CASE NO. B233670

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 6

SUSAN LANGE Appellant,

vs.

ALTA COMMUNITY INVESTMENT III, LLC; SEASIDE CAPITAL FUND 1, LP Respondents.

APPEAL FROM THE VENTURA COUNTY SUPERIOR COURT
HONORABLE MARK S. BORRELL, JUDGE
SUPERIOR COURT CASE NO. 56-2010-00378356-CU-OR-VTA

RESPONDENTS' BRIEF

SILVER & ARSHT
Samuel J. Arsht - SBN 100156
Randall A. Cohen - SBN 125409
1860 Bridgegate Street, Suite 100
Westlake Village, CA 91361-1409
Telephone: (805) 495-4044
Facsimile: (805) 494-4704

Attorneys for Respondents ALTA COMMUNITY INVESTMENT III, LLC and SEASIDE CAPITAL FUND 1, LP

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

STATUTES:

I. INTRODUCTION

Appellant Susan Lange appeals from a judgment of dismissal entered in favor of respondents, Alta Community Investment III, LLC ("Alta") and Seaside Capital Fund 1, LP ("Seaside"), after the sustaining of their demurrer to appellant's Third Amended Complaint without leave to amend.[1]

As is becoming increasingly popular with homeowners who have defaulted on their mortgage obligations, appellant sought to recover her foreclosed property by alleging widespread wrongdoing by her lender. She also sued respondents by speculating about respondents' alleged involvement in her lender's purported wrongdoing. In her efforts to recover her property appellant, by way of four successive complaints, attempted to allege that the foreclosure sale was in some way "wrongful" and should therefore be cancelled, with title to the property to be returned to appellant.

Appellant asserts that, since her pleading contains "disputed material facts," all of her causes of action should be decided by "a jury of her peers" without regard to whether her pleading is legally sufficient. As she did in the trial court, appellant relies on the claim that she is a victim of an "elaborate securitization and securities fraud scheme," having been forced by her lender to take out a "toxic" and "fraudulent" loan for the sole purpose of profiting by "illegally" forcing her from her home.

Appellant relies on emotional stories and public rebukes of her lender (which were not accepted as evidence by the trial court or are not relevant to the specific facts of this case) to try to persuade the court that she is entitled to relief. Notwithstanding the emotionally-charged anecdotes, the trial court

---

[1] JP Morgan Chase Bank, an additional respondent in this appeal, also demurred to appellant's Third Amended Complaint and appellant has appealed the separate judgment of dismissal entered after the sustaining of that demurrer without leave to amend. This brief addresses only the issues pertaining to respondents Alta and Seaside.

properly found that appellant was unable to allege the legal elements of her causes of action. Despite four attempts and plenty of time to formulate her allegations (despite the protestations of her attorney to the contrary), appellant was never able to allege the facts necessary to support her causes of action, and was never able to set forth facts which, even if true, could justify setting aside the foreclosure sale. Thus, the demurrers to her successive complaints were sustained, ultimately without leave to amend.

In addition, this appeal, as to most causes of action, is moot. The remedy sought by appellant in the trial court was to obtain an order setting aside the foreclosure sale of the real property located at 276 Running Ridge Trail, Ojai, California (the "Property") or seeking to have title to the Property confirmed in appellant. Although appellant also sought damages, most of her damage claims relied entirely on a finding that she is the rightful owner of the Property and that the Trustee's Deed Upon Sale should therefore be cancelled.

After a judgment of dismissal was entered in favor of respondents, the Property was sold to a bona fide purchaser who was not a party in the action. Since the sale of the Property cannot be undone, even if appellant would otherwise be successful on her appeal, she cannot set aside the foreclosure sale and thus cannot obtain the primary remedy sought in the trial court. This court therefore cannot grant effective relief and the appeal as to all appropriate causes of action should be dismissed as moot.

II. STATEMENT OF THE CASE

A. THE ORIGINAL COMPLAINT

Respondents, Alta and Seaside, purchased the Property at a non-judicial foreclosure sale on July 14, 2010 and the Trustee's Deed Upon Sale was

recorded on July 28, 2010. (Clerk's Transcript, V-1070-1074.)[2] Appellant filed her original complaint on August 2, 2010, at the same time recording a Notice of Pending Action (the "Lis Pendens") against the Property. (CT, I-1 and 69.)

Appellant's original complaint named as defendants "Chase as Successor to Washington Mutual," "Alta Community Investment," and "Seaside Capital Fund." It contained causes of action to set aside the foreclosure sale, to cancel the trustee's deed, for quiet title, for an accounting, and, against Chase only, for infliction of emotional distress. (CT, I-2, 5, 6, 7, and 8.) The gravamen of the complaint was appellant's allegations that her lender had agreed to an initial modification of her loan pending agreement as to final terms, that appellant made the reduced payments under that initial agreement, but that the lender nevertheless foreclosed on the Property without sufficient notice to appellant. (CT, I-2:7-12, and 4:19-5:2.)

Respondents filed an answer on September 9, 2010, but JP Morgan Chase Bank (the correctly named defendant) filed a demurrer to be heard on October 13, 2010. (CT, I-74-89 and 136-144.) The trial court sustained the demurrer with leave to amend on the ground that the refusal by the lender to permanently modify its loan with appellant was not actionable as alleged. (CT, I-151, 152, and 153.)

B. THE FIRST AMENDED COMPLAINT

1. Appellant's Allegations

Appellant's First Amended Complaint alleged five causes of action: 1) "Fraud Against Chase;" 2) "Unfair Business Practice against Chase;" 3) "Covenant of Good Faith and Fair Dealing against Chase;" 4) "Infliction of

---

[2] The Clerk's Transcript will be referred to as "CT."

Emotional Distress against Chase and broker Jeff Dunavant;" and 5) "Cancellation of Deed against Seaside Capital and Alta Community Investment." The first four causes of action contained individual prayers for relief, but there was no such prayer for the fifth cause of action, the only one specifically alleged against respondents. (CT, I-153-159.)

Appellant generally alleged that she obtained a loan from Washington Mutual Bank in 2006 (presumably secured by the Property, but not alleged) in the amount of $1,380,500 at an annual interest rate of 7.418%. (CT, I-154:2-3.) The loan contained an "adjustable rate rider" which calculated monthly payments by adding a margin of 3.275 to the applicable index allowing adjustment every 12 months. The rate was capped at 10.300% and increases were capped at 1.75% of the prior monthly payment. (CT, I-154:3-7.)

Contrary to the loan documents, appellant stated that she "was told and expected" that payments would be fixed for the first five years and that increases would not be applied until the sixth year. (CT, I-154:8-9.) According to appellant, the loan she actually received was "predatory" because the lender was aware the adjustment provisions were "unreasonable" but made the loan anyway, disregarding appellant's ability (inability?) to pay. (CT, I-154:11-14.)

Appellant's first cause of action was for fraud directed only against "CHASE" as the successor in interest to Washington Mutual Bank. (CT, I-154:19-20.) The general allegations and the allegation that the loan was "predatory" were not incorporated into this first cause of action (or into any other). After alleging that her counsel "began" to negotiate for a temporary payment plan (what appellant defined as a "TPA"), with "a goal" for a full loan modification "down the road," appellant stated that Chase generated a letter "advising her of their intent to help with a loan modification." (CT, I-154:25-155:5.) The "essence" of this communication was that appellant

"would qualify for a loan modification and ask [sic] for her good faith in making the TPA payments while the final loan negotiation was completed." (CT, I-155:6-8.)

Appellant then called this communication a "representation" which she alleged was false and made for the sole purpose of "inducing plaintiff to begun [sic] making TPA payments, but what they intended to do was to foreclose on the property anyway." (CT, I-155:9-11.) When an initial notice of foreclosure sale was "withdrawn," appellant "believed she was on the way to a final loan modification" and alleged that she "had the right to rely on this representation because they [sic] were made by her lender and the foreclosure sale date had been suspended." (CT, I-155:11-14.) Appellant alleged that the "false representations" were made "knowing the impact they would have on plaintiff at the time CHASE decided to now sell the property despite the fact that the TPA payments were current." (CT, I-155:16-18.)

Appellant further alleged that she did not receive notice of the new foreclosure sale date and, departing from her fraud allegations, that in conducting the sale Chase "violated the covenant of good faith and fair dealing which is present in every contract." (CT, I-155:29-156:5.) Without naming respondents (the current owners of the Property) in this cause of action, appellant sought to have the foreclosure sale "set aside as invalid" and to have Chase "make plaintiff whole." (CT, I-156:7-8.)

Appellant's second cause of action was for unfair business practices, again only against Chase. After quoting the definition of unfair competition, appellant alleged that the loan to her was "predatory in nature" because she received a loan "which she could afford for one year and it was never clearly communicated to her that despite her initial 'fixed rate' loan payments would increase by a factor of 1.75 each 12 months." (CT, I-156:16-24.)

Appellant stated that Mr. Dunavant (a newly named defendant) told her "that a loan could be refinanced despite the negative amortization build [sic] into the 'lower stated payments.'" (CT, I-156:24-26.) Finally, appellant alleged that the "practice of making loans when it is questionable that borrower can't support the increased payments is unlawful, unfair, or fraudulent business act [sic]." (CT, I-157:4-5.) She sought costs and attorneys' fees and "injunctive relief so that this type of loan is no longer made." (CT, I-155:7-9.)

The third cause of action, also only against Chase, was for "Covenant of Good Faith and Fair Dealing." Appellant alleged that Chase violated the covenant of good faith and fair dealing present in every contract "when they made a loan to plaintiff that they knew plaintiff could not handle past the first year." (CT, I-157:14-17.) She claimed that, as a result, she "is now dispossessed of her home and her property." (CT, I-157:17.)

Appellant also contended that Chase was "involved in negotiations" for a loan modification with appellant, but without notice "sold the property at a foreclosure sale." (CT, I-157:17-19.) According to appellant, "[t]he end result is that plaintiff is dispossessed of her home despite CHASE's promises to modify the loan wherefore plaintiff praise [sic] as follows: . . ." (CT, I-158:7-8.) She sought an order setting aside the foreclosure sale, again without naming respondents as the current owners of the Property in this cause of action, attorneys' fees, and costs. (CT, I-158:9-11.)

Appellant's fourth cause of action was against Chase and the broker, Jeff Dunavant, and attempted to assert a claim for "Infliction of Emotional Distress." This emotional distress purportedly occurred by Chase "promising first to obtain a loan in 2006 and representations made in 2009 as to a reformation or loan modification were made either with the intent to cause

emotional distress or done with malignment and abandoned heart and this [sic] defendants knew or should have known that such conduct and such breach would result in severe emotional distress." (CT, I-158:16-20.) Here, appellant sought punitive damages in the amount of $100,000 (without asking for compensatory damages), costs, and attorneys' fees. (CT, I-158:23-25.)

