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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHARLES P. LE BEAU et al.,

Plaintiffs and Appellants,

v.

BANK OF AMERICA, N.A., et al.,

Defendants and Respondents.

G050079

(Super. Ct. No. INC1107667)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Harold W. Hopp, Judge. Motion to augment record. Request for judicial notice. Motion denied. Request for judicial notice denied. Judgment affirmed.

Charles P. Le Beau, Timothy P. Le Beau and Jeffrey K. Le Beau, in pro. per., for Plaintiffs and Appellants.

Bryan Cave, Sean D. Muntz and Jonathan M. Hurst for Defendants and Respondents.

* * *

Plaintiffs Charles P. Le Beau, Timothy P. Le Beau, and Jeffrey K. Le Beau in propria persona, appeal from a judgment entered after the court sustained without leave to amend the demurrer of defendants Bank of America, N.A. (B of A), The Bank of New York Mellon (Bank of New York), ReconTrust Company, N.A. (ReconTrust), and Mortgage Electronic Registration Systems, Inc. (MERS) to the first amended complaint. Although the allegations are framed in a variety of causes of action, the first amended complaint essentially asserts defendants improperly began and maintained nonjudicial foreclosure proceedings after plaintiffs defaulted on a note secured by a deed of trust.

On appeal plaintiffs argue each of the causes of action is sufficiently pleaded and if any are not they should be given the opportunity to amend. We disagree and affirm the judgment.

MOTION TO AUGMENT RECORD AND REQUEST FOR JUDICIAL NOTICE

Plaintiffs filed two motions to augment the record, one of which the court designated as a request for judicial notice, that reference the following documents: In the motion to augment dated February 19, 2013: (1) a Notice of Rescission of Declaration of Default and Demand for Sale and of Notice of Default and Election to Sell; (2) a press release from the California Attorney General's office dated July 11, 2012 announcing the signing into law of the California Homeowner Bill of Rights; (3) a document from the California Attorney General's office summarizing certain key provisions of that bill; (4) a communication from B of A to Jeffrey and Timothy dated January 31, 2013 discussing another opportunity for them to modify their loan.

The request for judicial notice dated April 22, 2013 included one document dated April 12, 2013 entitled Independent Foreclosure Review, which was accompanied by a check in the sum of \$500 made payable to Jeffrey and Timothy.

We deny both motions as to all documents. On appeal the record is limited to documents that were before the trial court. Neither augmentation nor judicial notice is proper to bring new documents before us. (*Vons Companies Inc. v. Seabest Foods Inc.*

(1996) 14 Cal.4th 434, 444, fn. 3.) This is especially true when the documents evidence the events that occurred after the trial court proceedings. There are no exceptional circumstances that would justify our considering these documents. (*Ibid.*)

FACTS AND PROCEDURAL HISTORY

According to the complaint, in 2006 Jeffrey and Timothy¹ refinanced real property in Palm Desert (Property) by borrowing \$480,000 from Countrywide Home Loans, Inc. (Countrywide). The obligation was evidenced by a promissory note (Note) secured by a deed of trust (Deed of Trust) on the Property. ReconTrust was the trustee under the Deed of Trust.²

The Deed of Trust describes MERS as a nominee for Countrywide and its successors and assigns, and the beneficiary under the Deed of Trust. It further provides that plaintiffs “understand[] and agree[] that MERS holds only legal title to the interests granted by [plaintiffs] in this [Deed of Trust], but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this” Deed of Trust.

¹ Charles is not a party to the loan documents but is merely on title to the property.

² In conjunction with their demurrer to the first amended complaint, defendants filed a request for judicial notice of the Deed of Trust, Substitution of Trustee, Notice of Default and Election To Sell, Assignment of Deed of Trust, and Notice of Trustee’s Sale. Although the minute order does not include a ruling, we assume the court granted the request since plaintiffs argue the court erred because the contents of the documents were hearsay. But plaintiffs direct us to nothing in the record showing they objected to the request for judicial notice in the trial court. Thus this argument is forfeited. (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512, fn. 4.)

Plaintiffs plead their loan was securitized, with Bank of New York as the trustee of the securitization trust. Plaintiffs did not become aware of the securitization until they received the Notice of Sale and Substitution of Trustee.

