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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ERWINA A. ONG,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A. et al.,

Defendants and Respondents.

G050396

(Super. Ct. No. CIVRS1202281)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,  
Ben T. Kayashima, Judge. Affirmed.

Law Offices of Edward C. Tu and Edward C. Tu for Plaintiff and  
Appellant.

Wright Finlay & Zak, T. Robert Finlay, Nicole S. Dunn, and Jonathan D.  
Fink for Defendants and Respondents.

Erwina A. Ong appeals from a judgment in favor of Wells Fargo Bank, N.A. (Wells Fargo), and Federal Home Loan Mortgage Corporation (Freddie Mac), after the trial court sustained their demurrer without leave to amend. After the trust deed securing the loan on Ong’s residence was foreclosed on, and the property sold at a trustee’s sale, Ong sued Wells Fargo and Freddie Mac and other defendants alleging several causes of action. Her complaint included a fraud cause of action alleged against Wells Fargo only, which is the only cause of action she addresses in this appeal.<sup>1</sup> She contends she adequately pleaded a fraud cause of action against Wells Fargo and in the alternative that the operative facts she alleged support negligent misrepresentation and promissory estoppel causes of action. We reject her contentions and affirm the judgment.

#### STANDARD OF REVIEW

“On appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend, we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. [Citation.] We assume the truth of all material facts properly pleaded, as well as facts that may be implied or inferred from those expressly alleged. [Citation.] Relevant matters that are properly the subject of judicial notice may be treated as having been pled. [Citation.]” (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 742.) “We also accept as true facts appearing in exhibits attached to the complaint. [Citations.] If the facts expressly alleged in the complaint conflict with an exhibit, the contents of the exhibit take precedence. [Citation.]” (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 56.)

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<sup>1</sup> Because Ong’s complaint contained no allegations directed at Freddie Mac, and on appeal she challenges only the ruling as to her fraud cause of action against Wells Fargo, we affirm the judgment in favor of Freddie Mac.

Where the trial court sustains the demurrer without leave to amend, we must decide whether there is a reasonable probability the plaintiff can cure the defect with an amendment. If we find that an amendment could cure the defect, we must find the court abused its discretion and reverse. If not, the court has not abused its discretion. The plaintiff bears the burden of proving an amendment would cure the defect. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153 (*Gomes*.)

#### FACTS AND PROCEDURE

Ong's original complaint was filed on March 22, 2012, against Wells Fargo, Freddie Mac, and two other defendants. On April 20, 2012, Wells Fargo and Freddie Mac filed a demurrer. On May 21, 2012, Ong filed her first amended complaint, which is the operative pleading, and which is identical to her original complaint with one insignificant exception we will point out below. Wells Fargo and Freddie Mac's demurrer was taken off calendar and re-filed June 15, 2012, as to the first amended complaint.

#### *Allegations of the First Amended Complaint*

Ong's first amended complaint (hereafter the complaint unless the context indicates otherwise) had numerous documents, recorded and otherwise, attached as exhibits. Wells Fargo's demurrer was supported by an unopposed request for judicial notice of additional recorded documents that the trial court granted. Accordingly, where appropriate we will supplement our summary of the allegations of the complaint with additional facts gleaned from the exhibits attached to the complaint and the additional recorded documents of which the trial court took judicial notice.

Ong alleged that on December 17, 2003, she borrowed \$310,197 from Wells Fargo (the Wells Fargo Loan) secured by a recorded first deed of trust on property located in Chino Hills (the First Deed of Trust). The First Deed of Trust identified First Alliance Bank as the lender although Ong's payments were made to Wells Fargo. The First Deed of Trust identified Fidelity National as the trustee and Mortgage

Electronic Registration Systems, Inc. (MERS), solely as the nominee for the lender and its successors and assigns, as the beneficiary.

In late 2006, Ong borrowed \$92,800 from “the Thayer Parties” (the Thayer Loan), which was secured by a second deed of trust recorded November 3, 2006 (the Second Deed of Trust). Ong defaulted on the Second Deed of Trust, foreclosure proceedings on the Second Deed of Trust began, and a trustee’s deed upon sale conveying all interest in the Second Deed of Trust to the Thayer Parties was recorded on April 28, 2009. In June 2009, Ong, represented by her current counsel, Edward Tu, sued the Thayer Parties. The litigation ended with Ong paying off the Thayer Loan obligation and obtaining a full reconveyance of the Second Deed of Trust that was recorded on February 15, 2011.

