v. Cheng* (1999) 71 Cal.App.4th 1276, 1279.)

First, we review the complaint de novo to determine whether it alleges sufficient facts to state a cause of action under any legal theory. (*Id.* at p. 1280.) We treat the demurrer as admitting all properly pleaded and judicially noticeable material facts, “but not contentions, deductions or conclusions of fact or law.” (*Blank v. Kirwan* (1985) 39

Cal.3d 311, 318.) We deem the properly pleaded facts “to be true, however improbable they may be.” (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) “[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.” (*Blank*, at p. 318.) “[I]ts allegations must be liberally construed, with a view to substantial justice between the parties.” (Code Civ. Proc., § 452.) The plaintiff “bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law” and “must show the complaint alleges facts sufficient to establish every element of [the] cause of action.” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43.)

“Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action.” (*Filet Menu, Inc., v. Cheng, supra*, 71 Cal.App.4th at p. 1280.) If there is a reasonable possibility the defect can be cured by amendment, the trial court abused its discretion by sustaining the demurrer. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) “The burden of proving such reasonable possibility is squarely on the plaintiff.” (*Ibid.*)

The Court’s Overruling of Citi’s Demurrer to Certain Causes of Action in Plaintiffs’ Prior Complaints

The court overruled Citi’s demurrer to certain causes of action in plaintiffs’ original and/or first amended complaints. Plaintiffs contend the court therefore lacked authority to sustain Citi’s demurrer to those same causes of action in the SAC.

The cases disagree on whether a defendant may properly demur to a cause of action as to which a court has previously overruled a demurrer to a prior complaint. *Bennett v. Suncloud* (1997) 56 Cal.App.4th 91 held that a trial court may *not* render a new determination on the “viability of those claims unless some new facts or circumstances were brought to [its] attention.” (*Id.* at p. 97.) *Pacific States Enterprises,*

Inc. v. City of Coachella (1993) 13 Cal.App.4th 1414 reached the opposite conclusion, holding that an objecting party may properly demur on grounds previously overruled in a prior demurrer because the “interests of all parties are advanced by avoiding a trial and reversal for defect in pleadings.” (*Id.* at p. 1420, fn. 3; accord *Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 389, fn. 3; *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1036.)³

Despite the difference in opinion on whether a trial court may properly reconsider its overruling of a demurrer, all the cases agree that once the matter reaches an appellate court, the reviewing court may consider de novo whether the challenged claim states a cause of action. (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1508-1509; *Bennett v. Suncloud, supra*, 56 Cal.App.4th at p. 97.) An appellate court’s role “entails review of the trial court’s ruling, not its rationale. Thus, even if the trial court . . . were constrained by its prior rulings[, an appellate court is] not so constrained and [is] free to render an opinion based on the correct rule of law.” (*Berg & Berg Enterprises, LLC v. Boyle, supra*, 178 Cal.App.4th at p. 1036.)

Accordingly, we consider the 12 causes of action alleged against Citi in the SAC, although not in the same order as set out in the SAC.

1. The Second and Third Causes of Action – Removal of Cloud on Title and Slander of Title/Quiet Title

In the second cause of action of the SAC, plaintiffs alleged that Citi placed a cloud on the title of plaintiffs’ property by issuing without cause a notice of default and a notice of trustee sale, when plaintiffs had performed all obligations required under the mortgage loan to clear any putative default or were excused from doing so by virtue of

³ In *Bennett v. Suncloud, supra*, 56 Cal.App.4th at pages 94-95, the defendants demurred on the same grounds to the original and the amended complaints. Here, Citi demurred on different grounds to the original complaint than to the first and second amended complaints.

Citi's malfeasance, and had tendered all sums due under the mortgage loan agreement. Plaintiffs asked the trial court to order Citi to perform all duties necessary to clear the cloud on the title of their house.

In a successful action to remove a cloud on title, the remedy is that the cloud is cleared. The challenged written instrument, which will harm the plaintiff if it is left outstanding, is adjudged void or voidable against the plaintiff and is "ordered to be delivered up or canceled." (Civ. Code, § 3412.) Here, plaintiffs' claim for removal of a cloud on title fails because Citi recorded a notice of rescission of its notice of default on January 3, 2011, thereby clearing any cloud on title.⁴ (*Oakland Municipal Improvement League v. City of Oakland* (1972) 23 Cal.App.3d 165, 170 ["right to relief . . . goes to the existence of a cause of action"]; *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 536 [judicial notice of fact or proposition within a recorded document that cannot reasonably be controverted].)