Beginning in February 2009 through June 2011 plaintiffs requested a loan modification from Countrywide, both in writing and in person, and in writing from B of A. Although plaintiffs failed to allege they breached, they do plead a notice of default and notice of trustee's sale were filed. A copy of the notice of trustee's sale, showing a recording date of August 28, 2011, is appended to defendants' request for judicial notice. In September 2011 plaintiffs filed a complaint and motion for preliminary injunction, the latter of which was denied.

Plaintiffs then filed the first amended complaint containing 19 causes of action and/or requests for remedies: quiet title, rescission, unfair debt collection practices, unfair business practices under Business and Professions Code section 17200, breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress, declaratory and injunctive relief, accounting, negligence per se, cancellation of a voidable contract, to set aside notices of default and sale, to void or cancel assignment of deed of trust, wrongful foreclosure, unjust enrichment, slander of title, and elder abuse. We set out the relevant allegations of the various causes of action in the discussions particular to them.

DISCUSSION

1. Introduction

“When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint’s properly pleaded or implied factual allegations. [Citation.]” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) But we do not assume the truth of speculative allegations (*Rotolo v. San Jose Sports & Entertainment, LLC* (2007) 151 Cal.App.4th 307, 318, disapproved on another ground in *Verdugo v. Target Corp.* (2014) 59 Cal.4th

312, 335, fn. 15) or “contentions, deductions or conclusions of law” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967). “[W]e give the complaint a reasonable interpretation, and read it in context. [Citation.]” (*Schifando, supra*, 31 Cal.4th at p. 1081.) If the demurrer can be sustained on any ground raised, we must affirm. (*Ibid.*) If the court sustains a demurrer without leave to amend and plaintiffs seek leave to amend, they must demonstrate how the complaint could be amended to state a valid cause of action. (*Ibid.*) We review a demurrer de novo.³ (*Lee v. Hanley* (2014) 227 Cal.App.4th 1295, 1300.)

A demurrer may challenge only allegations shown on the face of the complaint, including exhibits, or matters that properly may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) In opposition to a demurrer a party may not file and we may not consider declarations. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) Thus we reject plaintiffs’ argument defendants were required to file declarations or present expert testimony in support of their demurrer.

2. *Sufficiency of Plaintiffs’ Briefs*

Most of plaintiffs’ briefs is merely a repetition of the allegations in the first amended complaint. There is very little authority to support plaintiffs’ claims and even less reasoned legal argument. On that basis alone we could declare their arguments forfeited for failure to properly brief and affirm on that basis. (*Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 165.) In addition the briefs are repetitive and unclear in many places.

³ Nothing in the record supports plaintiffs’ argument the judge did not spend sufficient time to review the demurrer and the allegations of the first amended complaint. In any event the trial court’s decision has no effect on the case based on our de novo review.

We choose to address their basic arguments on the merits. In doing so, however, we will not review every single allegation plaintiffs repeat in the briefs. We focus only on those essential to the respective causes of action.

3. *Common Allegations*

There are five allegations that form the basis for most if not all of the causes of action. For convenience and ease of reading we will address them in this section.

a. Status of MERS and ReconTrust

Plaintiffs complain that neither MERS nor ReconTrust was qualified to do business in California and neither had a registered agent for service of process in the state. As a result, they assert, actions they took in connection with the foreclosure are ultra vires and void *ab initio*. This argument has no merit.

Preliminarily where, as here, there has been no sale, without specific allegations of irregularity a plaintiff has no standing to challenge a foreclosure based on a claim the party commencing the process is not authorized to do so.

In *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, (*Gomes*), the court considered and rejected claims similar to those plaintiffs raise here. The plaintiff, who had executed a note and deed of trust and subsequently defaulted on the note, sued for wrongful foreclosure. He alleged the note had been sold and the current owner was unknown and had not authorized the foreclosure.

In affirming the order sustaining the demurrer, the appellate court pointed to Civil Code sections 2924 through 2924k, describing them as constituting a “comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust” that covers “every aspect of exercise of the power of sale contained in a deed of trust.” [Citation.]” (*Gomes, supra*, 192 Cal.App.4th at p. 1154.)

Due to the “exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the [nonjudicial] foreclosure statute.’ [Citations.]” (*Gomes, supra*, 192 Cal.App.4th at p. 1154.) Thus, held there is no authority to “interject the courts into this comprehensive nonjudicial scheme” by allowing a party to file a suit to determine whether the party initiating the foreclosure has been properly authorized to do so by the owner of the note. (*Ibid.*)

Moreover, Civil Code section 2924, subdivision (a)(1) states a notice of default may be recorded by a “trustee, mortgagee, or beneficiary, or any of their authorized agents.” “[N]owhere does the statute provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized, and we see no ground for implying such an action. [Citation.] [T]he recognition of the right to bring a lawsuit to determine a nominee’s authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures.” (*Gomes, supra*, 192 Cal.App.4th at p. 1155.)