In the meantime, while the dispute over the Second Deed of Trust was pending, Ong went into default on the First Deed of Trust. Ong’s complaint alleged that sometime in 2010 Wells Fargo began refusing to accept monthly loan payments from her because of the ongoing litigation with the Thayer Parties. On November 1, 2010, a notice of default on the First Deed of Trust was recorded by Cal-Western Reconveyance Corporation (Cal-Western), which was identified in the notice of default as being either the trustee, duly appointed successor trustee, or agent for the trustee on the First Deed of Trust. The notice of default informed Ong she could reinstate her account up to five days prior to the date set for sale of the property and the then current reinstatement amount was \$23,567.71.

On December 28, 2010, an assignment of all beneficial interest in the First Deed of Trust from MERS (the original beneficiary) to Wells Fargo was recorded. Also on December 28, 2010, a substitution of trustee was recorded substituting Cal-Western as trustee on the First Deed of Trust. On February 2, 2011, Cal-Western recorded a notice of trustee’s sale setting a trustee’s sale date of February 25, 2011. On

July 21, 2011, Wells Fargo recorded an assignment of its beneficial interest in the First Deed of Trust to Freddie Mac.

Ong's complaint alleged that throughout 2011 she "kept in regular contact" with Wells Fargo and "Wells Fargo postponed the foreclosure sale several times . . . ." Ong alleged she attempted to make "several payments [to Wells Fargo,] which were returned."

The complaint alleged, "Finally, after agreeing at last to start accepting payments from [Ong] . . . Wells Fargo did on December 29, 2011[,] send the most recent updated reinstatement quote to [Ong], seeking payment of \$65,129.10 by [Ong] in order for [Ong] to reinstate the Wells Fargo Loan and avoid any foreclosure sale of the [p]roperty." The complaint alleged the reinstatement quote was contained in a letter dated December 29, 2011, from Wells Fargo's counsel, William L. Partridge of Pite Duncan, to Ong's counsel. The letter, attached as an exhibit to the complaint, reads in full: "Dear Mr. Tu: As you know, this firm represents [Wells Fargo] in regard to the above-referenced loan and real property. Please be advised that the total amount required to reinstate the account is as follows: [¶] . . . [specific itemization omitted] \$65,129.10. [¶] Please send the reinstatement amount in *certified funds* payable to [Wells Fargo care of Partridge]. Please note that [Wells Fargo] has commenced non-judicial foreclosure proceedings and foreclosure fees/costs as well as attorneys' fees and costs continue to accrue." (Original bold omitted; italics added.)

The complaint alleged the December 29, 2011, letter failed to specify a deadline for Ong to make the reinstatement payment, and it failed to inform Ong the trustee's sale had been rescheduled to January 6, 2012, and Wells Fargo intended to go ahead with the trustee's sale.

On January 6, 2012, a trustee's sale was conducted and Sun Ridge Trust #2172, Galileo Financial LLC (Galileo) was high bidder for \$339,799.64. On January 9, 2012, Ong's counsel faxed to Partridge photocopies of two cashier's checks

totaling \$65,129 payable to Wells Fargo, which were “ready to be provided to Wells Fargo for reinstatement of [Ong’s] loan.”

Ong’s first amended complaint added the following general allegation to those contained in her original complaint: prior to the January 6, 2012, trustee’s sale, Ong was not notified by any party, including Wells Fargo, the trustee’s sale had been rescheduled for January 6, 2012, or that Wells Fargo intended to proceed with the trustee’s sale on that date.

On January 24, 2012, a trustee’s deed upon sale from Cal-Western conveying the property to Galileo was recorded. The trustee’s deed stated the trustee had “complied with all applicable statutory requirements . . . and performed all duties required by [the First] Deed of Trust, including among other things, as applicable” all duties pertaining to mailing, publication, and personal delivery of notices of default and notice of the trustee’s sale.