⁴ We grant Citi's motion for judicial notice of its notice of rescission of notice of default, recorded on January 3, 2011, and of the court's December 23, 2010 injunction enjoining the sale of plaintiffs' home. Contrary to plaintiffs' assertion that these documents are irrelevant, they are relevant to plaintiffs' claims for removing a cloud on title and for violation of Civil Code section 2923.5 (discussed later in this opinion). Plaintiffs also object to Citi's motion on grounds the documents lack authentication and constitute hearsay. Those rules do not apply to judicial notice, which operates "as a substitute for proof, 'a judicial shortcut, a doing away with the formal necessity for evidence because there is no real necessity for it.'" (1 Witkin, Cal. Evidence (5th ed. 2012) Judicial Notice, § 3, p. 115.) A court may take permissive judicial notice of a matter specified in Evidence Code section 452 if a party requests it, notifies the adverse party, and gives the court sufficient information. (Evid. Code, § 453.) "Section 453 does not define "sufficient information"; this will necessarily vary from case to case. While the parties will understandably use the best evidence they can produce under the circumstances, mechanical requirements that are ill-suited to the individual case should be avoided.'" (1 Witkin, Cal. Evidence, *supra*, Judicial Notice, § 40, p. 150.)

In the third cause of action of the SAC, denominated “slander of title/quiet title,” plaintiffs alleged the following. Between August 2010 and May 2011, plaintiffs had listed the property for sale and had “at least a quarter million dollars in equity.” Citi filed the notice of default and the notice of trustee sale, which were false statements, to limit plaintiffs’ ability to sell the property, so that Citi could try to steal plaintiffs’ equity. Citi published a false accounting in the form of plaintiffs’ credit report to preclude plaintiffs from participating in the Program. They schemed to deny plaintiffs access to the Program by leaving false, negative credit reporting data on plaintiffs’ credit report, falsely indicating plaintiffs were behind on their mortgage payments, at a time when plaintiffs had tendered all mortgage payments due under the loan agreement. Once it was clear that no default existed, Citi owed a duty to clear the title on the property. Plaintiffs have suffered actual pecuniary damage in the reduction of the value of their property of at least \$100,000.

To the extent the third cause of action attempts to allege a *quiet title* action, plaintiffs have confused their alleged right to remove a cloud on title with their right to a decree quieting title in their name. Their claim for removal of a cloud on title is addressed above in the discussion of the second cause of action. In contrast, a “basic requirement of an action to *quiet title* is an allegation that plaintiffs ‘are the rightful owners of the property, i.e., that they have satisfied their obligations under the Deed of Trust.’ [Citation.] ‘[A] mortgagor cannot quiet his title against the mortgagee without paying the debt secured.’” (*Lane v. Vitek Real Estate Industries Group* (E.D.Cal. 2010) 713 F.Supp.2d 1092, 1103, italics added.) The SAC does not allege that plaintiffs have repaid the loan in full. Consequently, they cannot sustain a quiet title action against Citi. (*Ibid.*) Plaintiffs do not take the position that the deed of trust itself is invalid — only that the notices of default and sale are invalid — allegations made in the second cause of action for removal of a cloud on title.

To the extent the third cause of action attempts to allege an action for damages for *slander of title*, a basic requirement of this action is that the plaintiff's publication be “without privilege or justification.” (*Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664.) Plaintiffs' slander of title claim fails because Citi's notice of default and notice of trustee sale were privileged under Civil Code sections 2924, subdivision (d)(1), and 47.

Citi's demurrer to the second and third causes of action for removal of cloud on title and slander of title was properly sustained.

2. *Fourth Cause of Action — Breach of Contract*

In the fourth cause of action of the SAC, plaintiffs alleged the following. As of May 2011, plaintiffs had complied with every term of the agreement or were excused from compliance due to Citi's conduct, and had tendered all sums due under the loan and the accompanying default documents through tender of the disputed default amount. Citi unilaterally increased the amount of plaintiffs' monthly payments and accepted plaintiffs' monthly payments of the original amount through April 2010. Citi breached the contract by, inter alia, “demanding that which not authorized by the agreement of the parties [and] falsely reporting that the account was in arrears.” Plaintiffs also alleged the existence of “an actual and present controversy about . . . whether [plaintiffs had] paid all sums owed and required to be paid by the terms of the mortgage and loan agreement between the parties.” Plaintiffs prayed for damages and a declaration that the default had been cleared.