The allegation MERS is not qualified to do business in California and has no agent for service of process is not an irregularity that overcomes the rule in *Gomes*. This argument has been considered and rejected in many cases.

“MERS is statutorily exempted from the requirement to obtain a certificate of qualification to conduct business in California. MERS registered as a Delaware corporation, which is a foreign corporation under California law. [(Corp. Code §§ 167, 171.)] MERS is not required to obtain a certificate of qualification from the Secretary of State because it does not ‘transact intrastate business’ within the meaning of the statute. [Citation.]” (*Castaneda v. Saxon Mortgage Services, Inc.* (E.D.Cal. 2009) 687 F.Supp.2d 1191, 1195, fn.3; *Baidoobonso-Iam v. Bank of America (Home Loans)* (C.D.Cal., Nov. 22, 2011, No. CV 10-9171 CAS MANx) 2011 U.S. Dist. Lexis 80555 [“courts have routinely recognized that MERS’s conduct in California is within the permissible scope

for an unregistered foreign corporation”); see *Perlas v. Mortgage Electronic Registration Systems, Inc.* (N.D.Cal., Aug. 6, 2010, No. C 09-4500 CRB) 2010 U.S. Dist. Lexis 79705 [“even assuming MERS was obligated to register with the state, its failure has not caused any injury to [the] Plaintiffs. There is no authority for the argument that because MERS was unregistered, its contractual obligations are void”].)

The same reasoning applies to ReconTrust, The Deed of Trust and substitution of trustee showed ReconTrust’s place of doing business as Thousand Oaks, California.

In a related argument, plaintiffs maintain MERS was shown only as a nominee on the Deed of Trust. The point of this claim is unclear but what is clear is that under California law a lender is authorized to name a nominee to be the beneficiary under a trust deed. (Bus. & Prof. Code, §10234, subd. (a).) Under the Deed of Trust, in its capacity as the nominee, MERS has the right to foreclose on and sell the property. Furthermore, the Deed of Trust grants MERS the right “to exercise any or all” of the lender’s interests, including the right to assign the Deed of Trust. (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 84.) The argument MERS has no authority to foreclose has been rejected in countless cases. (E.g. *Pantoja v. Countrywide Home Loans, Inc.* (N.D.Cal. 2009) 640 F.Supp.2d 1177, 1189, 1190; *Morgera v. Countrywide Home Loans, Inc.* (E.D.Cal., Jan. 11, 2010, No. 2:09-cv-01476-MCE-GGH) 2010 U.S. Dist. Lexis 2037.) The two bankruptcy cases on which plaintiffs rely are neither binding (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18) nor good law in California. (*Gomes, supra*, 192 Cal.App.4th 1149, 1157-1158.)

The complaint alleged B of A had no authority to attempt to substitute ReconTrust as successor trustee because MERS was named as the nominee and B of A had no right to act as trustee under the original deed of trust. But the Deed of Trust specifically granted B of A the authority to do so. (See *Karimi v. GMAC Mortgage*

(N.D.Cal., Nov. 28, 2011, No. 11–CV–00926–LHK) 2011 U.S. Dist. Lexis 136071.) Moreover, even assuming it did not, a mere “attempt” to substitute a trustee cannot constitute wrongful conduct.

In addition, as to all of these claims, plaintiffs have not stated how they were prejudiced by these alleged deficiencies. They do not contend their ability to make payments was in any way impeded. The threat of losing the Property in foreclosure is not sufficient prejudice. That occurred due to their default, not to some perceived imperfection in the foreclosure process. (See *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272.)