Finally, appellant's fifth cause of action was for "Cancellation of Deed" against respondents Seaside and Alta. Without incorporating any previous allegations, appellant stated only that "[i]nasmuch as the foreclosure sale should not have taken place because of all the forgoing discussion these defendants must agree to the cancellation of the deed and reconveyance of the property to plaintiff." (CT, I-159:1-6.) Apparently attempting to head off a potential defense that respondents were bona fide purchasers for value, appellant further stated: "Even if this [sic] defendants claim a position as BFP, this status will not destroy the illegality or failure of the foreclosure sale therefore if the foreclosure sale is held to be invalid it stands to reason that the deed must be cancelled." (CT, I-159:8-10.) This fifth cause of action did not contain a prayer for relief.

2. Respondents' Demurrer

Respondents demurred to the First Amended Complaint on a number of grounds, including (1) respondents were not named in the causes of action seeking to set aside the foreclosure sale; (2) appellant did not allege that she had tendered or could tender the amount due under the deed of trust as required in an action to set aside a foreclosure sale; (3) the facts alleged were not sufficient to justify the relief requested; and (4) the complaint was so badly written that it was impossible to tell what was being alleged or what appellant wanted. (CT, I-247-261.) The hearing was set for December 6, 2010.

After the filing of the First Amended Complaint on October 12, 2010, appellant substituted new counsel on October 29, 2010. (CT, II-287:3 and VI-1350, Item 24.) Appellant's new counsel acknowledged in the opposition to respondents' demurrer (filed five days late) that the complaint was not sufficient to justify setting aside the foreclosure sale. (CT, II-290:2-6.) Appellant indicated her intent to file a Second Amended Complaint containing "multiple causes of action against the defendants named in the First Amended Complaint as well as adding new defendants and causes of action . . . including unalleged facts regarding fraud and evidencing that these demurring defendants are not bona fide purchasers for value in the unlawful and reprehensible taking" of appellant's home. (CT, II-287:7-13.)

After striking appellant's opposition based on its late filing, the trial court sustained respondents' demurrer to the First Amended Complaint with leave to amend. (CT, II-311-312.) At the hearing on the demurrer, appellant's counsel specifically asked if he would be permitted to amend the pleading to include additional defendants and causes of action. The trial court responded that appellant would not be allowed to amend the complaint in that fashion, but would only be permitted to amend the existing causes of action as to the existing defendants based on the grounds on which the demurrer was sustained. (CT, II-437:3-10.) New defendants and causes of action would require an amended complaint.

C. THE SECOND AMENDED COMPLAINT

1. Appellant's Allegations

Appellant filed her Second Amended Complaint on January 5, 2011. (CT, II-314.) Contrary to the court's clear instruction not to add new parties, this new pleading named Todd Kaufman and Luke McCarthy, principals of Alta and Seaside, as individual defendants along with several entities who

were supposedly affiliates of appellant's lender. (CT, II-314 and 315:20-316:22.) In addition, by including 42 paragraphs and 12 pages of general allegations, appellant significantly broadened her causes of action and alleged entirely new theories in an effort to assert claims not previously stated against not only the new defendants, but also against the existing defendants.

For the first time, appellant generally alleged that she was the victim of "an elaborate securitization and securities fraud scheme" when she was induced to obtain a negative amortization adjustable rate mortgage which was then sold without transferring the deed of trust securing the loan. (CT, II-317:18-319:5.) Appellant further alleged, on information and belief, that Todd Kaufman created this scheme when he worked for the lender many years before, that he and Luke McCarthy therefore had knowledge that appellant's loan was included among those sold under this purported scheme, and that they knew the foreclosure sale was improperly noticed and invalid. (CT, II-316:5-317:3 and 325:26-326:8.)

Appellant's first cause of action was apparently to set aside the foreclosure sale. It included two "counts," one for "fraud" against the lenders and Todd Kaufman, and one for "statutory violations" against the lenders. (CT, II-327:1-18.) Again, the purchasers at the foreclosure sale, Alta and Seaside, were not named. The fraud count stated that the lenders and Kaufman "knowingly and intentionally misreprented [sic] to [appellant] the true nature and motive of their securitization scheme" and that appellant was "deceived" as to "what mortgage product would be best for her to their own benefit and to her detriment and in spite of her true wishes." (CT, II-327:8-11.) The prayer for relief asked that the foreclosure sale be vacated, that the trustee's deed be rescinded, and that appellant be awarded general, special, and punitive damages in an amount to be proven at trial. (CT, II-328:15-27.)

The second cause of action was for quiet title against the lenders, Alta, and Seaside. There were no new allegations. Plaintiff merely incorporated all of the general allegations and asked that the court declare title to the Property to be in the name of appellant as her sole and separate property and that she be determined to be the true holder of title. (CT, II-327:20-24 and 328:25-329:2.) In addition, appellant sought an award of "any other damages seen fit by the Court." (CT, II-328:28.)

Appellant's third cause of action for infliction of emotional distress contained two identical counts. The first count was against only the lenders, while the second count was against Alta, Seaside, Kaufman, and McCarthy. (CT, II-327:26-328:11.) After incorporating all of the general allegations, appellant alleged that the defendants "exhibited extreme and outrageous conduct with intentional and or reckless disregard of the probability of causing extreme emotional distress to [appellant]" and that the appellant actually "suffered extreme emotional distress" caused by this purported "outrageous conduct." (CT, II-328:9-11.) The prayer for relief sought general, special, and punitive damages in an amount to be proven at trial. (CT, II-329:4-9.)

2. Respondents' Demurrer and Appellant's Motion for Leave to File a Third Amended Complaint

Respondent (and Todd Kaufman and Luke McCarthy) demurred to the Second Amended Complaint on the following grounds: (1) Alta and Seaside were not named as defendants in the cause of action to set aside the foreclosure sale; (2) Todd Kaufman and Luke McCarthy could not be named as new defendants in an amended complaint filed pursuant to the court's order sustaining the demurrer to the First Amended Complaint with leave to amend; (3) appellant failed to allege the required tender in connection with her attempt to set aside the foreclosure sale; (4) the fraud allegations were separate from

the procedures relating to the foreclosure sale and therefore could not justify setting aside the sale; (5) quiet title was not a valid remedy; and (6) the facts did not support a cause of action for emotional distress. (CT, II-443-447.)

Before the demurrer was heard, appellant filed a motion for leave to amend the Second Amended Complaint by filing a proposed Third Amended Complaint on February 17, 2011. (CT, II-455-460.) Ultimately, both the demurrer and the motion for leave to file an amended complaint were scheduled for the same time on March 16, 2011.

The proposed Third Amended Complaint contained 12 causes of action and named a number of new defendants. (CT, II-461.) Since it had been approximately eight months since the foreclosure sale and more than seven months since the lawsuit had been filed, respondent opposed the motion on the ground that adding so many new causes of action and defendants who had not yet been served would substantially lengthen the trial court proceedings, prejudicing respondents who could not make use of the Property until the Lis Pendens could be removed. (CT, III-571-577.)

The trial court allowed appellant to file the proposed Third Amended Complaint but, determining that the addition of new parties would "unduly prejudice" respondents, allowed the amended complaint "as to the current parties only." (CT, III-606-608.) In addition, the court stated: "Absent exceptional circumstances, this should be considered plaintiff's last opportunity to plead her causes of action." (CT, III-608.) In light of the ruling allowing the amended complaint, the demurrer to the Second Amended Complaint was deemed moot. (CT, III-608.)

///

///

///

D. THE THIRD AMENDED COMPLAINT

1. Appellant's Allegations

Appellant filed her Third Amended Complaint on April 1, 2011, again violating the trial court's order by naming six new defendants affiliated with her lender that had not previously been named. Notably, the Third Amended Complaint did not include as defendants Todd Kaufman or Luke McCarthy who had been named in the Second Amended Complaint. (CT, III-618.) In addition, the filed Third Amended Complaint eliminated the breach of fiduciary duty cause of action and contained three new causes of action that were not present in the proposed Third Amended Complaint. (CT, II-461 and III-618.)

The "factual" allegations were virtually identical to those in the Second Amended Complaint, but they were expanded to assert fourteen causes of action instead of the three previously alleged. These fourteen causes of action were for: 1) wrongful foreclosure; 2) violations of California Civil Code section 2920 et seq.; 3) unjust enrichment; 4) RESPA and TILA violations; 5) breach of or in the alternative no contract; 6) fraud and concealment; 7) quiet title; 8) declaratory and injunctive relief; 9) slander of title; 10) intentional infliction of emotional distress (erroneously shown as the twelfth cause of action in the caption); 11) breach of the duty of good faith and fair dealing (erroneously shown as the tenth cause of action in the caption); 12) constructive trust (erroneously shown as the eleventh cause of action in the caption); 13) respondeat superior; and 14) negligence. (CT, III-618.) Respondents were named only in the third, seventh, eighth, ninth, tenth, twelfth, thirteenth, and fourteenth causes of action.

Appellant's first and second causes of action sought to set aside the foreclosure sale, again failing to name respondents, despite being educated

repeatedly through respondents' previous arguments, that it was required. The first cause of action alleged a number of purported irregularities in the documents that appellant believed justified setting aside the sale, including: 1) an invalid Notice of Default because it was executed and recorded before the Substitution of Trustee; 2) no recorded document indicating Chase to be a "holder in due course or beneficiary" of the note; 3) transfer of the beneficial interest in the note to a WAMU entity with subsequent transfer to others through an "elaborate securitization and securities fraud scheme," thereby depriving Chase of the right to foreclose; 4) failure to record transfer of any beneficial interest in the note to Chase; 5) inability of Chase to produce a promissory note or an assignment of the note; and 6) failure of Chase to be an authorized servicer on behalf of the beneficiary of the note. (CT, III-619-642.)

The second cause of action alleged a violation of Civil Code section 2920 et seq., suggesting that Civil Code section 2923.5 requires a declaration in the Notice of Default that the lender tried to contact the borrower to be signed under penalty of perjury. (CT, III-642:24-646:4.) Since the declaration that was contained in the Notice of Default in this case was not signed under penalty of perjury, appellant alleged that it must therefore be insufficient, requiring that the foreclosure sale be set aside. (CT, III-643:10-644:11.) In addition, appellant questioned the signing of the Notice of Default, alleging that the foreclosure documents were signed by "robosigners," thereby rendering them invalid. (CT, III-644:12-646:4.)

Appellant's third cause of action for unjust enrichment contained "Count 1" against Chase and "Count 4[sic]" against Alta and Seaside. Appellant alleged that, since Todd Kaufman knew that neither WAMU nor Chase had an interest in the "Subject Mortgage" or was a holder in due course of the "Subject Note" Chase had no interest in the Property. (CT, III-647:13-

648:4.) Appellant further alleged that Kaufman knew that the foreclosure documents were signed by a "robosigner" and that Kaufman and Luke McCarthy both knew that proper notice of the foreclosure sale was not given. (CT, III-647:13-648:4.) Thus, the purchase of the Property at the foreclosure sale "unjustly enriches them with purported title." (CT, III-647:25-27.)