Plaintiffs' identification of the “agreement” alleged to have been breached is not a model of clarity. Plaintiffs allege they had “a written agreement” with Citi, under the terms of which they would pay \$1,679.91 for a period of 360 payments or until the loan was paid in full. The terms of an accompanying deed of trust securing the obligation are not alleged, although it is clear from the allegations of a wrongful notice of default

and notice to sell that plaintiffs' loan obligation was secured by a deed of trust. Citi has filled in some blanks here by requesting we take judicial notice of the deed of trust securing plaintiffs' loan. We grant that request. The deed of trust provides, inter alia, that "[a]ll rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law." In turn, "Applicable Law" is defined, inter alia, as "all controlling applicable . . . state . . . statutes." Moreover, "[i]t is well settled the existing applicable law is part of every contract, the same as if expressly referred to or incorporated in its terms." (*Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP* (2007) 152 Cal.App.4th 42, 56.)

Thus, the deed of trust obligates Citi to follow the California statutes governing the foreclosure process. Civil Code section 2924 requires, inter alia, that the power of sale in a deed of trust "shall not be exercised" until a notice of default is recorded including "[a] statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred." (*Id.*, subd. (a)(B).) Plaintiffs allege they were current on their loan payments and taxes, but Citi nevertheless unilaterally demanded an increase in their monthly payment. "[I]n testing a pleading against a demurrer the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Del E. Webb Corp. v. Structural Materials Co.*, *supra*, 123 Cal.App.3d at p. 604.) Citi argues at length that it had the right to increase the payments because plaintiffs were delinquent on their taxes. But as noted earlier, that fact does not appear in the complaint, and the truth of that assertion is not judicially noticeable. (See fn. 2, *ante.*) Thus, if Citi did what it is alleged to have done, it has breached its obligation under the note and deed of trust not to declare a default unless plaintiffs were actually in default.

Accordingly, the court erred in sustaining the demurrer to the fourth cause of action for breach of contract.

3. The Fifth, Sixth, and Twelfth Causes of Action — Bad Faith, Breach of Fiduciary Duty, and Negligence

A tort cause of action for bad faith or for breach of fiduciary duty each generally require the plaintiff to allege a special relationship exists between the plaintiff and the defendant. (*Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1370 [bad faith cause of action generally requires special relationship between the contracting parties, such as that between insurer and insured]; *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023 [“general rule preclude[es] tort recovery for noninsurance contract breach” absent violation of independent tort duty]; *Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 466 [generally no fiduciary relationship between borrower and lender].) And a cause of action for negligence requires the existence of a duty of care. (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096 [generally no duty of care owed by financial institution to borrower when institution acts merely as lender].) “It is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid.” (*Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 334.)

Plaintiffs acknowledge that a bank generally has an arm’s length relationship with a borrower. They contend, however, that Citi bears them a fiduciary duty because Citi participates “in the ‘HAMP’ and ‘Save-Your-Home-California’ programs.” Plaintiffs rely on two cases for this proposition. Both are inapt.

In the first case, *Washington Mutual Bank v. Superior Court* (1999) 75 Cal.App.4th 773, the Court of Appeal held that two federal disclosure laws⁵ did not preempt the plaintiffs' state law claims. (*Id.* at pp. 777, 787.) The appellate court upheld "the decision of the trial court to overrule the [defendant banks'] demurrer to the extent it alleged that plaintiffs' state law claims were preempted by" the two federal laws. (*Id.* at p. 787.) Thus, the appellate court did not address the defendant banks' fiduciary duties or duties of care, if any.