In sum, nothing about the status of either MERS or ReconTrust supports the claims in plaintiffs’ first amended complaint.

b. Production of the Note and Deed of Trust

In a related argument plaintiffs allege B of A did not possess and has not produced a note or deed of trust showing it is the trustee or beneficiary. In support they refer to Uniform Commercial Code section 3-202. But there is no such requirement. (*DeBrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440 [foreclosing party need not possess note]; Civ. Code § 2924.) Nor does the Uniform Commercial Code apply to the comprehensive statutory scheme governing nonjudicial foreclosures. (*DeBrunner*, at pp. 440-441.)

c. Securitization of the Loan

Plaintiffs also challenge the securitization of the loan.⁴ They have no standing to do so since they are not parties to that transaction. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 515.) Moreover, a legal beneficiary’s

⁴ In their brief plaintiffs refer to an exhibit D to the first amended complaint in connection with this claim. There is no exhibit D contained in the record and we are unable to ascertain the nature of the document. Per paragraph 17 of the first amended complaint, exhibit D appears to contain the notice of trustee sale and substitution of trustee, which have no relevance to this argument.

standing to enforce the trust deed is not affected by securitization. (*Sami v. Wells Fargo* (N.D.Cal., April 3, 2012, No. C 12–00108 DMR) 2012 U.S. Dist. Lexis 38466.)

d. California Homeowner Bill of Rights

Plaintiffs rely on the California Homeowner Bill of Rights (Sen. Bill No. 900 (2011–2012 Reg. Sess.); Assem. Bill No. 278 (2011–2012 Reg. Sess.)). They claim B of A did not credit \$7,000 worth of payments they made as required by the statute. However the statute did not become effective until January 1, 2013, after the events giving rise to this action and after the first amended complaint was filed.

The statute does not apply retroactively and the foreclosure had already been initiated before its effective date. (*Rockbridge Trust v. Wells Fargo, N.A.* (N.D.Cal. 2013) 985 F.Supp.2d 1110, 1152; see *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840-841 [statutes not presumed retroactive].) Plaintiffs have no rights pursuant to that statutory scheme.

e. Robo-signing

Although not pleaded in the complaint, plaintiffs almost offhandedly mention in their brief, without supporting authority or argument, that the Deed of Trust and the foreclosure documents were robo-signed on behalf of MERS as the nominee. This claim fails because plaintiffs have not alleged any actionable prejudice. (E.g., *Pederson v. Greenpoint Mortgage Funding, Inc.* (E.D.Cal. 2012) 900 F.Supp.2d 1071, 1083.) No matter what the entity that signed the documents, the foreclosure would have gone forward because plaintiffs were in default. (*Javaheri v. JPMorgan Chase Bank* (C.D.Cal., Aug. 13, 2012, No. 2:10–cv–08185–ODW (FFMx)) 2012 U.S. Dist. Lexis 114510.)

4. Quiet Title and Wrongful Foreclosure

a. Quiet Title

In addition to the other elements of a quiet title cause of action, a plaintiff must allege tender of any arrearages or an excuse from tender. (*Shimpones v. Stickney*

(1934) 219 Cal. 637, 649; *Mix v. Sodd* (1981) 126 Cal.App.3d 386, 390; *Monreal v. GMAC Mortgage, LLC* (S.D.Cal. 2013) 948 F.Supp.2d 1069, 1079.) The gravamen of plaintiffs' cause of action is that defendants have no enforceable security interest in the Property because they did not "legally succeed[]" to the original Note and Deed of Trust. Plaintiffs have not alleged tender but have pleaded none is required because: (1) there has not yet been a foreclosure sale; (2) it would be inequitable to demand it; and (3) the validity of the underlying Note "in the alleged hands of the Defendant banks" is being challenged.

We reject plaintiffs' argument they were not required to tender. Quiet title is an equitable action. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1241.) Plaintiffs are attempting to recoup the Property free and clear, thereby eliminating defendants' interest. (Code Civ. Pro., §761.020, subd. (e).) There is no basis in equity to allow them to do so without repaying the \$480,000 they admittedly borrowed. A judgment quieting title without repayment would represent a windfall to plaintiffs in the amount. In addition, they have lived in the house for several years without making any payments.

Onofrio v. Rice (1997) 55 Cal.App.4th 413, 424, where the foreclosure sale occurred prior to the action being filed is not to the contrary. That the foreclosure sale has not taken place here is not relevant.

Nor can plaintiffs avoid tender based on a challenge to the underlying invalidity of the Note and Deed of Trust. They do not claim either the Note or the Deed of Trust evidencing the loan from Countrywide is void. At most they dispute B of A's right to enforce them. The foreclosure process cannot be attacked based on irregularities unless tender is made. (See *Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512.)