The seventh cause of action for quiet title against Chase, WAMU, and respondents alleged that the Property should have been "reconveyed" rather than placed "for auction at trustee's sale." (CT, III-660:19-662:20.) Appellant further stated that the Trustee's Deed Upon Sale was "illegally issued and recorded" and that, because Kaufman and McCarthy had "knowledge and awareness" that the Deed of Trust was "fraudulently obtained," respondents could not be bona fide purchasers for value and could therefore have no interest in the Property. (CT, III-661:26-662:7.) Appellant sought a judicial declaration that title to the Property be "vested solely" in appellant and that respondents have no interest in that Property. (CT, III-662:16-20.)

Appellant's eighth cause of action was for declaratory and injunctive relief against WAMU, Chase, and respondents. The "actual controversy" alleged was that: 1) no defendant has been the holder in due course or beneficiary of the "Subject Note" but Chase contends that it was the owner and beneficiary; and 2) no defendant had standing or was entitled to accelerate the maturity of any obligation or to sell the Property because they were not a beneficiary or authorized agent of a beneficiary under the "Subject Note" but defendants assert that the sale was proper. (CT, III-662:22-664:18.) In addition, appellant sought an injunction preventing respondents from selling the Property or advertising it for sale. (CT, III-663:15-664:12.)

The ninth cause of action was for slander of title. Appellant alleged that respondents "published matters" which were untrue and disparaging to

appellant's title in the Property without identifying those "published matters." (CT, III-664:21-665:10.) According to appellant the publication was without privilege, it was reasonably foreseeable that the "aforementioned" publications cast doubt on appellant's title, and that as a result of "said publications" appellant suffered and continues to suffer damages. (CT, III-664:21-665:10.)

Appellant's tenth cause of action was for intentional infliction of emotional distress. It contained a separate count against respondents which alleged that, knowing that it "had illegally paid" for the Property, and knowing that title had not yet been transferred, respondents directed Nancy Mura to persuade appellant to "move immediately." (CT, III-666:21-667:4.) Appellant further stated that Mura did so by "threatening" appellant that if she did not move right away, Mura would have McCarthy "pay her a very unpleasant visit." (CT, III-666:27-28.) Mura pressed appellant to move because McCarthy "never loses these things." (CT, III-667:1-2.) Appellant alleged this conduct was "extreme and outrageous" and caused her to suffer "extreme emotional distress." (CT, III-667:4.)

The twelfth cause of action was for a constructive trust. Appellant first alleged that she "owns her home." (CT, III-667:26-27.) She then alleged in Count 1 against respondents that they purchased the Property at the foreclosure sale knowing that it "could not be legally sold." (CT, III-668:2-3.) Nevertheless, respondents "paid" Chase's agents in order "to get the agents to execute a Trustee's Deed Upon Sale which they succeeded in doing." (CT, III-668:3-6.) Appellant alleged that, as a result of these "wrongful acts" respondents held the Property as constructive trustees for appellant's benefit. (CT, III-668:9-10.)

The thirteenth cause of action was for "respondeat superior" against WAMU, Chase, and respondents. It alleged generally that Kaufman was the

agent and employee of either WAMU or Alta and was acting in the course and scope of his authority "in the transaction of the business of the employment or agency." (CT, III-669:19-25.) Appellant then alleged that WAMU and Alta are liable to appellant for Kaufman's acts during his employment with each of them. (CT, III-669:23-25.)

Similarly, appellant alleged that McCarthy was the agent and employee of Seaside and that Seaside was therefore liable to appellant for McCarthy's acts during his employment. (CT, III-669:26-670:3.) Finally, appellant stated that Seaside was also liable for the acts of Mura. (CT, III-670:4-9.) The acts for which WAMU and respondents were allegedly liable were not described but appellant stated that they were the acts "herein described" or "as alleged herein." (CT, III-669:19-670:9.)

Finally, the fourteenth cause of action was for negligence. It alleged only that "in the alternative to the above acts being taken intentionally, LANGE alleges that the above acts were taken negligently thereby breaching each defendant's duty to LANGE and causing her damage." (CT, III-670:23-671:2.) This "duty" was not described and there was no explanation as to how that "duty" applied to and was supposedly breached by the respondents.

2. Respondents' Demurrer

Respondents demurred to the Third Amended Complaint on the following grounds, among others: (1) appellant again had failed to name respondents in the causes of action seeking to set aside the foreclosure sale; (2) appellant again had failed to sufficiently allege a tender of the amount necessary to cure the default; (3) there were insufficient facts alleged to justify setting aside the foreclosure sale; (4) a quiet title action was improper under the circumstances alleged; (5) a declaratory relief claim was improper because it involved only past conduct; and (6) there were insufficient facts to support

claims for unjust enrichment, constructive trust, slander of title, infliction of emotional distress, or negligence. (CT, III-687-712.)

Respondents' demurrer was heard on May 12, 2011. The trial court sustained respondents' demurrer to the first and second causes of action on the basis that the purchasers at the foreclosure sale were not named in the causes of action to set aside that sale and, even if they had been named, appellant had not sufficiently alleged a tender of or an ability to tender the amounts due under the foreclosed deed of trust. (CT, VI-1223-1226.) In so finding, the court noted that the failure to provide an explanation for not including respondents as parties to the first and second causes of action "is noteworthy in view of the court's prior finding that plaintiff has been dilatory and that the moving defendants' interests are prejudiced by unwarranted delay." (CT, VI-1224.)

The demurrer to the third cause of action was sustained because appellant failed to allege that she could have prevented the sale, thus there was no unjust enrichment resulting from the sale. (CT, VI-1225.) The demurrer to the seventh cause of action was sustained on the basis of the failure to allege the ability to tender. (CT, VI-1225.) As to the eighth cause of action for declaratory relief, the court determined that, since the note and deed of trust were extinguished by the foreclosure sale, there was no need to declare the parties' rights and interests in those instruments. (CT, VI-1225.)

The demurrer to the ninth cause of action for slander of title failed because respondents were found to own the property. Thus, appellant could not allege slander of title to property which she did not own. (CT, VI-1225.) As to the tenth cause of action for infliction of emotional distress, the trial court found that the allegations did not sufficiently allege facts constituting extreme and outrageous conduct. (CT, VI-1225.) The twelfth cause of action for

imposition of constructive trust was found to be insufficient because there were no other valid causes of action to support it and the thirteenth cause of action for respondeat superior failed because it is a theory of liability, not a cause of action. (CT, VI-1225.) Finally, the demurrer to the fourteenth cause of action for negligence was sustained because appellant failed to allege facts giving rise to a tort duty. (CT, VI-1225.)

3. Appellant's Request to File a Fourth Amended Complaint

In denying appellant's request to file a fourth amended complaint, the court referred to its minute order of March 23, 2011, which allowed the filing of the Third Amended Complaint, stating: "The court noted that 'absent exceptional circumstances' further leave to amend would be unlikely. No such exceptional circumstances have been shown." (CT, VI-1224.) In addition, the court noted that "plaintiff has not alleged an ability to tender, only the possibility that she might have the ability to tender. Hence, plaintiff has not identified factual allegations she can make to satisfy the tender requirement as between her and the moving defendants." (CT, VI-1224.)

4. The Court's Ruling Regarding Additional Defendants

As to all of the additional defendants named in appellant's Third Amended Complaint, the trial court noted that "the court's order granting leave to amend explicitly indicated that leave was only granted to add allegations as to the parties to the action as of that time and expressly denied leave to add new parties. It appears that plaintiff ignored that limitation in filing the [Third Amended Complaint]." (CT, VI-1225.) The court therefore issued an order to show cause why the court should not, on its own motion, strike the allegations adding new parties. The hearing on the order to show cause was set for June 27, 2011, the same day as the hearing on the demurrer by JP Morgan Chase. (CT, VI-1225.)

5. The Final Judgment

After the sustaining of the demurrer without leave to amend on May 12, 2011, a Judgment of Dismissal dismissing respondents was entered May 27, 2011. (CT, VI-1237-1238.) It is this Judgment from which appellant has filed a timely Notice of Appeal.[3] The first three pleadings filed by appellant have been described in some detail for historical background and in connection with the determination of the trial court to deny a fourth opportunity to amend. However, the pertinent allegations for determination as to whether respondents' demurrer was properly sustained in the trial court are the allegations of the Third Amended Complaint.

An appellate court, when reviewing the sufficiency of a complaint against a demurrer, will not ordinarily consider the allegations of a superseded complaint. (See *Baltins v. James* (1995) 36 Cal.App.4th 1193, 1205, disapproved on other grounds in *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 761.) Thus, in showing that the trial court was correct in sustaining the demurrer to the Third Amended Complaint, respondent will address primarily the allegations in that pleading. Only where previous allegations are pertinent to the determination will they be discussed.

E. EXPUNGEMENT OF THE LIS PENDENS

In light of the entry of the Judgment of Dismissal, and the resulting absence of any causes of action containing a real property claim, respondents (in the absence of appellant's cooperation) filed a motion to expunge the Lis Pendens. (CT, VI-1241-1257.) The motion was granted, an order expunging

---

[3] Apparently two versions of the Clerk's Transcript were prepared, one with regard to the appeal of the judgment in favor of respondents and one with regard to the appeal of the judgment in favor of JP Morgan Chase. The Notice of Appeal of the judgment in favor of respondents is contained in Volume I of I of the Clerk's Transcript dated June 6, 2011 at pages 5-7.

the Lis Pendens was issued by the trial court, and that order was recorded on August 17, 2011. (CT, VI-1311, 1320-1323, and Request for Judicial Notice filed concurrently.)

F. THE SALE OF THE PROPERTY

The Property was sold on December 23, 2011 to Estelle M. Ritter, Trustee of the Estelle M. Ritter Living Trust, a third party bona fide purchaser who was not a party to the action in the trial court. (Request for Judicial Notice filed concurrently.)

III. STANDARD OF REVIEW

Judgments of dismissal entered after a demurrer to the complaint has been sustained without leave to amend are appealable. (See, e.g., *Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13, 16.) Since a demurrer tests the legal sufficiency of a complaint and the granting of leave to amend involves the trial court's discretion, in reviewing the sustaining of a demurrer without leave to amend, an appellate court will employ two separate standards of review. (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 791.)

In ruling on the sustaining of a demurrer, there will be a de novo review of the complaint to determine if it contains facts sufficient to state a cause of action – in other words, whether the trial court correctly sustained the demurrer as a matter of law. The decision must be affirmed if supported on any ground stated in the demurrer, whether or not relied on by the trial court. (*Farmers Insurance Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 459.)