Plaintiffs' second cited case, *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, involved unique facts in the plaintiff's appeal from a summary judgment in favor of the defendants (a bank and a trustee). The plaintiff "and Washington Mutual Bank (WaMu) entered into a construction loan agreement in 2006, which eventually encountered problems due to alleged failures by WaMu to properly disburse construction funds. As [the plaintiff] was continuing to attempt to salvage the transaction, WaMu went into receivership with the Federal Deposit Insurance Corporation (FDIC), and in September 2008 JPMorgan Chase (Chase) bought WaMu's assets through a purchase and assumption agreement[. The plaintiff] soon stopped making payments on the loan, and in late 2009 Chase took steps to foreclose." (*Id.* at p. 877, fn. omitted.) The Court of Appeal reversed the trial court's grant of summary adjudication on the plaintiff's negligence claim because "there was a triable issue of material fact as to a duty of care to [the plaintiff], which potentially makes Chase liable for its own negligence." (*Id.* at p. 897.) The Court of Appeal acknowledged that lenders and borrowers generally operate at arm's length and that "as a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the

⁵ The federal laws in question were the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. § 2601 et seq.) and Regulation X to the Real Estate Settlement Procedures Act (24 C.F.R. § 3500.1 et seq. (1999)). (*Washington Mutual Bank v. Superior Court, supra*, 75 Cal.App.4th at p. 776.)

loan transaction does not exceed the scope of its conventional role as a mere lender of money.’” (*Id.* at p. 898.) But the Court of Appeal concluded the general rule did not apply under the circumstances presented: “When considered in full context, the cases show the question is not subject to black-and-white analysis — and not easily decided on the ‘general rule.’ We conclude here, where there was an ongoing dispute about WaMu’s performance of the construction loan contract, where that dispute appears to have bridged the FDIC’s receivership and Chase’s acquisition of the construction loan, and where specific representations were made by a Chase representative as to the likelihood of a loan modification, a cause of action for negligence has been stated that cannot be properly resolved based on lack of duty alone.” (*Id.* at p. 898.)

None of the *Jolley* circumstances are present here. Plaintiffs’ core allegation is that Citi improperly increased the amount of their monthly payment. Unlike the bank in *Jolley*, plaintiffs have not alleged that Citi was under a continuing obligation to perform under a bilateral contract. Plaintiffs’ allegation is not unique and does not justify deviation from the general rule that lenders and borrowers operate at arm’s length. Whatever wrongs Citi may have committed arise only under the terms of the statutes governing foreclosure procedures and the terms of the note and trust deed.

Plaintiffs introduce in their reply brief the argument that Citi assumed a duty of care and a fiduciary duty when it “chose to report [plaintiffs’] payment history to a credit reporting agency.” “[W]e will not address arguments raised for the first time in the reply brief [citation]” (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1295.)

Accordingly, the court correctly sustained Citi’s demurrer to the fifth, sixth, and twelfth causes of action for the torts of bad faith, breach of fiduciary duty, and negligence.

4. *First Cause of Action — Accounting*

The SAC alleged the following. Citi had a duty to properly process and record plaintiffs' payments. Based on plaintiffs' information and belief, Citi is a participating lender in the Program, obtains federal benefits, and therefore had a duty to familiarize itself with the Program's guidelines and policies and to correctly account for payments made by its mortgage holders. Beginning in 2009 and continuing to the date of the SAC, Citi failed to properly account for funds paid by plaintiffs to plaintiffs' mortgage account. Plaintiffs demanded an accounting detailing (1) payments credited to plaintiffs' account, (2) payments not credited to plaintiffs' account, (3) payments Citi claimed were due and unpaid, and (4) whether 90 days of nonpayment of plaintiffs' mortgage payment existed as of May 11, 2011. Citi failed to produce such an accounting. Once plaintiffs paid \$10,079.46 on August 16, 2010, "all accounts were current and [plaintiffs] maintained the payments current through May of 2011, which should have entitled [them] to participate in the Program." Inter alia, plaintiffs requested the court to issue, "[i]f determined by the Accounting, an order returning all overpayments made by" plaintiffs on their account.

To state an accounting cause of action, a plaintiff must allege (1) a fiduciary relationship or other circumstances appropriate to the remedy, and (2) a "balance due *from the defendant to the plaintiff* that can *only* be ascertained by an accounting." (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 820, p. 236, italics added; see *Brea v. McGlashan* (1934) 3 Cal.App.2d 454, 460 ["cause of action for accounting need only state facts showing the existence of the relationship which requires an accounting and the statement that some balance is due the plaintiff"].)

As to the first element, as discussed above, plaintiffs have not alleged sufficient facts to show Citi owes plaintiffs a fiduciary duty. And plaintiffs have not alleged other circumstances appropriate to the remedy.