Plaintiffs argue in the brief, although curiously this is not alleged in the first amended complaint, not even in the cause of action for an accounting, that defendants failed to credit payments of \$7,000. Assuming this is true, as we must for purposes of

demurrer, plaintiffs still must make a tender of the sum due less this disputed amount. (*Rupisan v. JP Morgan Chase Bank, NA* (E.D.Cal., Aug. 29, 2012, No. 1:12-CV-0327 AWI GSA) 2012 U.S. Dist. Lexis 123166 [causes of action for quiet title and wrongful foreclosure must include allegation the plaintiff can “tender payment of the loan proceeds (less fees, interest, etc.)”].) And plaintiffs do not allege they could have cured the default by paying the amount claimed less \$7,000.

Plaintiffs point out that at the demurrer hearing they argued the Deed of Trust was an adhesion contract, apparently because it required MERS to be designated as the nominee. This is not alleged in the first amended complaint, but even if it were the argument has no substance. As is typical in most of the brief, plaintiffs provided no authority or reasoned legal argument as to why this excuses tender. Thus the argument is forfeited. (*Evans v. CenterStone Development Co., supra*, 134 Cal.App.4th at p. 165.) Second, merely because a contract is adhesive does not necessarily render it unenforceable. (*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1375.) Rather, it is enforceable unless there are other reasons it should not be. (*Ibid.*) Plaintiffs have not pleaded or suggested any of them.

In addition, there is no requirement plaintiffs execute a new note or deed of trust or that the Deed of Trust be assigned. Plaintiffs alleged in the first amended complaint that B of A took over Countrywide. On our own motion we may take judicial notice of the fact that B of A acquired by merger the assets of Countrywide, including the Note. (E.g., *Allstate Ins. Co. v. Countrywide Financial Corp.* (C.D.Cal. 2012) 842 F.Supp.2d 1216, 1221-1222; see *Reade v. CitiMortgage Inc.* (S.D.Cal., Nov. 7, 2013, Civil No. 13cv404 L (WVG) 2013 U.S. Dist. Lexis 160681 [same claim rejected where the defendant was successor by merger to original lender].)

The allegation plaintiffs on more than one occasion requested a loan modification is wholly inadequate to support this cause of action. The mere request for a loan modification says nothing about whether plaintiffs might be entitled to quiet title.

b. Wrongful Foreclosure

The gravamen of this cause of action is that defendants had no authority to declare a default, record the notice of default, notice of sale, or substitution of attorney, or foreclose on the Property because the Note and Deed of Trust were never assigned to them or in their possession. Further, plaintiffs allege defendants could not take these actions on behalf of Countrywide because they were not its beneficiaries or representatives. Because defendants allegedly knew they had no such authority, the foreclosure actions were fraudulent. These contentions have been discussed and rejected above.

Further, plaintiffs have not alleged the Property has been sold, generally an element of a wrongful foreclosure cause of action. (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062 [elements of wrongful foreclosure are illegal or fraudulent sale of property pursuant to a trust deed, harm to plaintiff, and plaintiff's tender of debt amount or excuse therefrom].) And plaintiffs have not tendered the amount due under the Note.

In addition, to recover in a wrongful foreclosure action, plaintiffs must also plead "the alleged imperfection in the foreclosure process was prejudicial." (*Fontenot v. Wells Fargo Bank, N.A., supra*, 198 Cal.App.4th at p. 272.) "Prejudice is not presumed from 'mere irregularities' in the process. [Citation.]" (*Ibid.*)

5. Rescission

Although unclear it, appears this cause of action seeks to have the foreclosure documents rescinded based on fraud. There are two major flaws. First, to obtain this relief, a party must tender, which plaintiffs have not done. (*Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 457-458.)

Second, plaintiffs have not alleged a sufficient cause of action for fraud, the elements of which are: (1) misrepresentation of a material fact; (2) knowledge of the falsity; (3) an intent to induce reliance or to defraud; (4) plaintiff's justifiable reliance;

and (5) resulting damages. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 363.) Fraud must be pleaded with particularity. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.) This means the complaint must include specific facts showing ““how, when, where, to whom, and by what means the representations were”” made. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) In a cause of action made against a corporation, the complaint must also state the names of the people who allegedly made the misrepresentations, their authority to act on behalf of the corporation, to whom the people spoke, the statements made, and the dates of the statements. (*Ibid.*)

The first amended complaint does not comply. There are few allegations of fraudulent misrepresentations and those that are pleaded are conclusory. The cause of action fails. And plaintiffs have not explained what they could plead to sufficiently amend.