Where a demurrer is sustained without leave to amend, the reviewing court must determine whether the trial court abused its discretion in refusing leave to amend. The trial court's decision will be an abuse of discretion only where there is a reasonable possibility that the defects can be cured by amendment. (*Durrell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350,

1371.) It is proper to sustain a demurrer without leave to amend when it is improbable that the plaintiff can state a cause of action in light of earlier failed attempts to do so. (See *Alexandria S. v. Pacific Fertility Medical Center, Inc.* (1997) 55 Cal.App.4th 110, 115, where it was held proper to deny leave to amend after plaintiff had twice failed to adequately amend the complaint.)

IV. THE APPEAL IS MOOT AS TO ALL BUT THE THIRTEENTH AND FOURTEENTH CAUSES OF ACTION

The duty of every judicial tribunal is to decide actual controversies by a judgment that can be carried into effect, and not to give opinions on moot questions or abstract propositions or to declare principles or rules of law that cannot affect the matter in issue. (*Consolidated Vultee Aircraft Corp. v. United Automobile, etc.* (1946) 27 Cal.2d 859, 863.) A case is moot when the decision of the reviewing court can have no practical impact or provide the parties effectual relief. (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214.)

The recent case of *Vegas Diamond Properties, LLC v. Federal Deposit Insurance Corporation* (9th Cir. 2012) 669 F.3d 933 (attached as Exhibit 1), decided by the Ninth Circuit Court of Appeals is extremely similar to the present case. Although admittedly not binding on this court, the case is so directly on point and in conformance with California authority that it acts as persuasive argument.

In the *Vegas Diamond* case, the property owners obtained a temporary restraining order in the Nevada state court enjoining a trustee's sale of the property. The lender removed the case to federal court. The FDIC substituted as the receiver for the lender and venue was changed to the Southern District of California. The FDIC then successfully moved to dissolve the temporary

restraining order and to deny issuance of a preliminary injunction on the basis that injunctive relief was not allowed under the applicable federal statute.

The property owners appealed the decision dissolving the restraining order and denying issuance of the injunction. The properties were then sold, in one case to a bona fide purchaser, and in the other case to the FDIC. The FDIC contended that the appeal was moot because the properties had been sold and reinstatement of the restraining order prohibiting the sale would be ineffective. The appellate court determined that the requested action was moot because the activities sought to be enjoined had already occurred and could no longer be prevented or undone. (*Id.* at 937.)

In this case, the conclusion that the appeal is moot as to most causes of action is even stronger. Code of Civil Procedure section 405.61 states:

> Upon the withdrawal of a notice of pendency of action pursuant to Section 405.50 or upon recordation of a certified copy of an order expunging a notice of pendency of action pursuant to this title, no person except a nonfictitious party to the action at the time of recording of the notice of withdrawal or order, who thereafter becomes by conveyance recorded prior to the recording of a certified copy of the judgment or decree issued in the action, a purchaser, transferee, mortgagee, or other encumbrancer for valuable consideration of any interest in the real property subject to the action, shall be deemed to have actual knowledge of the action or any of the matters contained, claimed, or alleged therein, or of any of the matters related to the action, irrespective of whether that person possessed actual knowledge of the action or matter and irrespective of when or how the knowledge was obtained.
>
> **It is the intent of the Legislature that this section shall provide for the absolute and complete free transferability of real property after the expungement or withdrawal of a notice of pendency of action.** (Emphasis added.)

The effect of this statute is to render a purchaser of property upon which a lis pendens was recorded and has been expunged a **conclusive bona fide purchaser for value** even if that purchaser has actual notice of the action.

This conclusion represents a determination by the Legislature that, given the choice between two systems, (1) the property can be readily freed up for sale after trial court litigation, or (2) the property will continue to be tied up for a long period pending an appeal if the claimant can come up with some nonfrivolous argument on which to base that appeal, "the Legislature chose free transferability of the property by the prevailing property owner as the preferred option." (*Mix v. Superior Court* (2004) 124 Cal.App.4th 987, 994.)

In light of this Legislative determination, the bona fide purchaser in this case cannot be divested of title even if this court was to find that the foreclosure was wrongful and should not have occurred. Such a finding could no longer result in cancellation of the Trustee's Deed Upon Sale because it would have the effect of undoing the sale to the bona fide purchaser who was entitled to rely on the order expunging the Lis Pendens which thereby created "the absolute and complete free transferability" of the Property. Thus, the decision of this court, regardless of the conclusion, can have no meaningful effect or practical impact and cannot provide the appellant with effectual relief sought under her first or second causes of action for wrongful foreclosure.

The third cause of action for unjust enrichment claimed that respondents were unjustly enriched "with purported title." (CT, IV-884:26-28.) Appellant further alleged that "[s]ince these subject defendants [respondents] have no legal right to Running Ridge [the Property], they are unjustly enriched by claiming title to Running Ridge." (CT, IV-885:2-3.)

Appellant also alleged that respondents were unjustly enriched by payment of "$6,000 per month to continue to live in Running Ridge." (CT,

IV-884:28-885:2.) She refers here to the $6,000 the court required her to pay into the trust account of respondents' counsel pending resolution of this case as a condition of staying the unlawful detainer action that had been filed as a separate action by respondents.[4]

Appellant did not allege damages in her third cause of action, but instead contended that, in order to remedy the purported unjust enrichment, she should be placed in title to the Property and impliedly should receive a return of her $6,000 per month. Since she cannot be placed in title to the Property in light of the sale of the Property to a bona fide purchaser, and since she would be entitled to a return of the $6,000 only if she was wrongfully dispossessed of title, the appeal as to the unjust enrichment cause of action is moot.

Similarly, the seventh cause of action for quiet title is moot. That cause of action seeks to quiet title to the Property in appellant which can no longer occur even if appellant was determined to be entitled to quiet title. Thus, neither the appellate court nor the trial court can grant effective relief and the conclusion of this court can have no meaningful effect.

The ultimate declaration sought by appellant in the eighth cause of action for declaratory relief related to the "validity of the Subject Note" and the "rights to have sold Running Ridge pursuant to nonjudicial foreclosure on Running Ridge." (CT, III-663:11-13.) As the trial court correctly pointed out, since "the note and deed of trust are extinguished by the trustee's sale," there is no need to declare the parties' rights with regard to those instruments. (CT, VI-1225.) This court cannot undo the foreclosure sale, and therefore cannot

---

[4] Although the papers relating to the unlawful detainer case are not part of the record in this appeal, there are numerous references in the record to that case and to the $6,000 payment required as a condition of the stay. (See, e.g., appellant's Motion to Reduce Her Monthly Payment to Defendants at CT, II-527-539 (inexplicably and erroneously filed in this case) and the trial court's denial of that motion at CT, III-596.)

reinstate the note and deed of trust which were extinguished. Thus, any claim that the trial court should adjudicate the rights and duties of the parties pursuant to those instruments is moot.

In addition, appellant's eighth cause of action sought injunctive relief to prevent the advertisement for sale and the sale of the Property to a subsequent third party purchaser on the grounds that appellant would suffer "great and irreparable injury for which pecuniary compensation would not afford adequate relief." (CT, III-663:15-18.) Again, appellant did not seek damages, but instead sought declaratory and injunctive relief regarding the disposition of the Property which this court can no longer affect.

Moreover, an injunction to prevent the advertisement for sale and the sale of the Property would be nonsensical since such a sale has already taken place. Injunctive relief may not be granted when events have rendered the relief unnecessary or ineffectual. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 133.) An injunction is available only if there is a substantial basis to suppose that the defendant will actually engage in the conduct sought to be enjoined. (*Epstein v. Superior Court* (2011) 193 Cal.App.4th 1405, 1410.) Since the Property has already been sold, there is no possibility that respondents will advertise it for sale. Therefore, appellant's claim for injunctive relief to prevent that advertisement and sale is moot.

The ninth cause of action for slander of title is also clearly moot since it relies, as a prerequisite, on appellant holding title to the Property. As the trial court correctly noted, appellant cannot allege that a publication implying ownership by respondents is false because in fact respondents do own the Property. (CT, VI-1225.) Since appellant now can never own the Property, she can never allege slander of title she can never own. Thus, the appeal as to the ninth cause of action is moot.

In her tenth cause of action, appellant sought damages from respondents for infliction of emotional distress. However, the basis for these purported damages was respondents' knowledge that they "had no legal title to Running Ridge" but nevertheless sought to persuade appellant to "move immediately." (CT, III-666:22-667:4.) Since the Property has now been sold by respondents, a determination that respondents "had no legal title to Running Ridge" is impossible. Thus, the appeal as to this cause of action is moot.

The twelfth cause of action is for constructive trust and seeks a determination that respondents hold the Property in trust for appellant. Again, this cause of action relies on a finding that appellant is entitled to ownership of the Property, something that can no longer occur. In addition, respondents no longer own the Property, therefore they cannot be found to be holding it in trust for anyone.

Since appellant can never hold title following the sale of the Property to a third party bona fide purchaser, even if this court determined that the demurrer to the first, second, third, seventh, eighth, ninth, tenth, or twelfth causes of action should have been overruled by the trial court, effective relief is now impossible. Thus, the decision of this court can have no practical impact on appellant's rights and cannot lead to appellant obtaining the relief she sought in the trial court. As a matter of law, appellant's claims are moot.

///

///

///

///

///

///

///

V. THE TRIAL COURT DID NOT ERR IN SUSTAINING THE DEMURRER

A. THE DEMURRER TO THE FIRST AND SECOND CAUSES OF ACTION TO SET ASIDE THE FORECLOSURE SALE WAS PROPERLY SUSTAINED

1. Appellant Failed to Name the Proper Parties

Appellant steadfastly refused to name respondents, the purchasers of the Property at the foreclosure sale, as defendants in either the first or second causes of action, even though that deficiency had been pointed out to appellant in all three of respondents' demurrers. (See CT, I-256:9-11 and 257:12-13, II-440-19-27 and III-707:11-16.) Appellant provided no explanation as to why respondents had not been named. (See the trial court's comments at CT, VI-1224.)

Appellant does not even address the issue in her opening brief, even though it was clearly a basis for the sustaining of the demurrer by the trial court as to the first and second causes of action. Without the purchasers and current owners as parties, one cannot obtain the remedy of setting aside a foreclosure sale and recovering the property. (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1047.) Even if appellant proved that the foreclosure sale was void, the trial court could not invalidate the sale because it did not have jurisdiction over respondents to carry the order into effect. Appellant had three opportunities to cure this defect but failed to do so. Thus, the demurrer to the first and second causes of action was properly sustained on that basis alone.

2. Appellant Failed to Allege a Tender Sufficient to Cure the Default

Appellant did not allege that she had tendered or offered to tender a sufficient sum to cure the default, nor did she allege that she had the ability to make such a tender. A full and valid tender of the amount due is a necessary

prerequisite to an action challenging or seeking damages from a trustee's sale. (*FPCI Re-Hab 01 v. E & G Investments* (1989) 207 Cal.App.3d 1018, 1021-1024.)