As to the second element, a “complaint does not state a cause of action for an accounting where it shows on its face that none is necessary.” (5 Witkin, Cal. Procedure, *supra*, § 820, p. 236.) “A suit for an accounting will not lie where it appears from the complaint that none is necessary or that there is an adequate remedy at law.” (*St. James Church of Christ v. Superior Court* (1955) 135 Cal.App.2d 352, 359.) Here, plaintiffs’ obligations to Citi are established by the note and deed of trust and the amounts owed for taxes and insurance. Plaintiffs do not need any information from Citi to prevail on their claim. Plaintiffs need only provide evidence of the amounts they owed for principal, interest, taxes, and insurance and provide proof of timely payments of those amounts. An accounting in equity is simply not necessary.

The court properly sustained the demurrer to the first cause of action for an accounting.

5. *Seventh Cause of Action — Civil Code Section 2923.5*

The SAC alleged Citi violated Civil Code section 2923.5 by failing “to meet and confer with [plaintiffs] prior to issuing the default(s) in this case, and in so doing rendered the default void.” Plaintiffs requested the court to issue an injunction terminating the notice of default and the notice of trustee sale until Citi complied with Civil Code section 2923.5.

Under Civil Code section 2923.5, a mortgagee or beneficiary may not record a notice of default until it (1) has contacted the borrower in person or by telephone to assess the borrower’s financial situation and to explore options for the borrower to avoid foreclosure, or (2) has diligently tried to make such contact. (*Id.* subs. (a)(1)(A) & (2), (e).) The contact required by the statute is limited and is satisfied if the lender simply asks the borrower, ““why can’t you make your payments?”” and tells “the borrower the traditional ways that foreclosure can be avoided (e.g., deeds ‘in lieu,’ workouts, or short sales).” (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 232.)

The private right of action under section 2923.5 “is limited to obtaining a postponement of an impending foreclosure to permit the lender to comply with section 2923.5.”

(*Mabry*, at p. 214.)

Here, the impending foreclosure has been postponed. There is no pending notice of default or sale. Citi recorded a rescission of notice of default on January 3, 2011, and the trial court enjoined the sale of plaintiffs’ home in an injunction issued on December 23, 2010. (*Oakland Municipal Improvement League v. City of Oakland*, *supra*, 23 Cal.App.3d at p. 170 [“right to relief . . . goes to the existence of a cause of action”]; *Jenkins v. JPMorgan Chase Bank, N.A.*, *supra*, 216 Cal.App.4th at p. 536 [judicial notice of fact or proposition within a recorded document that cannot reasonably be controverted].) The issue is therefore not ripe for adjudication.

Thus, the court properly sustained the demurrer to the seventh cause of action for violation of Civil Code section 2923.5.

6. *Tenth Cause of Action — Deceit*

The SAC alleged the following. Citi represented to plaintiffs they would be charged \$1,679.91 per month. Citi changed the amount of plaintiffs’ payments, then demanded payment of a default sum of \$10,079.91. Plaintiffs demanded the sum be substantiated with a statutorily required statement of account, but Citi refused to provide an accounting. Citi served the notice of default knowing there was no default, and served the notice of trustee sale knowing they had not provided the accounting which plaintiffs had demanded. Plaintiffs paid the disputed notice of default. Citi cashed the check, but then refused to withdraw the foreclosure sale, forcing plaintiffs to file this lawsuit. Citi represented to plaintiffs and the Program administrator that (1) as of May 11, 2011, plaintiffs were over 90 days past due on their mortgage payments, (2) plaintiffs had *not* paid \$10,079.91, which cleared Citi’s account on September 1, 2010, (3) plaintiffs were in default under the loan agreement, and (4) plaintiffs did not qualify for the Program.

To state a fraud cause of action, a plaintiff must allege, with particularity (*Committee On Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216, superseded by statute on another point as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228), that he or she detrimentally relied on an intentional misrepresentation made by the defendant (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291). “[E]very element of a cause of action for fraud must be alleged both factually and specifically, and the policy of liberal construction of pleadings will not be invoked to sustain a defective complaint.” (*Cooper v. Equity Gen. Insurance* (1990) 219 Cal.App.3d 1252, 1262.)

The SAC fails to allege any facts showing plaintiffs relied to their detriment on Citi's alleged misrepresentations. In their reply brief, plaintiffs ambiguously argue that Citi's misrepresentations were “relied-upon by the *hearer*.” (Italics added.) The hearer could be the Program administrator or anyone else who heard the alleged misrepresentation. This is insufficient to satisfy the element of *plaintiffs'* detrimental reliance.