Based on the foregoing general allegations, the complaint alleged causes of action for wrongful foreclosure (against Wells Fargo, Freddie Mac and Cal-Western), fraud and deceit (against Wells Fargo), “[s]etting [a]side [s]ale” (against all defendants and any subsequent purchasers of the property), cancellation of instruments (against all defendants), quiet title (against all defendants), and declaratory relief (against all defendants).

Each of the complaint’s causes of action was based on the same misrepresentations or concealments of fact alleged in the fraud cause of action,<sup>2</sup> which

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<sup>2</sup> On appeal, Ong does not discuss the wrongful foreclosure, “setting aside sale,” cancellation of instruments, quiet title, or declaratory relief causes of action. Accordingly, we treat those claims as abandoned. (See *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 [“[w]hen an issue is unsupported by pertinent cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary”]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [when appellant raises contention but “fails to support it with reasoned argument and citations to authority, we treat the point as waived”].)

we set forth in full: “On December 29, [2011], a mere few days prior to the foreclosure sale conducted on January 6, 2012, . . . Wells Fargo (a) misrepresented to [Ong] that [she] could [reinstate] the Wells Fargo Loan and avoid any upcoming foreclosure sale[;] (b) concealed from [Ong] the material fact that the foreclosure sale of the [p]roperty was going to occur notwithstanding . . . Wells Fargo’s offer for [Ong] to reinstate a few days before[;] (c) concealed from [Ong] the material fact that the foreclosure sale was scheduled to occur on January 6, 2012[,] and such foreclosure sale was definitely going to occur on such aforesaid date and not be postponed any further; (d) concealed the material fact that . . . Wells Fargo was no longer the beneficiary under the [First] Deed of Trust when [it] made the offer to [Ong] for [Ong] to reinstate and avoid any upcoming foreclosure sale; and (e) concealed the material fact that . . . Cal-Western had not been the valid trustee for the [First] Deed of Trust when [it] recorded the [n]otice of [d]efault.” Ong alleged Wells Fargo knowingly made the misrepresentations with the intent that Ong would rely on the misrepresentations, causing her damages.

#### *The Demurrer and Ruling*

Wells Fargo’s and Freddie Mac’s demurrer to Ong’s complaint argued all the complaint’s causes of action failed because to the extent Ong was seeking to set aside or cancel the trustee’s sale, she failed to allege any facts showing she had tendered the full amount of the secured debt. They further argued Ong had failed to plead any actionable misrepresentation or fraud, and they made additional arguments pertaining to Ong’s other causes of action that we need not detail here.

Ong’s opposition did not respond to the tender argument. Ong argued she adequately alleged her fraud cause of action against Wells Fargo based on the December 29, 2011, letter from Partridge to her attorney specifying the reinstatement amount without mentioning the continued trustee’s sale date.

The trial court sustained the demurrer to the complaint without leave to amend as to all six causes of action. The trial court agreed with the tender argument,

explaining a valid and viable tender of payment of the full indebtedness owing was essential to an action seeking to cancel a voidable sale under a deed of trust. The court observed Ong failed to address the tender rule in her opposition, instead arguing “she made an actual and reasonable attempt to reinstate the loan. However, the offer to reinstate is not a tender of the full amount of the secured indebtedness. Rather the offer to reinstate is simply the amount to cure the default under a right to reinstate over the statutory deadline [(Civ. Code, § 2924c, subd. (e)). [¶]] By the time [Ong] offered to reinstate on January 9, 2012, the subject property had already been sold to [Galileo]. A failure to tender bars the first four causes of action for wrongful foreclosure, fraud, setting aside a sale and cancellation of instruments. Failure to plead with requisite specificity is failure to allege prejudice. Without leave to amend, I will sustain [the demurrer as to] those four causes of action.” The trial court offered additional rationale for sustaining the demurrer without leave to amend as to Ong’s quiet title and declaratory relief causes of action that are not relevant to issues raised in this appeal. Ong offered no suggestions as to how she might amend her complaint.

The trial court entered judgment for Wells Fargo and Freddie Mac. Ong appealed.

## DISCUSSION

### *A. Governing Law on Non-Judicial Foreclosures*

Civil Code section 2924 through 2924k<sup>3</sup> provide the statutory framework for nonjudicial foreclosure sales. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 101 (*Lona*).) “The statutory scheme has three purposes: “(1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and

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All further statutory references are to the Civil Code.