To set aside a trustee's sale without such a tender would be an exercise in futility if the appellant were unable to pay the loan anyway. (*Id.*) Without an allegation of such a tender in the complaint, the complaint does not state a cause of action. (*Carpenter v. Hamilton* (1943) 59 Cal.App.2d 146, 151-152.) Appellant alleged only that she "timely made all payments required" under what she asserted was the Trial Plan Agreement with her lender, and that she "had and continues to have the ability to make payments as due." (CT, III-633:4-5.) However, that allegation is far different from one that appellant tendered a sufficient sum to cure the default.

Appellant cites *Lona v. Citibank* (2011) 202 Cal.App.4th 89 to support her position that an allegation of tender is not required if it is properly alleged that a foreclosure sale is void. That case was decided in December 2011, after the judgment from which appellant appeals was entered in this case, and is distinguishable on its facts. In addition, not only did appellant fail to allege that there was an exception to the tender requirement in this case (as was alleged in *Lona*), but appellant, as found by the trial court, has not set forth allegations which, if true, are sufficient to establish a void sale. (CT, VI-1302-1303.)

In *Lona* the court found that the plaintiff made no more than $3,333 per month, did not speak English well, and had little education. Yet the lender induced the plaintiff to take out two loans for which the monthly payments totaled over $12,000. Plaintiff alleged that the loan documents and the loans themselves were unconscionable and that, in light of the invalidity of the loans, there was no requirement that plaintiff tender the amounts due as a prerequisite to setting aside the foreclosure sale.

Here, although plaintiff challenged the validity of the underlying loan documents, she relied on what she perceived as procedural irregularities and defects in the documentation which allegedly divested the lender of the right to foreclose, and did not assert an exception to the tender requirement. In fact, she alleged that she tendered the amounts due under the TPA and argues that is sufficient to satisfy the requirement. Since the appeal is moot as to the causes of action seeking to set aside the foreclosure sale and, as will be seen, appellant's allegations that the loan documents are invalid are insufficient, even if true, to establish that result, she cannot rely on the *Lona* exception to the tender requirement in this case.

3. The Foreclosure Sale Was Not Void and the Sale Procedures Were Proper

Public policy favors the finality of nonjudicial foreclosure sales conducted pursuant to the power of sale contained in a deed of trust. (See *Brown v. Busch* (1987) 152 Cal.App.2d 200, 204.) In addition to the common law presumption of validity of a foreclosure sale, a statutory presumption of validity arises from the recitals in the trustee's deed that all of the statutory requirements have been satisfied. (Civil Code section 2924.) In order to overcome this presumption, a trustor challenging a foreclosure sale must prove the presumption is not applicable on equitable grounds such as fraud, and that the trustor has suffered injury or been prejudiced by the irregularity in the proceedings. (*Stevens v. Plumas Eureka Annex Mining Co.* (1935) 2 Cal.2d 493, 496-497.)

a. The First Cause of Action

Appellant contends that the Notice of Default was invalid because it was executed and recorded before the Substitution of Trustee. Therefore, according to appellant, the trustee that executed the Notice of Default was not

authorized to do so, thereby rendering the foreclosure sale void. In addition, because appellant cannot identify the signer of the Notice of Default, she speculates that it was "initialed" by a "robosigner" and jumps to the conclusion that it is therefore invalid.

Civil Code section 2934a(b) expressly authorizes a situation where the Notice of Default is executed and recorded before the Substitution of Trustee:

> If a substitution is executed, but not recorded prior to or concurrently with the recording of the notice of default, the beneficiary or beneficiaries or their authorized agents shall cause notice of the substitution to be mailed prior to or concurrently with the recording thereof, in the manner provided in Section 2924b, to all persons to whom a copy of the notice of default would be required to be mailed by the provisions of Section 2924b. An affidavit shall be attached to the substitution that notice has been given to those persons and in the manner required by this subdivision.

The trial court found that "the allegations of the complaint and the matters judicially noticed establish that an affidavit of mailing pursuant to Civil Code § 2934a, subd. (b) was recorded with the substitution of trustee . . . and no irregularity has been shown on this ground." (CT, VI-1302.) The trial court's factual conclusion is confirmed by an examination of the Affidavit of Mailing. (CT, V-1065.)

Appellant argues that the substitution was not executed prior to the recording of the Notice of Default on March 20, 2009. Although the date of the Substitution of Trustee just above the signature line is March 18, 2009, appellant relies on the notary acknowledgment which is dated March 26, 2009. Appellant has presented no authority to support her implied claim that the acknowledgment must be dated the same date as the signature.

In fact, the acknowledgment does not state that the notary witnessed the signature, only that the person who signed "acknowledged to me" that the

person "executed the instrument." The purpose of an acknowledgment is simply to establish the genuineness of the signature, not to establish the time of signature. (See *Bernd v. Eu* (1979) 100 Cal.App.3d 511.) Moreover, appellant has never alleged that she did not receive the Notice of Default. Thus, she could not show that she was prejudiced by this claimed irregularity as required to state a cause of action. (See *Stevens, supra,* at 496-497.)

Appellant also argues that there was no recorded document indicating Chase to be a "holder in due course or beneficiary" of the note and that there was a failure to record the transfer of any beneficial interest in the note to Chase. However, there is no requirement anywhere in the foreclosure statutes that there be such a recorded document. In fact, because a trust deed is incidental to the debt that it secures, assignment of the debt alone carries with it the security without the need for recording an assignment of that security. (Civil Code section 2936; see also *Santens v. Los Angeles Finance Co.* (1949) 91 Cal.App.2d 197, 202.)

Just because an assignment of the beneficial interest under a deed of trust "may" be recorded pursuant to Civil Code section 2934 does not require that it be recorded as a prerequisite to its validity. A foreclosure sale under a deed of trust does not require the recording of such an assignment. (*Calvo v. HSBC Bank USA, N.A.* (2011) 199 Cal.App.4th 118.) Thus appellant's allegation that failure to record assignments of the trust deed renders the foreclosure sale invalid is incorrect as a matter of law.

Similarly, the allegations of some sort of "elaborate securitization and securities fraud scheme" by which the note was packaged and sold to investors also are ineffective to invalidate the foreclosure sale. In order to justify the setting aside of a presumptively valid foreclosure sale, the claimed irregularity

must arise from the foreclosure proceeding itself. (*6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* (2001) 85 Cal.App.4th 1279, 1285.)

"A mistake that occurs outside (dehors) the confines of the statutory proceeding does not provide a basis for invalidating the trustee's sale." (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 445.) Here, the alleged fraud in connection with the original loan and the "elaborate securitization and securities fraud scheme" supposedly perpetrated by the defendants had nothing whatsoever to do with the foreclosure sale and therefore cannot serve as a basis for setting aside that sale.

Moreover, as the trial court pointed out, a similar contention was rejected by a federal district court sitting in California. (CT, VI-1303.) In *Zivanic v. Washington Mutual Bank, F.A.* (N.D. Cal. 2010) 2010 U.S. Dist. LEXIS 56846 (attached hereto as Exhibit 2), the court found that the contention that the defendants "lost the power to foreclose on Plaintiff's property after they sold the promissory note and the note was securitized" was "untenable." (*Id.* at 21.) The allegation that the loan was "securitized" did not provide "any legal basis for concluding that entities other than Defendants are entitled to her loan payments." (*Id.* at 19.) Similarly, in this case, it does not follow, as appellant argues, that just because the loan was securitized the original lender lost the ability to exercise the power of sale allowed by the deed of trust.

Appellant further alleged that the foreclosure sale should be set aside because Chase could not produce a promissory note or an assignment of the note. But appellant again failed to show that such production is a requirement of a valid foreclosure. Nothing in the comprehensive foreclosure statutes requires the production of the note or an assignment of the note as a condition to foreclosure.

Moreover, appellant has not alleged or shown how she was prejudiced by this purported failure. "Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to [appellant], an assignment merely substituted one creditor for another, without changing her obligations under the note." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272.) In short, none of appellant's allegations are sufficient to overcome the presumption that the foreclosure sale was valid, and the demurrer was therefore properly sustained by the trial court.

b. The Second Cause of Action

The sole basis in this cause of action for setting aside the foreclosure sale was appellant's allegation that the lender did not comply with Civil Code section 2923.5. That section requires that the notice of default contain a declaration "that the mortgagee, beneficiary, or authorized agent has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required pursuant to subdivision (h)."

Appellant admits in paragraph 96 of the Third Amended Complaint that the Notice of Default in this case contained language which complied with the requirements of Civil Code section 2923.5. (CT, III-643:10-14.) Yet she dishonestly informs the court (on page 14 of her opening brief) that the Notice of Default recorded March 20, 2009 "did not include the statutory language required by Cal. Civ. Code § 2923.5(b). . . ." citing to CT, 119-120.

An examination of the second page of the Notice of Default at CT, 120 reveals that the required language is indeed present as alleged in paragraph 96 of the Third Amended Complaint. In the section of her opening brief relating to the second cause of action beginning on page 24, appellant seems to argue that, because a "declaration must be subscribed by an identifiable real person"

the Notice of Default is invalid. But an argument that the entire Notice of Default is invalid is far different from asserting that the document does not contain required language which is clearly present here.

Regardless, appellant no longer has a remedy under Civil Code section 2923.5. That very issue was addressed in *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522. The court determined that Civil Code section 2923.5 does not provide for damages or for setting aside a foreclosure sale. Instead, "the *sole* available remedy is 'more time' before a foreclosure sale occurs." (*Id.* at 526; emphasis in original.) There is no provision for relief "after a sale takes place." (*Id.*) Thus, the trial court was correct in sustaining respondents' demurrer.

B. THE DEMURRER TO THE THIRD CAUSE OF ACTION FOR UNJUST ENRICHMENT WAS PROPERLY SUSTAINED

Unjust enrichment has been described as a quasi-contractual form of common count for money had and received to recover money paid by fraud or mistake. (*Kossian v. American National Insurance Co.* (1967) 254 Cal.App.2d 647, 650-651.) It is synonymous with the term "restitution" and is used to characterize the effect of a failure to make restitution for property or benefits received under circumstances that give rise to a legal or equitable obligation to account for them. (*Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1314-1315.)

Here, appellant alleged that the acquisition of the Property by respondents was wrongful because Todd Kaufman knew that Chase had no interest in the mortgage and therefore the Property, and because he knew that the foreclosure documents were signed by a "robosigner." (CT, III-647:15-21.) Appellant then jumps to the conclusion that respondents were unjustly enriched with title to the Property they purchased at the foreclosure sale.

However, as previously shown, appellant has been unable to effectively allege that there were any irregularities in the foreclosure proceedings. Thus, it follows that the purchasers at the foreclosure sale could not be "unjustly enriched" with title. As the trial court noted, appellant "failed to allege that she could have prevented the sale." (CT, VI-1225.)