Accordingly, the court properly sustained the demurrer to the tenth cause of action for deceit.

7. *Eighth Cause of Action — Violation of Unfair Competition Law*

Business and Professions Code section 17200 (the UCL) defines “unfair competition” to “include any unlawful, unfair or fraudulent business act or practice” “By proscribing ‘any unlawful’ business act or practice [citation], the UCL “borrows” rules set out in other laws and makes violations of those rules independently actionable. [Citation.] However, a practice may violate the UCL even if it is not prohibited by another statute. Unfair and fraudulent practices are alternate grounds for relief.” (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370; *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169-1170.)

“While the scope of conduct covered by the UCL is broad, its remedies are limited.” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144 (*Korea*)). Plaintiffs are limited to injunctive relief and restitution. (Bus. & Prof. Code, § 17203; *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129, superseded by statute on a different point as recognized in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 982-983 [“Restitution is the only monetary remedy expressly authorized by section 17203”].)⁶

“In 1992, the Legislature expanded the scope of the unfair competition law to include unfair business *acts* as well as *practices*.” (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 195 (conc. & dis. opn. of Kennard, J.)) “[T]his change . . . did not alter the meaning of ‘unfair . . . business practice’ but merely extended it to include single instances of conduct.” (*Ibid.*)

Here, plaintiffs have alleged that Citi unilaterally increased the payment terms on their mortgage loan at a time when all loan installments, taxes, and insurance payments were current, proceeded further to record a notice of default on the loan while it was current, and then failed to respond to plaintiffs’ request for an itemization of the amount of the claimed default. As noted above, a predicate to the recordation of a notice of default under Civil Code section 2924 is that the borrower actually be in default. And Civil Code section 2924c, subdivision (b)(1) requires the lender, in its notice of default, to promise the borrower upon written request to “give . . . a written itemization of the

⁶ An “action under the UCL ‘is not an all-purpose substitute for a tort or contract action.’ [Citation.] Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. . . . [T]he ‘overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.’ [Citation.] Because of this objective, the remedies provided are limited. While any member of the public can bring suit under the act to enjoin a business from engaging in unfair competition, it is well established that individuals may not recover damages.” (*Korea, supra*, 29 Cal.4th at p. 1150.)

entire amount” the borrower must pay to cure the default. Plaintiffs allege that the statutory promise of an itemization was made, but was not performed upon their written request. For purposes of ruling on the demurrer, we accept these allegations as true. And if true, the described conduct is both unfair and unlawful. Plaintiffs further allege they paid the \$10,079.46 demanded, despite Citi’s failure to provide the requested itemization, and Citi then failed to credit the payment to plaintiffs’ account. This is a sufficient allegation that ““money . . . [has] been lost by . . . a plaintiff, on the one hand, and that it [has] been acquired by a defendant, on the other.”” (*Zhang v. Superior Court, supra*, 57 Cal.4th at p. 371.)

Accordingly, the demurrer to the eighth cause of action for violation of the unfair competition law should have been overruled.

8. *Eleventh Cause of Action — Interference with Prospective Economic Benefit*

The elements of the tort of interference with prospective economic advantage are: ““(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.” [Citations.]” (*Korea, supra*, 29 Cal.4th at p. 1153.) In addition, as to the third element, the defendant’s intentional act of interference must be *independently* wrongful. (*Id.* at p. 1158.) An “act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.” (*Id.* at p. 1159.)

Interference with prospective economic advantage does not require a contractual economic relationship between the plaintiff and the third party. (*Korea,*

supra, 29 Cal.4th at p. 1157.) The torts of intentional interference with contract and intentional interference with prospective economic advantage are distinct from one another. (*Ibid.*) Our “courts should . . . firmly distinguish the two kinds of business contexts, bringing a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant.” (*Ibid.*)

Importantly, to prevail on a cause of action for intentional interference with prospective economic advantage, plaintiff must plead and prove ““*intentional* acts on the part of the defendant *designed* to disrupt the relationship.”” (*Korea, supra*, 29 Cal.4th at p. 1153, italics added.)