(3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.” [Citation.]” (*Id.* at p. 102.)

Section 2924 governs the procedures leading to a nonjudicial foreclosure: Upon default by the trustor under a deed of trust containing a power of sale, the beneficiary may declare a default and proceed with a nonjudicial foreclosure sale. To commence the foreclosure process, the trustee, mortgagee, or beneficiary, or any of their authorized agents, must first record a notice of default. (§ 2924, subd. (a)(1).) After the notice of default is recorded, the trustee must wait three calendar months before proceeding with the sale. (§ 2924, subd. (a)(2).) After the three-month period has elapsed, a notice of sale must be published, posted and mailed, and recorded in accordance with the time limits prescribed by the statute. (§ 2924; *Lona, supra*, 202 Cal.App.4th at p. 101.)

The manner in which the sale must be conducted is governed by section 2924g. Any number of postponements may be called without triggering a new notice of sale as long as the total period of time for all postponements does not exceed 365 days from the date set forth in the original notice of sale. (§ 2924g, subd. (c).) “The property must be sold at public auction to the highest bidder. [Citations.] [¶] . . . [¶] . . . A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender. [Citation.] Once the trustee’s sale is completed, the trustor has no further rights of redemption. [Citation.] [¶] The purchaser at a foreclosure sale takes title by a trustee’s deed. If the trustee’s deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser. [Citations.]”” (*Lona, supra*, 202 Cal.App.4th at p. 102; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 87.)

The statutes governing nonjudicial foreclosure “‘provide the trustor with opportunities to prevent foreclosure by curing the default. The trustor may make back payments to reinstate the loan up until five business days prior to the date of the sale, including any postponement. [Citations.] Additionally, the trustor has an equity of redemption under which the trustor may pay all amounts due at any time prior to the sale to avoid loss of the property.’ [Citations.]” (*Lona, supra*, 202 Cal.App.4th at pp. 101-102; *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830; see §§ 2924c, subd. (e) [reinstatement by curing default]; 2903-2906 [redemption].)

After a trustee’s sale has been completed, a trustor may pursue equitable remedies to set aside the sale—typically by way of a wrongful foreclosure action.<sup>4</sup> “Generally, a challenge to the validity of a trustee’s sale is an attempt to have the sale set aside and to have the title restored. [Citations.]” (*Lona, supra*, 202 Cal.App.4th at p. 103.) A trustor might also pursue other tort claims.

In this case, Ong’s complaint alleged various causes of action against all the defendants seeking to set aside the trustee’s sale including wrongful foreclosure, “setting aside sale,” cancellation of instruments, quiet title, and declaratory relief, which she has abandoned on appeal. (See *infra*, fn. 2.) Ong’s complaint also alleged a cause of action against Wells Fargo only seeking monetary damages for fraud and deceit. Her appeal addresses only her fraud cause of action and additional tort causes of action—negligent misrepresentation and promissory estoppel—she now contends could have been alleged against Wells Fargo. We address only those claims.

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<sup>4</sup> To obtain the equitable remedy of setting aside a trustee’s sale based on wrongful foreclosure by a trustee under a deed of trust, the plaintiff/trustor must establish three elements: (1) the trustee under a deed of trust with a power of sale caused an illegal, fraudulent, or willfully oppressive sale of real property; (2) the trustor suffered prejudice; and (3) the trustor either tendered the amount of the secured indebtedness or was excused from the tender requirement. (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1449; *Lona, supra*, 202 Cal.App.4th at p. 104.)

## *B. Tender*

The trial court sustained Wells Fargo’s demurrer as to the complaint’s first four causes of action—wrongful foreclosure, fraud, “setting aside sale,” and cancellation of instruments, agreeing with Wells Fargo that each of those causes of action were barred because Ong failed to allege any facts showing she had tendered the full amount of the secured debt. The trial court concluded tendering the full amount of the debt was “essential to an action to cancel a voidable sale under a deed of trust.”