Appellant also alleged that respondents were unjustly enriched by the receipt of the $6,000 per month the court ordered her to deposit with respondents' counsel as a condition of the court order staying the unlawful detainer action. (CT, III-647:28-648:2.) But she does not explain and offers no authority for her contention that respondents could be unjustly enriched by payments made pursuant to a court order which were not received by respondents until the conclusion of the case and by way of an additional court order. The trial court properly sustained the demurrer.

C. THE SEVENTH CAUSE OF ACTION FOR QUIET TITLE DID NOT STATE A VALID CLAIM

The owner of an equitable interest in real property may not maintain a quiet title action against the holder of legal title. (See *Santoro v. Carbone* (1972) 22 Cal.App.3d 721, 732.) In *Stafford v. Ballinger* (1962) 199 Cal.App.2d 289, 294-295, the court determined that the appellant did not have legal title to the property in question, but at the most may have acquired some equitable rights. The court stated: "[i]t has been held consistently that the owner of an equitable interest cannot maintain an action to quiet title against the owner of the legal title." (*Id.* citing *G.R. Holcomb Estate Co. v. Burke* (1935) 4 Cal.2d 289, 297.)

Here, by appellant's own admissions and allegations, respondents owned legal title to the Property. Appellant sought to quiet title against the owners of legal title based on a claim of an equitable interest arising from the

alleged fraud of the defendants and alleged statutory irregularities in the foreclosure sale. Appellant did not and could not allege that she had legal title contrary to the Trustee's Deed Upon Sale which vested title in respondents. (CT, V-1070-1074.)

Appellant's argument that quiet title is appropriate is circular at best. According to appellant, she did have legal title because the documents which purported to place title in the name of respondents were illegal or invalid. Thus, legal title was never conveyed to respondents, so appellant can maintain a quiet title action to obtain the legal title she already supposedly owned but which was never conveyed. But if one simply has to allege that she *should* have legal title and can therefore maintain a quiet title action, one who claims equitable title will always be able to bring a quiet title action by way of that allegation. That is not the law and the trial court correctly sustained the demurrer.

D. THE DEMURRER TO THE EIGHTH CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF WAS PROPERLY SUSTAINED

Once the trial court determined that appellant had not sufficiently stated a cause of action to set aside the foreclosure sale, its determination that the eighth cause of action was insufficient had to follow as a matter of law and logic. The court correctly stated that the note and deed of trust were extinguished by the foreclosure sale. (CT, VI-1225.) (See Civil Code section 2910; *Streiff v. Darlington* (1937) 9 Cal.2d 42, 45.) Once that occurred, there were no longer any rights or interests to adjudicate. Thus, there was no longer an existing controversy and declaratory relief was improper. The demurrer was properly sustained.

Moreover, the purpose of declaratory relief is to eliminate uncertainties and controversies that may result in **future** litigation. (*Marina Development Co. v. County of Los Angeles* (1984) 155 Cal.App.3d 435, 443.) Although declaratory relief necessarily deals with present rights, the present right contemplated is the right to have immediate judicial assurance that advantages will be enjoyed or liabilities escaped in the future. (See *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541, fn. 2.) Therefore, when only past wrongs are involved there is no basis for declaratory relief. (*County of San Diego v. State* (2008) 164 Cal.App.4th 580, 607-608.)

Here, appellant sought a judicial declaration that "no defendant has been the holder in due course or beneficiary of the Subject Note" and that "no defendant was a real party in interest, had standing or was entitled to accelerate the maturity of any obligation . . . because they were not a beneficiary or authorized agent of a beneficiary under the Subject Note." (CT, III-663:3-10.) Appellant's sole goal was to obtain a declaration that the foreclosure was invalid or void. That relief was necessarily based on past events only and sought a declaration regarding alleged past wrongs. Since declaratory relief relating to such past wrongs is improper, appellant could not state a valid cause of action.

Appellant also sought injunctive relief barring respondents from advertising the Property for sale or selling the Property "until the resolution of this case." (CT, III-664:1-7.) There was no necessity for such an injunction since appellant had already recorded the Lis Pendens on the Property which would clearly prevent a sale of the Property. Moreover, as the trial court noted, since appellant did not allege a valid reason to set aside the foreclosure sale, there was no basis for injunctive relief. (CT, VI-1225.) Therefore, the trial court did not err in sustaining respondents' demurrer.

E. APPELLANT'S NINTH CAUSE OF ACTION FOR SLANDER OF TITLE WAS PROPERLY RULED DEFICIENT

Appellant's only allegation is that the respondents by the acts and omissions alleged in the complaint "published matters which were untrue and disparaging to" appellant's title in the Property. Notably, the "published matters" are not specified, and are referred to only as the "aforementioned publications," rendering the cause of action unacceptably vague. Nevertheless, appellant alleged that these "published matters" cast doubt on her right to title in her property, causing damages. (CT, III-664:21-665:10.)

Slander of title is an invasion of the interest in the vendibility of property or in the immediate salability of property. (*Phillips v. Glazer* (1949) 94 Cal.App.2d 673, 677.) Such an action may be brought against one who publishes matter which is untrue and disparaging to another's property only if there is no privilege to publish the allegedly disparaging matter. (*Gudger v. Manton* (1943) 21 Cal.2d 537, 544, disapproved on other grounds in *Albertson v. Raboff* (1956) 46 Cal.2d 375.) Substantially the same privileges are recognized as those set forth in Civil Code section 47 relating to personal defamation.

Civil Code section 2924(d) states that "the following shall constitute privileged communications pursuant to Section 47: (1) The mailing, publication, and delivery of notices as required by this section. (2) Performance of the procedures set forth in this article . . . ." Since anything published or recorded in connection with the foreclosure was privileged under Civil Code section 2924(d), if appellant's reference to "publications" means the foreclosure documents, appellant cannot maintain a cause of action for slander of title.

/ / /

If appellant intended to claim that advertising the Property for sale constituted the slander of title as she appears to have argued previously, that claim also was properly deemed insufficient. Essentially, appellant contended that such an advertisement implied that someone other than appellant owned the Property. But, as the trial court correctly decided, since respondents actually did own the Property, an advertisement which implied that to be true could not be a slander of title. (CT, VI-1225.) Since appellant did not own title to the Property, nothing anyone said or did could slander title she did not own. The demurrer was correctly sustained.

F. THE TENTH CAUSE OF ACTION FOR INFLICTION OF EMOTIONAL DISTRESS WAS CORRECTLY RULED DEFICIENT

The elements of a cause of action for intentional infliction of emotional distress are: 1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; 2) the plaintiff's suffering severe or extreme distress; and 3) causation of the emotional distress by the defendant's outrageous conduct. (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 594.) A defendant's conduct is considered outrageous only if it is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Id.*) "[T]he court is to determine, in the first instance, whether conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." (*Unterberger v. Red Bull North America, Inc.* (2008) 162 Cal.App.4th 414, 423.)

In "Count 2" of the tenth cause of action against respondents, the only allegations related to the effort by Nancy Mura, purportedly Seaside's employee, to cause appellant to move immediately out of the Property after the foreclosure. (CT, III-666:21-667:4.) According to appellant, Mura threatened appellant "that if she didn't move right away" Mura would have Luke

McCarthy "pay her a very unpleasant visit." In addition, Mura allegedly said that McCarthy "never loses these things." (CT, III-666:21-667:4.)

Appellant alleged that this conduct was even more "outrageous" because respondents purportedly knew that they had "illegally paid" for the Property. (CT, III-666:22-23.) These facts hardly give rise to conduct "so extreme as to exceed all bounds of that usually tolerated in a civilized community," particularly when appellant has not been able to show that respondents "illegally paid" for the Property or that the foreclosure sale was in any way improper. The trial court was correct in concluding that appellant failed to "allege facts constituting extreme and outrageous conduct." (CT, VI-1225.)

G. APPELLANT WAS NOT ENTITLED TO A CONSTRUCTIVE TRUST UNDER HER TWELFTH CAUSE OF ACTION

A constructive trust may only be imposed where there has been a wrongful acquisition or detention of property to which another is entitled. (*American Airlines, Inc. v. Shepard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017.) Appellant alleged that respondents are constructive trustees of the Property because they knew the Property "could not be legally sold" and "paid CHASE's agents in order to get the agents to execute a Trustee's Deed Upon Sale which they succeeded in doing." (CT, III-668:1-8.)

However, since appellant did not successfully allege that the foreclosure sale was in any way improper, the allegation that respondents knew that the Property could not be legally sold is incorrect and irrelevant as a matter of law. The trial court correctly determined that, since none of appellant's other causes of action were viable, there was no basis for imposition of a constructive trust. (CT, VI-1225.)

/ / /

H. THE THIRTEENTH CAUSE OF ACTION FOR RESPONDEAT SUPERIOR WAS INSUFFICIENT

In this cause of action appellant attempted to hold WAMU and Alta liable for the acts of Todd Kaufman and Seaside liable for the acts of Luke McCarthy and Nancy Mura by including a cause of action for "respondeat superior." However, theories such as respondeat superior that impose vicarious liability are not separate causes of action, but counts of the underlying cause of action for damages. (See *Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441, 448-449.) Thus, the court properly sustained respondents' demurrer on the ground that respondeat superior is not a cause of action in and of itself. (CT, VI-1225.)

In addition, and perhaps more significantly, appellant was not able to successfully allege that Todd Kaufman, Luke McCarthy, or Nancy Mura engaged in any wrongful conduct for which appellant would be entitled to damages in her other causes of action. Since the previous causes of action fail, this cause of action must fail as well. Employer liability under a respondeat superior theory will not attach if the employee is absolved from liability. (*Campbell v. Security Pacific National Bank* (1976) 62 Cal.App.3d 379, 386.)

I. RESPONDENTS' DEMURRER TO THE FOURTEENTH CAUSE OF ACTION WAS PROPERLY SUSTAINED

The elements of actionable negligence are: 1) a legal duty of care owed by the defendant to the plaintiff; 2) an act or omission by the defendent constituting a breach of that duty; 3) defendant's breach as an actual and legal cause of plaintiff's damages; and 4) actual damages to the plaintiff. (*Hoyem v. Manhattan Beach City School District* (1978) 2 Cal.3d 508, 513-514.)

Appellant's entire cause of action against respondents consists of incorporation of the previous 189 allegations contained in more than 50 pages plus the following statement: "In the alternative to the above acts being taken

intentionally, LANGE alleges that the above acts were taken negligently thereby breaching each defendant's duty to LANGE and causing her damage." (CT, III-670:23-671:2.)

Appellant does not identify the duty each defendant supposedly owed to her, does not identify how that duty was breached, does not allege how the breach caused her damages, and does not describe her damages. Thus, she has utterly failed to plead any of the elements of negligence and cannot state a valid cause of action with her single sentence. The trial court properly found that appellant failed to allege facts giving rise to a tort duty and therefore correctly sustained respondents' demurrer. (CT, VI-1225.)