The SAC alleged the following. Plaintiffs “had an economic relationship with [the Program administrator] through the application for benefits under” the Program. At the time they applied for benefits, plaintiffs qualified for the Program. Their application for benefits was initially denied based upon the claim that the monthly outlay would exceed \$3,000 per month. After the time to respond lapsed, the Program administrator claimed that plaintiffs were more than 90 days past due, based on plaintiffs’ credit report, which included false information provided by Citi in violation of Civil Code section 1788 et seq. Citi committed fraud by willfully concealing the true state of plaintiffs’ payments with the intent of inducing default and foreclosure. Citi knew of plaintiffs’ application for benefits under the Program, but refused to correct the credit information or notify the Program administrator of the true state of plaintiffs’ payments. As a result of Citi’s conduct, plaintiffs were denied participation in the Program.

Even assuming plaintiffs had an economic relationship with the Program administrator by virtue of applying for benefits, their allegation they qualified for the Program is a factual and legal conclusion we do not deem true for purposes of Citi’s demurrer. Furthermore, plaintiffs failed to allege sufficient facts to show Citi’s act was independently wrongful. The SAC alleged Citi’s report to a credit agency violated Civil

Code section 1788 et seq. — the Rosenthal Fair Debt Collection Practices Act — but did not specify a particular section of that act. Under section 1788.12, subdivision (e), “the disclosure, publication or communication by a debt collector of information relating to a consumer debt or the debtor to a consumer reporting agency or to any other person reasonably believed to have a legitimate business need for such information shall not be deemed to violate this title.”⁷ As to plaintiffs’ allegation Citi committed fraud, we have concluded plaintiffs failed to state a cause of action for fraud, as discussed earlier in this opinion. Finally, plaintiffs have not alleged that Citi’s conduct was *intentionally designed* to interfere with plaintiffs’ application to the Program.

The demurrer to the eleventh cause of action for interference with prospective economic advantage was properly sustained.

9. *Ninth Cause of Action — RICO*

Plaintiffs attempted to state a cause of action under RICO, but do not specify which paragraph of the statute Citi allegedly violated. They allege generally that RICO “makes it unlawful for any person engaged in an enterprise affecting interstate commerce to, *inter alia*, attempt to collect an unlawful debt, to engage in the enterprise with an intent to commit an illegal activity, and to conspire to do any of the foregoing.” Section 1962(a) and (b) of RICO make it unlawful to use the income derived from either a pattern of racketeering activity or the collection of an unlawful debt for the acquisition of an interest in or the operation of an enterprise engaged in interstate or foreign commerce. Section 1962(c) makes it unlawful to conduct the affairs of an enterprise through a pattern of racketeering activity or collection of an unlawful debt.

RICO defines “unlawful debt” as a debt incurred or contracted in illegal gambling activity, or the business of lending money at a usurious rate under federal or

⁷

We do not repeat in our discussion of other causes of action plaintiffs’ meritless allegation that Citi’s report to a credit agency violated Civil Code section 1788.

state law which is “at least twice the enforceable rate.” (18 U.S.C., § 1961(6).) Plaintiffs have not alleged gambling activity or loan sharking. Accordingly, we analyze plaintiffs allegations to determine whether a violation of RICO is adequately alleged based on the “racketeering activity” prong of the statute.

To state a claim under section 1962 of title 18 of the United States Code based on alleged racketeering activity, a plaintiff must allege “(1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity.” (*Sedima S.P.R.L. v. Imrex Co. Inc.* (1985) 473 U.S. 479, 496.) “RICO defines ‘racketeering activity,’ also referred to as ‘predicate acts,’ as acts indictable under any one of several federal or state offenses” (*McDonald v. Schencker* (7th Cir. 1994) 18 F.3d 491, 494.) RICO’s racketeering activities are listed in section 1961(1)(B) of title 18 of the United States Code, as conduct that violates specific statutes. The list includes mail fraud, wire fraud, fraud on a financial institution, and extortionate credit transactions (18 U.S.C. § 891(6) [where the debtor and creditor understand that delay or failure to make repayment could result in violence or other criminal means to cause harm to the person, reputation, or property of any person]). “To establish a pattern of racketeering activity, plaintiffs must allege at least two predicate acts that ““are interrelated by distinguishing characteristics”” [citation] and ‘amount to or pose a threat of continued criminal activity.’” (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal. 4th 800, 826.) “To maintain a claim under RICO, a plaintiff must show not only that the defendant’s violation was a ‘but for’ cause of his injury, but that it was the proximate cause as well. [Citations.] This requires a showing of a direct relationship between the injurious conduct alleged and the injury asserted. [Citation.] The plaintiff must show a concrete financial loss.” (*Forsyth v. Humana, Inc.* (9th Cir. 1997) 114 F.3d 1467, 1481, overruled on another point in *Lacey v. Maricopa County* (9th Cir. 2012) 693 F.3d 896, 925.) It has been noted that the “vagueness of RICO’s language has led to vast divisions of authority in the federal courts, and these divisions are dumped upon California courts compelled to adjudicate