As a general rule, a homeowner in default must first tender payment of the obligation in full to achieve standing to challenge nonjudicial foreclosure proceedings. (*Lona, supra*, 202 Cal.App.4th at p. 112.) “The tender rule is an equitable doctrine that prevents a court from uselessly setting aside a foreclosure sale on a technical ground when the borrower making the challenge has not established the ability to purchase the property. [Citation.]” (*Maynard v. Wells Fargo Bank, N.A.* (S.D.Cal. Sept. 11, 2013) 2013 WL 4883202, 6;<sup>5</sup> *Lona, supra*, 202 Cal.App.4th at p. 112.) The tender rules are strictly applied, and it is a debtor’s obligation to make an unambiguous tender of the entire amount of the debt. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 445-446.)

In her opposition to Wells Fargo’s demurrer, Ong simply did not respond to Wells Fargo’s tender argument. Similarly, on appeal, she makes virtually no attempt at challenging the trial court’s application of the tender rule. Her opening brief contains a single sentence addressing the basis for the trial court’s ruling—she argues it was error to apply the tender rule to her fraud cause of action because fraud is an action at law, not in equity.

Wells Fargo responds that Ong’s fraud cause of action was subject to the tender rule because, “Under California law, the ‘tender rule’ requires that as a precondition to challenging a foreclosure sale, *or any cause of action implicitly*

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<sup>5</sup> We may cite unpublished federal cases as persuasive authority. (*Nungaray v. Litton Loan Servicing, LP* (2011) 200 Cal.App.4th 1499, 1501, fn. 2.)

*integrated to the sale*, the borrower must make a valid and viable tender of payment of the secured debt. [Citations.]” (*Montoya v. Countrywide Bank, F.S.B.* (N.D.Cal. June 25, 2009) 2009 WL 1813973, 31, italics added, citing *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578; *Karlsen v. American Savings and Loan Assn.* (1971) 15 Cal.App.3d 112, 117 (*Karlsen*).) Wells Fargo argues Ong’s fraud cause of action was “implicitly integrated” in the trustee’s sale because it was premised on allegations of Wells Fargo’s fraudulent misrepresentations concerning the pending trustee’s sale. But tendering full payment of the secured debt is only a prerequisite to an action to set aside a voidable sale under a deed of trust. (*Karlsen, supra*, 15 Cal.App.3d at p. 117; see *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1280 [“the tender rule applies only in cases seeking to set aside a completed sale”].)

Unlike her other causes of action, Ong’s fraud cause of action did not seek to set aside the trustee’s sale; rather it sought an award of damages resulting from the alleged fraud. Although Ong’s failure to plead tender of full payment of the underlying secured debt precludes her from pursuing those causes of action directed at setting aside the trustee’s sale and restoring title to her (which presumably explains why Ong has now abandoned all of those causes of action), we cannot say Ong was required to tender full payment of the secured debt as a prerequisite to pursuing her fraud cause of action for damages.<sup>6</sup> Nonetheless, as we explain below, we will affirm the judgment as to that cause of action for the alternate reason that Ong failed to plead any actionable misrepresentation or fraud.

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<sup>6</sup> In view of this conclusion, we need not address Ong’s argument made in her reply brief that sending Wells Fargo photocopies of two cashier’s checks for the reinstatement amount satisfied the requirement she tender full payment of the entire secured debt.

### *C. Fraud*

Ong contends she adequately pleaded her fraud cause of action against Wells Fargo. We disagree.

““The elements of fraud, which gives rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” [Citation.]” (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173 (*Small*)). “[F]raud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] “Thus “the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.” [Citation.] This particularity requirement necessitates pleading *facts* which ‘show how, when, where, to whom, and by what means the representations were tendered.’” [Citation.]” (*Id.* at p. 184; *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792-793.)

Ong contends she adequately pleaded a fraud cause of action against Wells Fargo based on the December 29, 2011, letter sent by Wells Fargo’s attorney to Ong’s attorney stating the amount required to reinstate her loan as of that date was \$65,129.10. Ong contends the letter constituted a misrepresentation by Wells Fargo that she could still reinstate her loan. She alleged that unbeknownst to her, the postponed trustee’s sale had been set for January 6, 2012, and thus December 29, 2011, was in fact the last day she could reinstate her loan. (§ 2924c, subd. (e) [reinstatement by curing default up to five business days before sale date].) Ong alleged Wells Fargo’s attorney did not inform (or warn) Ong (or her attorney) about the upcoming date for the trustee’s sale, and that Wells Fargo planned to go forward with the sale. Ong alleged Wells Fargo obviously knew about the misrepresentation because Partridge was an attorney and Wells Fargo went forward with the trustee’s sale on January 6, 2012. She alleged Wells Fargo intended to induce her reliance on the misrepresentation by causing her to

“come up with the requisite money to reinstate the loan,” and lulling her into a “false sense of security” that she could reinstate her loan. Ong alleged she justifiably relied on Wells Fargo’s misrepresentations by unsuccessfully attempting to reinstate her loan within a reasonable time after receiving the letter.