6. *Unfair Debt Collection Practices*

Plaintiff relies on the Rosenthal Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq.; Rosenthal Act), the federal Fair Debt Collection Act (15 U.S.C. §1692 et seq.; FDCPA), and the Real Estate Settlement and Procedures Act of 1974 (12 U.S.C. §2601 et seq.; RESPA), the latter two being the federal counterparts of the Rosenthal Act. The bases of the cause of action are (1) that defendants did not possess the “legal documents,” including the Note, and (2) that MERS and ReconTrust were not qualified to do business in the state and thus their acts were void *ab initio*, two arguments we have already disposed of.

Further, foreclosing under a trust deed is not debt collection under the Rosenthal Act. (*Sipe v. Countrywide Bank*, E.D.Cal. 2010) 690 F.Supp.2d 1141, 1151; accord, *Velasco v. Homewide Lending Corp.* (C.D.Cal. June 21, 2013, No. SACV 13-00698-CJC(RNBx)) U.S. Dist. Lexis 87880.)

The same is true under the FDCPA. (*Cordero v. Bank of America N.A.* (C.D.Cal., Feb. 14, 2013, No. CV 11-08921 DDP (MRWx)) 2013 U.S. Dist. Lexis 20261

[foreclosure not a debt collection].) As to RESPA, plaintiffs have made no allegations as to why a claimed unfair debt collection would fall within this statute.

None of the factual allegations on which plaintiffs rely support their unfair debt collection practices cause of action. There is no basis on which this claim could be amended; therefore the demurrer was properly sustained without leave to amend.

7. *Unfair Business Practices*

Plaintiffs allege defendants engaged in unfair business practices in violation of Business and Professions Code section 17200 et seq. (UCL). To state a UCL cause of action a complaint must allege, among other things, acts constituting unlawful, fraudulent, or unfair business practices. (*Ibid.*) “In effect, the UCL borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL. [Citations.]” (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1505.) Plaintiffs rely primarily on the common allegations discussed above and the unfair debt collection cause of action as the predicate unlawful acts.

There are at least two reasons why this cause of action fails. First, as discussed above, none of the underlying actions on which plaintiffs rely are unlawful, fraudulent, or unfair.

Second the remedies in a UCL action are equitable. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950). And plaintiffs seek only equitable relief. But to receive equity plaintiffs must do equity by tendering the amount due. “Without [the plaintiff’s] meaningful tender, [the plaintiff] seeks empty remedies, not capable of being granted. The claims . . . are subject to dismissal in the absence of a sufficiently alleged tender of loan proceeds. (*Saldate v. Wilshire Credit Corp.* (E.D.Cal. 2010) 686 F.Supp.2d 1051, 1061 [UCL claim dismissed].)

8. *Breach of Fiduciary Duty*

The general rule is there is no fiduciary duty between a bank and its borrower. (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 476, overruled on

another ground in *Riverside Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n.* (2013) 55 Cal.4th 1169, 1182.) The complaint does not allege any facts showing there is any relationship other than lender/borrower between plaintiffs and defendants.

9. *Breach of Implied Contract*

“A cause of action for breach of implied contract has the same elements as does a cause of action for breach of contract, except that the promise is not expressed in words but is implied from the promisor’s conduct. [Citation.]” (*Yari v. Producers Guild of America, Inc.* (2008) 161 Cal.App.4th 172, 182.) Those elements are: (1) a contract; (2) plaintiffs’ performance or excused nonperformance; (3) defendants’ breach; and (4) plaintiffs’ damages. (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 228.)

The basis of this cause of action appears to be the allegation B of A did not have a right to begin foreclosure against plaintiffs but “took such actions in breach of implied contract.” This fails to satisfy any of the requirements of this cause of action. Plaintiffs have not suggested anything they could plead to cure these deficiencies.

10. *Breach of Implied Covenant of Good Faith and Fair Dealing*

This cause of action is based on the allegation that in 2006 and thereafter defendants “used their superior knowledge in the real estate, mortgage lending, and finance and trust areas” to plaintiffs’ detriment. It also appears plaintiffs claim defendants violated Civil Code sections 2954.6 (cancellation of private mortgage insurance), 2924 (foreclosure rights & duties), and 2934 (right to record assignment of beneficial interest under a trust deed), and title 15 of the United States Code section 1639(h) (ban on extension of credit without consideration of borrower’s ability to pay). This cause of action is flawed as well.