VI. THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW THE JOINDER OF ADDITIONAL DEFENDANTS

Appellant complains that her substituted counsel (who entered the case nearly three months after the original complaint was filed) had only nine weeks to file the Second Amended Complaint. (Opening brief, page 4.) She further complains that her counsel was denied the opportunity to add new defendants "who were directly involved in the trustee's sale" by the trial court's order of March 23, 2011, nearly eight months after the case was filed. (Opening brief, page 21.)

First, if these proposed new defendants were so "directly involved in the trustee's sale," they should have been easily known and identified much earlier in the case. Second, appellant's counsel had been telling respondent's counsel since early November of his intent to add new defendants. (CT, III-582:27-584:19.) Third, appellant's counsel indicated his intent to name these new defendants in appellant's opposition to the demurrer to the First Amended Complaint filed on December 2, 2010. (CT, II-287:7-13.) But the motion to file a proposed third amended complaint naming 16 defendants was not filed

until February 17, 2011, three and a half months after first indicating the intent to do so. (CT, II-455.)

Not only did appellant unnecessarily delay the filing of the motion, but it was served with insufficient notice and did not comply with Rule of Court 3.1324(b) which requires the submission of a detailed declaration justifying the amendment. (CT, VI-607.) More importantly, the trial court found that there was no justification for the delay in seeking to add new defendants and correctly enunciated the prejudice that would be suffered by respondents if those new defendants were added:

> Defendants oppose the motion for leave to amend on the ground that they will be prejudiced. Specifically, defendants observe that adding more parties and causes of action will inevitably assure that this action will not be ready for trial this summer as it otherwise should be. They anticipate delays effecting service on new parties as well as further challenges to the pleadings. In defendants' eyes, the value of the property depreciates with each passing day, although no evidence to substantiate this assertion has been presented. But what is self-evident is that the asset is frozen, such that it may not be occupied, transferred, encumbered or developed by the purchaser at the trustee's sale.
>
> Were the court to allow the filing of the TAC, it could be anticipated that the newly added defendants would not have responsive pleadings on file within the next 45-60 days. That challenges to the TAC would follow is a foregone conclusion. This suggests the state of the pleadings would not be resolved until mid-summer, at least insofar as the newly added defendants. . . . So, as a practical matter, were leave granted to add new parties at this stage, the chance of commencing trial before late 2011 would appear remote. Such a delay would prejudice the defendants' interests.
>
> . . . . Plaintiff's explanation for why this motion was not advanced sooner is unsatisfying. Counsel's assertion that this case is so complex that seven months have been required to

> understand plaintiff's theories and identify the culpable parties is unpersuasive. First, the assertion is unexplained. But, based on that which is apparent to the court, no such complexity exists. Second, this is not an instance where newly discovered information produced a shift in the plaintiff's case. The parties admit no discovery has been conducted. Counsel's barren assertion that this is plaintiff's first "real opportunity" to plead her case is inconsistent with the facts. Plaintiff has squandered considerable time, when in fact time was of the essence. (CT, III-607-608.)

When a demurrer is sustained, the court may grant leave to amend "upon any terms as may be just. . . ." (Code of Civil Procedure section 472a.) In addition, the court may "on any terms as may be proper" allow a party to amend a pleading. (Code of Civil Procedure section 473(a)(1).) Just as with the decision to allow an amendment itself, the terms on which an amendment may be allowed is within the discretion of the court. (See *Branick v. Downey Savings & Loan* (2006) 39 Cal.4th 235.) The trial court can hardly be said to have abused its discretion given the unchallenged facts and the extensive analysis by the court. Refusal to allow additional defendants was clearly proper within the trial court's discretion.

VII. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT LEAVE TO AMEND FOR A FOURTH TIME

Appellant has not argued that she should have been given a fifth opportunity to plead her causes of action and any such request to this court should be summarily denied. Appellant bears the burden of establishing that the court abused its discretion by failing to grant leave to amend. (*Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537, 1541. The appellant has the further burden of showing that there is a reasonable possibility that she could have amended the complaint to cure the defects. (*Blank v. Kirwan* (1985) 39 Cal.3d. 311, 318.) In addition to showing how the appellant can

amend the complaint, she must show how that amendment will change the legal effect of the pleading. (*Palm Springs Tennis Club v. Rangel* (1999) 74 Cal.App.4th 151, 163.)

In order to sustain this burden, the appellant must assert more than simply an abstract right to amend. She must clearly and specifically set forth the applicable substantive law and the legal basis for amendment – in other words, the elements of the cause of action and the authority for it. All factual allegations must be presented that will sufficiently state all required elements of that cause of action and the allegations must be factual and specific, not vague or conclusory. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.)

Appellant has been unable, after four attempts spanning more than eight months, to set forth facts which, if true, would result in a judgment vacating the foreclosure sale or entitling her to relief for any of her other claims. The court, having found that the respondents' interests were prejudiced by unwarranted delay, warned appellant that the Third Amended Complaint would, "absent exceptional circumstances" be considered "plaintiff's last opportunity to plead her causes of action." (CT, III-608 and VI-1224.)

Despite this explicit warning from the trial court, and despite many of the defects having been pointed out to appellant through respondents' successive demurrers, appellant could not adequately plead her causes of action in the Third Amended Complaint. Under those circumstances, the trial court was well within its discretion to refuse leave to file a fourth amended pleading (which would have been appellant's fifth attempt to plead her claims). The trial court did not err in sustaining respondents' demurrer without leave to amend.

///

VIII. CONCLUSION

Based on the foregoing, it is respectfully requested that this court determine appellant's appeal to be moot because, regardless of the decision of this court on appeal, appellant cannot obtain title to the Property, and effective relief which can have a practical impact on the parties is impossible. Therefore, the appeal should be dismissed. Alternatively, it is requested that this court affirm the rulings of the trial court in their entirety. It is further requested that the court order that respondents recover their costs on appeal.

Respectfully submitted,
SILVER & ARSHT

Dated: August 9, 2012

By: _____

SAMUEL J. ARSHT
RANDALL A. COHEN
Attorneys for Respondents ALTA COMMUNITY INVESTMENT III, LLC and SEASIDE CAPITAL FUND 1, LP

CERTIFICATE REGARDING NUMBER OF WORDS

I, Randall A. Cohen, certify as follows:

1. I am an attorney with the law firm of Silver & Arsht, attorneys of record for respondents ALTA COMMUNITY INVESTMENT III, LLC and SEASIDE CAPITAL FUND 1, LP in connection with the above entitled Respondents' Brief.

2. I have reviewed the word count indicated by the WordPerfect program with which this Respondents' Brief was prepared.

3. The number of words contained in the Respondents' Brief is 13,786 (not including the Table of Contents, the Table of Authorities, or this Certificate).

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Westlake Village, California on August 9, 2012.

Randall A. Cohen

W:\McCARTHY, LUKE\LANGE\APPEAL\RESPONDENTS' BRIEF.wpd

Analysis
As of: Jun 15, 2012

VEGAS DIAMOND PROPERTIES, LLC, and JOHNSON INVESTMENTS, LLC, Plaintiffs-Appellants, v. FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR LA JOLLA BANK, SERVICES, INC., Defendants-Appelleees.

No. 10-56720

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

669 F.3d 933; 2012 U.S. App. LEXIS 236

June 7, 2011, Argued and Submitted, Pasadena, California
January 6, 2012, Filed

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Southern District of California. D.C. No. 3:10-cv-01205-WQH (BGS). William Q. Hayes, District Judge, Presiding.

Vegas Diamond Props., LLC v. La Jolla Bank, FSB, 2011 U.S. Dist. LEXIS 8316 (S.D. Cal., Jan. 27, 2011)

Vegas Diamond Props. LLC v. LA Jolla Bank, FSB, 2010 U.S. Dist. LEXIS 115398 (S.D. Cal., Oct. 29, 2010)

DISPOSITION: DISMISSED.

COUNSEL: Gus W. Flangas, Kim D. Price, Flangas McMillan Law Group, Las Vegas, Nevada, for the plaintiffs/appellants.

Joseph L. Oliva, Thomas E. Ladegaard, Oliva & Associations, ALC, San Diego, California, for the defendant/appellee FDIC.

J. Scott Watson, Counsel, Federal Insurance Deposition Corporation, Arlington, Virginia, for the defendant/appellee FDIC.

JUDGES: Before: Dorothy W. Nelson and Sandra S. Ikuta, Circuit Judges, and Lawrence L. Piersol,* District Judge. Opinion by Judge Piersol.

* The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota, sitting by designation.

OPINION BY: Lawrence L. Piersol

OPINION

[*934] PIERSOL, District Judge:

Vegas Diamond Properties, LLC, (Vegas Diamond) and Johnson Investments, LLC, (Johnson Investments) appeal from the district court's Order granting the Ex Parte Motion to Dissolve Temporary Restraining Order filed by the Federal Deposit Insurance Corporation (FDIC) as receiver for La Jolla Bank. The temporary restraining order, which was issued by a Nevada state court judge, enjoined [**2] La Jolla Bank and Action Foreclosure Services, Inc., from proceeding with a trustee's sale of real properties owned by Vegas Diamond and Johnson Investments. The district court determined that 12 U.S.C. § 1821(j), the anti-injunction provision of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) precluded a court from enjoining the FDIC from conducting a trustee's sale of the real properties. Since the real properties were sold during the pendency of this appeal, the appeal is dismissed as moot.

[*935] **BACKGROUND**

EXHIBIT 1

La Jolla Bank is a federally chartered savings bank. Robert Dyson, an owner of various real estate entities in Southern California and Las Vegas, Nevada, obtained a series of loans from La Jolla Bank. Dyson and an entity controlled by Dyson purchased land for development in Anza, California. La Jolla Bank lent Dyson money in connection with the Anza property, but required Dyson, when he sought another loan, to find a partner or investor so as to meet equity requirements.

Vegas Diamond owned approximately 8.96 acres of real property located near Barbara Street and Las Vegas Boulevard in Las Vegas, Nevada. Johnson Investments also owned real properties of [**3] approximately 4.19 and 2.5 acres located near Barbara Street and Las Vegas Boulevard in Las Vegas, Nevada. Dyson contacted and allegedly painted a strong but inaccurate financial picture of the Anza project to the principals of Johnson Investments and Vegas Diamond.

The principals of Johnson Investments and Vegas Diamond agreed to take out loans from La Jolla Bank which were secured against the Johnson Investments properties and the Vegas Diamond property in Las Vegas, and also agreed to loan the proceeds to Dyson so the Anza project could proceed. Johnson Investments received a $10,933,125 loan and Vegas Diamond received a $14,568,750 loan from La Jolla Bank.