Ong has not alleged any actionable misrepresentation contained in the December 29, 2011, letter. She has not alleged any affirmatively false statements in the letter. It was a very brief letter from Wells Fargo’s attorney to Ong’s attorney stating the current reinstatement amount, and which specifically reminded Ong’s attorney that Wells Fargo was pursuing non-judicial foreclosure proceedings.

Ong’s allegations pertain to what was *not* in the letter—i.e., that Wells Fargo failed to also advise her the postponed trustee’s sale date was January 6, 2012, and thus December 29, 2011, was the last day she could reinstate her loan. Under section 1710, subdivision (3), fraud may consist of suppression of a material fact in circumstances under which the defendant has a legal duty of disclosure. (See *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 735 [“the person charged with the concealment or nondisclosure of certain facts” must be found to be “under a legal duty to disclose them”].) “[N]ondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. [Citation.]’ [Citation.]” (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336.)

There are no allegations Wells Fargo had a duty of disclosure due to a fiduciary relationship. Generally “[n]o fiduciary duty exists between a borrower and lender in an arm’s length transaction.” (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 206; *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 945.) Wells Fargo’s duty was to comply with the statutory

procedures for non-judicial foreclosure. (See *Gomes, supra*, 192 Cal.App.4th at p. 1154 [“[b]ecause of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute”].)

Moreover, there are no allegations Wells Fargo had exclusive knowledge of the continued trustee’s sale date and actively concealed the date from Ong. There are no allegations Wells Fargo (or the trustee) did not comply with statutory obligations concerning notice of the trustee’s sale date. Ong alleged notice of the original date for the trustee’s sale, February 25, 2011, was recorded, and there is no allegation she did not receive notice of the original sale date. To the contrary, Ong alleged that after the notice of the original sale date was recorded, she maintained regular contact with Wells Fargo and as a result obtained numerous postponements of the sale date. There are no allegations the trustee did not follow the statutory procedure for those postponements and the trustee’s deed on sale states all statutory procedures were followed. (*Lona, supra*, 202 Cal.App.4th at p. 102 [rebuttable presumption arising from recital in trustee’s deed].) And under the law applicable to these non-judicial foreclosure proceedings, so long as the trustee followed the statutory procedure for oral postponements, no further notice of sale by publication, posting, or mailing was required. (*Tully v. World Savings & Loan Assn.* (1997) 56 Cal.App.4th 654, 664; § 2924g, subd. (c) [any number of postponements may be called without triggering new notice of sale as long as total period of time for all postponements does not exceed 365 days from date set forth in original notice of sale].)<sup>7</sup>

Ong also has failed to allege any justifiable detrimental reliance—an essential element of fraud. (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 156.) Ong alleged she relied to her detriment because she attempted to reinstate her loan but

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<sup>7</sup> Although legislation enacted after this action was filed provides that for a period of five years—from January 1, 2013, until January 1, 2018—when a trustee sale is postponed for a period of at least 10 business days, written notice must be given to the borrower of the new sale date and time within five business days after the postponement (§ 2924, subd. (a)(5)), that legislation is inapplicable here.

could not do so because the time had passed. The complaint alleges the fraud was in advising her attorney of the reinstatement amount without telling him it was the last day she could reinstate. But there are no allegations that had she been advised of the date of the postponed trustee's sale, she would have attempted to reinstate earlier.

In sum, Ong has failed to allege any actionable fraud. She offered no suggestions below, and none on appeal, as to how she could amend her complaint to cure the defects in her fraud cause of action. (See *Gomes, supra*, 192 Cal.App.4th at p. 1153 [plaintiff's burden to demonstrate an amendment would cure defect].) Instead, for the first time on appeal, she contends her complaint can be interpreted as alleging two new causes of action—negligent misrepresentation and promissory estoppel. We address each in turn.