These allegations are unclear and make no sense. They do not set out the acts constituting the alleged breach. In addition, “[t]he implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation.

[Citation.]’ [Citation.]” (*Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1015.) Plaintiffs fail to allege the underlying contract.

Further, as defendants note, the statute of limitations for this cause of action is four years at the outside. (Code Civ. Proc., § 337(1).) The complaint, filed in 2011, alleges defendants breached in 2006. The cause of action is time barred.

11. Negligence and Negligence Per Se

This cause of action is based primarily on the common allegations, with the negligence per se claim based on violation of Civil Code sections 2924 and 2934 in addition to “all statutory provisions regulating the collection and enforcement of mortgages in California.” The allegations are insufficient.

“‘[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.’ (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.)” (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 206.) Plaintiffs allege no facts showing their relationship with defendants was anything beyond that of borrowers and a lender.

12. Emotional Distress

“‘The elements of a prima facie case of intentional infliction of emotional distress consist of: (1) extreme and outrageous conduct by the defendant with the intent to cause, or reckless disregard for the probability of causing, emotional distress; (2) suffering of severe or extreme emotional distress by the plaintiff; and (3) the plaintiff’s emotional distress is actually and proximately the result of defendant’s outrageous conduct.’ [Citations.]” (*Chang v. Lederman* (2009) 172 Cal.App.4th 67, 86.)

Plaintiffs base this cause of action primarily on the common allegations, alleging that by engaging in these acts defendants intended to cause plaintiffs distress. The underlying actions do not constitute extreme or outrageous conduct. “At most, this

was a creditor/debtor situation, whereby defendants were exercising their rights under the loan agreements.” (*Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1009.)

A cause of action for negligent infliction of emotional distress is not a separate tort but a a subspecies of a negligence claim. (*Ragland v. U.S. Bank National Assn.*, *supra*, 209 Cal.App.4th at p. 205.) Thus, plaintiff must allege the existence of a duty. (*Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1520.) As discussed above, defendants owed no duty to plaintiffs.

13. Accounting

This cause of action is again based on the common allegation that B of A and Bank of New York had no rights to any of plaintiffs’ payments because they were not the beneficiaries, assignees, or transferees of the Note or Deed of Trust. Thus, they assert, they have the right to an accounting of sums paid to those entities. But as discussed above, B of A acquired rights to the Note and Deed of Trust by virtue of its acquisition of Countrywide. And plaintiffs have no right to challenge securitization of the loan and by extension any payments made to Bank of New York, if any were made. Plaintiffs do not even allege that basic fact.

14. Declaratory and Injunctive Relief

Plaintiffs seek a declaration as to their rights concerning B of A’s and Bank of New York’s alleged lack of possession of the Note and Deed of Trust. As noted above, this does not create a controversy sufficient for declaratory relief. Moreover, as also discussed above, pursuant to the exhaustive statutory scheme set out in Civil Code sections 2924 through 2924k, plaintiffs have no right to challenge the authority of the party initiating the foreclosure proceeding. (*Gomes*, *supra*, 192 Cal.App.4th at p. 1155.)

Based primarily on the common allegations plaintiffs seek to enjoin foreclosure. *Gomes* prohibits this remedy as well. (*Gomes*, *supra*, 192 Cal.App.4th at p. 1154.)

15. Cancellation of a Voidable Contract, to Set Aside Notices of Default, Sale and Substitution of Trustee and to Cancel Assignment of Deed of Trust

Plaintiffs seek to void the Note and Deed of Trust based on defendants' alleged irregularities in the foreclosure process, claiming this makes their actions ultra vires and the documents void *ab initio*. Even assuming there had been irregularities, they would not affect the validity of the Note and Deed of Trust. Moreover, as with many of the other claims, *Gomes* prevents any challenge to the validity of the foreclosure proceedings. (*Gomes, supra*, 192 Cal.App.4th at pp. 1154, 1155.)

The cause of action to cancel the assignment of the Deed of Trust contains no allegations regarding the assignment. Rather, it is merely a repetition of allegations regarding the alleged invalidity of the Deed of Trust itself.

Again, based on the common allegations, plaintiffs attempt to set aside the notices of default, sale, and substitution of trustee. And again, these allegations do not amount to improper conduct and are not the basis for setting aside any of these documents.

Therefore none of these causes of action suffice.