RICO claims.” (*Gervase v. Superior Court* (1995) 31 Cal.App.4th 1218, 1247 (conc. opn. of Sims, J.).)

For a RICO claim based on fraud, the pleader must “state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation.” (*Moore v. Kayport Package Express, Inc.* (9th Cir. 1989) 885 F.2d 531, 541 [decided under the particularity requirements of Fed. Rules Civ. Proc., rule 9(b), 28 U.S.C.].) California’s particularity requirement for pleading fraud is congruent with the federal requirement. “[E]very element of a cause of action for fraud must be alleged both factually and specifically, and the policy of liberal construction of pleadings will not be invoked to sustain a defective complaint.” (*Cooper v. Equity Gen. Insurance, supra*, 219 Cal.App.3d at p. 1262.)

Plaintiffs alleged that Citi committed the following interstate acts, which they label “predicate acts.” Citi changed the amount of plaintiffs’ “monthly payment without cause or notice for the purpose of stealing funds from [plaintiffs] and other borrowers;” violated Civil Code section 2924c, “which mandates a statement of account upon demand;” pursued the default of plaintiffs’ property and the property of other Citi borrowers, knowing the borrower was not in default, and the sale of plaintiffs’ property, knowing plaintiffs were not in default; accepted payments they refused to credit to plaintiffs’ account; charged plaintiffs fees incurred as a result of Citi’s increase in plaintiffs’ payment amount; misrepresented its mortgage holders’ account status on credit reports for the purpose of increasing the potential for foreclosure; and failed to maintain accurate credit records or lied to the Program and the Program administrator with the intent to deprive plaintiffs and other borrowers of the benefits of a federal program.⁸

⁸

Plaintiffs also alleged, without elaboration, that defendants violated Civil Code section 2923.5, a legal conclusion we do not deem to be true. Moreover, as noted above, that issue is not ripe for review.

Plaintiffs' RICO claim fails because they have failed to plead a particular type of racketeering activity and the elements of that statutory offense. It is not sufficient simply to allege certain conduct which plaintiffs deem wrongful. One is left to guess which of the several statutory predicate offenses plaintiffs allege Citi to have violated. Without identification of the statutory predicate offense, it is difficult if not impossible to determine whether the elements of any particular offense have been pleaded, much less whether the elements have been pleaded with particularity. (See, e.g., *McDonald v. Schencker, supra*, 18 F.3d at p. 494 [to sufficiently plead indictable act of mail fraud, plaintiff must allege elements of statute].) Nor have they alleged with specificity any other particular borrower(s) who were defrauded or otherwise victimized by a statutory predicate act. They have therefore failed to properly allege a pattern of racketeering activity. (*Medallion Television Ent., Inc. v. SelectTV of California* (9th Cir. 1987) 833 F.2d 1360, 1365 [existence of "pattern of racketeering activity" depends on whether acts are isolated or sporadic, as opposed to indicating a threat of continuing activity].)

The demurrer to the ninth cause of action for violation of RICO was properly sustained.

Plaintiffs Fail to Establish Their Complaint can Be Successfully Amended

Plaintiffs bear the "burden to show the reviewing court how the complaint can be amended to state a cause of action." (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th, 1093, 1105.) "Here, [plaintiffs have] not apprised the court of any new information that would contribute to meaningful amendments, and [their] generalized assertion that [their] complaint can be amended . . . does not suffice to meet [their] burden of demonstrating that [they] can plead each element of" their causes of action to which the demurrer was properly sustained. (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 749.)

DISPOSITION

The judgment is affirmed in part and reversed in part. The dismissal of the fourth cause of action and the eighth cause of action for breach of contract and violation of the unfair competition law, respectively, is reversed, and the cause remanded with directions to overrule Citi's demurrer to those causes of action. In all other respects the judgment is affirmed. Each party shall bear their own costs on appeal.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.