#### *D. Negligent Misrepresentation*

Ong contends for the first time on appeal that even if the factual allegations of her complaint do not support a fraud cause of action, they are sufficient to support a negligent misrepresentation cause of action against Wells Fargo. She contends the December 29, 2011, letter from Partridge to her attorney stating the reinstatement amount constituted a misrepresentation that Ong could still reinstate her loan, which in view of the postponed trustee's sale date of January 6, 2012, she could not do. Ong contends she adequately alleged Partridge should not have provided her with the reinstatement quote without: (1) first ascertaining the actual date of the foreclosure sale so as to make sure she still had a right to reinstate her loan; (2) informing her of the postponed trustee's sale date if such sale was going to take place so soon; (3) advising Ong as to the precise amount of time she had left to reinstate her loan; and (4) postponing the trustee's sale date to accommodate the issuance of the reinstatement quote. We reject her contention.

“The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable

reliance on the misrepresentation, and (5) resulting damage. [Citation.] In contrast to fraud, negligent misrepresentation does not require knowledge of falsity. A defendant who makes false statements “honestly believing that they are true, but without reasonable ground for such belief, . . . may be liable for negligent misrepresentation . . . .” [Citations.]’ [Citation.] *However, a positive assertion is required; an omission or an implied assertion or representation is not sufficient.*” (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243, italics added.) Ong has not suggested any positive assertion contained in the December 29, 2011 letter that would support a negligent misrepresentation cause of action. Rather, she relies entirely upon an implied representation, which is insufficient to support such a cause of action.

Furthermore, to the extent Ong is suggesting a theory of negligent nondisclosure, a defendant cannot be found liable based on negligent nondisclosure unless that defendant had a duty to disclose the information at issue to the plaintiff. (*Karoutas v. HomeFed. Bank* (1991) 232 Cal.App.3d 767, 771.) The duty to disclose arises when: “(1) the material fact is known to (or accessible only to) the defendant; and (2) the defendant knows the plaintiff is unaware of the fact and cannot reasonably discover the undisclosed fact.” (*San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1055, orig. italics, fn. omitted.) As already explained above, Wells Fargo’s duty was to comply with the statutory procedures for non-judicial foreclosure. (See *Gomes, supra*, 192 Cal.App.4th at p. 1154 [“[b]ecause of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute”].) The allegations of the complaint reveal the statutory notice requirements were met, and Ong does not suggest she could allege only Wells Fargo could have known of the postponed trustee’s sale date and she had no means of discovering the sale date.

*E. Promissory Estoppel*

Finally, Ong argues, again for the first time on appeal, the facts alleged in her complaint support a promissory estoppel cause of action. We disagree.

““The elements of a promissory estoppel claim are ‘(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.’” [Citation.]” (*Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 225.)

Ong contends her complaint adequately alleged the December 29, 2011, letter providing her attorney with a reinstatement amount constituted a promise she could reinstate the loan. She relied on the promise by gathering the funds required. She argues her reliance was reasonable and foreseeable given Wells Fargo reputable nature as a national bank. And she was injured because she attempted to pay the reinstatement amount, but the trustee’s sale had already taken place.

The facts contained in Ong’s complaint do not support a promissory estoppel claim. “[A] promise is an indispensable element of the doctrine of promissory estoppel. The cases are uniform in holding that this doctrine cannot be invoked and must be held inapplicable in the absence of a showing that a promise had been made upon which the complaining party relied to his prejudice . . . .” [Citations.] The promise must, in addition, be ‘clear and unambiguous in its terms.’ [Citation.]” (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1044.)

Here, there was no clear and unambiguous promise in the letter. It stated the current reinstatement amount and warned Ong’s attorney foreclosure proceedings were underway. There was no promise or representation the trustee’s sale would be further postponed.

Furthermore, Ong has not alleged prejudice or that she relied on the alleged promise to her detriment. As with her fraud cause of action, Ong alleges she relied to her

detriment because she attempted to reinstate her loan but could not do so because the time had passed. But there are no allegations that had she been advised of the date of the postponed trustee's sale, she would have attempted to reinstate earlier. Ong suggests no additional facts she could allege that would support a promissory estoppel claim.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.