16. Unjust Enrichment

Plaintiffs claim that by virtue of their alleged wrongful acts, primarily set out in the common allegations, defendants have been unjustly enriched and should be ordered to disgorge any payments or profits. There are no facts alleged supporting an unjust enrichment cause of action. As defendants assert, plaintiffs are the ones who have been unjustly enriched by virtue of their failure to repay the loan and living in the property rent-free since at least January 2009.

17. Slander of Title

The elements of a slander of title cause of action are “(1) a publication, (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss. [Citations.]”

(Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC (2012) 205 Cal.App.4th 999, 1030.)

Plaintiffs allege that none of the defendants was ever a trustee, beneficiary, or assignee of the Deed of Trust and on that basis they thereby falsely caused the notices of default, sale, and substitution of trustee to be recorded. But as stated several times in this opinion, defendants were authorized to commence and proceed with the foreclosure. Thus recording of those documents was not improper and their contents were not false. Thus this cause of action fails as well.

18. Elder Abuse

A cause of action for financial elder abuse must allege the defendants took, secreted, appropriated, obtained, or retained an elder's real property with the intent to defraud or for a wrongful use. (Welf. & Inst. Code, § 15610.30, subd. (a)(1).) The first amended complaint contains no such allegation because there has been no foreclosure sale. Thus, the cause of action fails. And without such a sale there is no basis to amend the complaint.

19. Leave to Amend

Other than passing mentions in the opening brief, plaintiffs do not even discuss leave to amend until their reply brief. And the only basis for their request is that since they are in propria person, they should be "given the benefit of the doubt."

To be granted leave to amend, plaintiffs must show how the complaint could be pleaded to state a valid cause of action. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.) "To satisfy that burden on appeal, a plaintiff "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." [Citation.] . . . The plaintiff must clearly and specifically set forth the "applicable substantive law" [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of

action. [Citations.]” (*Rosberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491.)

Plaintiffs have made no such showing. The fact they are in propria persona does not relieve them of this duty. “Pro. per. litigants are held to the same standards as attorneys. [Citations.]” (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.)

Finally, at oral argument plaintiffs contended, for the first time, a federal loan modification program required defendants to offer them a modification with payments not to exceed 30 percent of plaintiffs’ monthly income, and that plaintiffs could allege defendants’ failure to do so was an indication of actionable bad faith. We can find no such requirement. Presumably plaintiffs were referring to the Home Affordable Mortgage Program discussed in *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780 (*West*). As explained in *West*, there is a three step process for determining the borrower’s eligibility:

“First, the borrower had to meet certain threshold requirements, including that the loan originated on or before January 1, 2009; it was secured by the borrower’s primary residence; the mortgage payments were more than 31 percent of the borrower’s monthly income; and, for a one-unit home, the current unpaid principal balance was no greater than \$729,750.

‘Second, the servicer calculated a modification using a “waterfall” method, applying enumerated changes in a specified order until the borrower’s monthly mortgage payment ratio dropped “as close as possible to 31 percent.”’

‘Third, the servicer applied a Net Present Value (NPV) test to assess whether the modified mortgage’s value to the servicer would be greater than the return on the mortgage if unmodified. The NPV test is “essentially an accounting calculation to determine whether it is more profitable to modify the loan or allow the loan to go into foreclosure.” [Citation.] If the NPV result was negative—that is, the value of the modified mortgage would be lower than the servicer’s expected return after foreclosure—

the servicer was not obliged to offer a modification. If the NPV was positive, however, the Treasury directives said that “the servicer MUST offer the modification.”

[Citation.]” (*West, supra*, 214 Cal.App.4th at pp. 787-788.)

There is nothing in the record before us, and nothing plaintiffs said at oral argument, which even remotely suggests the modification they seek has any chance of surviving the NPV test. In fact the opposite appears to be true. A monthly payment equal to 31 percent of plaintiffs’ claimed \$2,000 monthly income would be \$620. In order to reduce the monthly payment on a 30-year \$480,000 loan from over \$3,000 to just \$620, the loan principal would have to be reduced or the loan maturity would have to be extended, to the point that the net present value of the modified loan would be less than what plaintiffs represent to be the fair market value of the Property. Thus, defendants would not be obliged to offer a modification.

For all of these reasons, we see no basis to allow amendment. Thus we deny leave to amend.

DISPOSITION

The judgment is affirmed. The motion to augment the record and the request for judicial notice are denied. Defendants are entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.