Vegas Diamond and Johnson Investments allege that La Jolla Bank and Dyson knew but did not disclose that the Anza project was worth around $15 million, when the project was securing loans in the amount of $32.5 million. Vegas Diamond and Johnson Investments also allege that unbeknownst to their principals, money from the loans made by La Jolla Bank to Johnson Investments and Vegas Diamond was used to pay off other loans Dyson had with La Jolla Bank and to pay Dyson's accountant.

Less than a month after the closing on the loans made [**4] by La Jolla Bank to Johnson Investments and Vegas Diamond, Dyson defaulted on his first interest payment. On February 19, 2010, the Office of Thrift Supervision appointed the FDIC as receiver of La Jolla Bank after finding that La Jolla Bank was in an unsafe and unsound condition to transact business. Dyson filed for bankruptcy on October 31, 2009, and the Vegas Diamond and Johnson Investments properties ended up in foreclosure.

A month before the FDIC was appointed receiver of La Jolla Bank, Vegas Diamond and Johnson Investments filed an Emergency Ex Parte Application for Temporary Restraining Order and Motion for Preliminary Injunction in Nevada state court seeking to enjoin La Jolla Bank and Action Foreclosure Services, Inc., from proceeding with a Trustee's sale of the Vegas Diamond and Johnson Investments properties. The underlying complaint pleaded causes of action against La Jolla Bank for fraudulent concealment, negligence, civil conspiracy, breach of the covenant of good faith and fair dealing, and aiding and abetting deceit. On January 11, 2010, the Nevada state court granted the Temporary Restraining Order. Two days later La Jolla Bank removed the action to the Nevada district [**5] court which accepted the parties' stipulation to continue the Temporary Restraining Order.

On April 21, 2010, the FDIC moved to substitute the FDIC as receiver for La Jolla Bank and venue was changed to the Southern District of California. The FDIC successfully moved to dissolve the Temporary Restraining Order on the basis that injunctive relief is not allowed under [*936] 12 U.S.C. § 1821(j).[1] Vegas Diamond and Johnson Investments have continuously maintained that the Temporary Restraining Order should not be dissolved since there has been no adjudication of the issue of whether the alleged fraud precluded the real properties from being a part of La Jolla Bank's estate and subject to administration by the FDIC. On May 18, 2011, the FDIC submitted a letter requesting that this appeal should be dismissed as moot because the properties in issue had been sold in March of 2011. In a June 3, 2011 letter, the FDIC urged that this appeal was not moot.

1 12 U.S.C. § 1821(j) provides: "Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as [**6] a conservator or a receiver."

MOOTNESS

Although the FDIC has wavered in its position on whether this appeal is moot, as a prerequisite to our exercise of jurisdiction, we must satisfy ourselves that a case is not moot. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975)). An appeal is moot if no present controversy exists as to which an appellate court can grant effective relief. *W. Coast Seafood Processors Ass'n v. Natural Res. Def. Council*, 643 F.3d 701, 704 (9th Cir. 2011); *Vill. of Gambell v. Babbitt*, 999 F.2d 403, 406 (9th Cir. 1993).

The Johnson Investments properties were purchased by a bona fide third party purchaser, but the Vegas Diamond properties were purchased by the FDIC, as the receiver of La Jolla Bank. Johnson Investments and Ve-

gas Diamond contend that the sale of the Vegas Diamond property to the FDIC does not moot this appeal because this Court has the power [**7] to unwind the sale to the FDIC. This argument overlooks the nature and scope of the appeal in this case. In this appeal, brought under 28 U.S.C. § 1292(a) from an interlocutory order dissolving a temporary restraining order and denying a motion for preliminary injunction, Johnson Investments and Vegas Diamond sought the relief of reinstating the order prohibiting the FDIC from conducting a trustee's sale of the real properties. No stay of the order of dissolution of the temporary restraining order was obtained, and thus the sale of the real properties prevents this Court from granting the requested relief and accordingly renders this appeal moot. *See Sharpe v. FDIC*, 126 F.3d 1147, 1154-55 (9th Cir. 1997) (the FDIC having recorded a reconveyance rendered moot the claim for injunctive relief seeking to enjoin the FDIC from recording the instruments in issue). This action is moot because the activities sought to be enjoined have already occurred and can no longer be prevented. *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377 (9th Cir. 1978).

We are unpersuaded that this case meets the requirements of the "capable of repetition, yet evading review" exception to the general principles [**8] of mootness, which exception was recognized in *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S. Ct. 279, 55 L. Ed. 310 (1911). "[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he [*937] will again be subjected to the alleged illegality." *Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). This case does not present the special circumstance contemplated in the "capable of repetition, yet evading review" exception. In addition, since Vegas Diamond and Johnson Investments are allowed to bring damages actions for the alleged unlawful conduct associated with the foreclosures, this conduct does not "evade review." *See Alvarez v. Smith*, 130 S.Ct. 576, 581, 175 L. Ed. 2d 447 (2009). Vegas Diamond and Johnson Investments had the right to exhaust the administrative claims procedure and then seek relief in the federal district court for claims involving the failed financial institution. *See* 12 U.S.C. § 1821(d). Their initial complaint set forth claims for damages against La Jolla Bank as well as a cause of action for injunctive relief. At the time of oral argument in this appeal a motion to amend the complaint was pending in the district court [**9] which added defendants and causes of action requesting equitable relief in the form of cancellation of the Trustee's sale of the properties and damages for alleged negligence in failing to follow Nevada law with regard to the Trustee's sale of the properties. A review of the district court's docket sheet discloses that the motion to amend was granted. Although Vegas Diamond and Johnson Investments predict that any monetary damages they may recover will be inadequate, they have not demonstrated that their claims evade review.

Vegas Diamond and Johnson Investments cite to numerous state court decisions in which a moot issue was ruled on when it raised issues of substantial public interest, and argue that such an approach is allowable in the case at hand based on the "flexible character of the Art. III mootness doctrine." *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 400, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980). "[P]urely practical considerations," such as the public interest, standing alone, however, are not controlling in the federal courts on the issue of mootness. *See Richardson v. Ramirez*, 418 U.S. 24, 36, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974)("While the Supreme Court of California may choose to adjudicate a controversy simply because [**10] of its public importance, and the desirability of a statewide decision, we are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties."); *Williams v. Alioto*, 549 F.2d 136, 144-45 (9th Cir. 1977).

For all of the above reasons, we dismiss the appeal as moot and vacate[2] the orders granting, continuing and dissolving the injunction prohibiting a trustee's sale of real properties owned by Vegas Diamond and Johnson Investments.

2 *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 482, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990).

DISMISSED.

Positive
As of: Jun 15, 2012

YVONNE ZIVANIC, Plaintiff, v. WASHINGTON MUTUAL BANK, F.A.; ERIC DIPPEL; LISA DIPPEL; JPMORGAN CHASE BANK, N.A.; DEUTSCHE BANK NATIONAL TRUST COMPANY; QUALITY LOAN SERVICE CORPORATION; and DOES 1-50, inclusive, Defendants.

Case No. 10-737 SC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 56846

June 9, 2010, Decided
June 9, 2010, Filed

SUBSEQUENT HISTORY: Motion denied by Zivanic v. Wash. Mut. Bank, N.A., 2010 U.S. Dist. LEXIS 131647 (N.D. Cal., Dec. 2, 2010)

PRIOR HISTORY: Zivanic v. Wash. Mut. Bank, F.A., 2010 U.S. Dist. LEXIS 54732 (N.D. Cal., May 7, 2010)

COUNSEL: [*1] For Yvonne Zivanic, Plaintiff: Stevan J. Henrioulle, LEAD ATTORNEY, Law Office of Uy & Henrioulle, Oakland, CA; Ronald Veridiano Uy, Law Office of Uy and Henrioulle, Oakland, CA.

For Washington Mutual Bank, F.A., Defendant: T. Matthew Hansen, LEAD ATTORNEY, Theodore Emery Bacon, Adorno Yoss Alvarado & Smith, Los Angeles, CA; Amy L. Morse, Patrick A Cathcart, Adorno Yoss Alvarado & Smith, A Professional Corporation, Los Angeles, CA.

For JPMorgan Chase Bank, N.A., Deutsche Bank National Trust Company, Defendants: T. Matthew Hansen, LEAD ATTORNEY, Theodore Emery Bacon, Adorno Yoss Alvarado & Smith, Los Angeles, CA; Amy L. Morse, Patrick A Cathcart, Timothy Matthew Hansen, Adorno Yoss Alvarado & Smith, A Professional Corporation, Los Angeles, CA.

For Quality Loan Service Corporation, Defendant: Renee Reyes De Golier, LEAD ATTORNEY, McCarthy and Holthus, San Diego, CA; Matthew Edward Podmenik, McCarthy & Holthus, LLP, San Diego, CA.

JUDGES: Samuel Conti, UNITED STATES DISTRICT JUDGE.

OPINION BY: Samuel Conti

OPINION

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Now before the Court is a Motion to Dismiss filed jointly by Defendants JPMorgan Chase Bank, N.A. ("JPMorgan") and Deutsche [*2] Bank ("Deutsche"). [1] Docket No. 4 ("MTD"). The Motion to Dismiss is fully briefed. Docket Nos. 12 ("Opp'n"), 13 ("Reply"). For the reasons described below, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion to Dismiss.

1 No other Defendant participated in this Motion.

EXHIBIT 2

II. *BACKGROUND*

By this action, Plaintiff Yvonne Zivanic ("Zivanic") challenges alleged misconduct that took place during the origination of a housing loan, during her subsequent efforts to modify that loan, and during the procedures that led to the recent foreclosure of her home. *See* Docket No. 1 ("Notice of Removal") Ex. 1 ("Compl.").

Zivanic claims that in late 2004, she and her husband began working with Defendants Eric Dippel and Lisa Dippel, who were allegedly employed as brokers/salespersons by Defendant Washington Mutual Bank, F.A. ("WaMu"). *Id.* PP 4-5, 16-17. The Dippels were assisting Zivanic in securing finance for the purchase of her house, which is located in Santa Clara County, California. *Id.* PP1, 3. Zivanic and her husband received a loan for $ 885,000 pursuant to a Deed of Trust. *Id.* PP 19-20. According to the Complaint, the Dippels "led Plaintiff and her husband to believe that she would be approved [*3] for a loan with certain terms. However, the NOTE contained a higher interest rate than what had been originally represented to Plaintiff, wrapped unearned fees into Plaintiff's monthly mortgage payment, and contained other less favorable terms." *Id.* P 22. Zivanic complains that she and her husband should not have been approved for the loan because they would be unable to afford the fully amortized payment rates. *Id.* P 23. The Deed of Trust named WaMu as the lender and beneficiary, and California Reconveyance Company was named as the trustee. *Id.* Ex. A ("DoT") at 1.

In early 2008, Zivanic and her husband began experiencing difficulties making their monthly loan payments, and "they began to talk to WAMU representatives regarding forbearance." *Id.* P 29. Defendants began taking measures to foreclose upon Plaintiff's residence. By an "Assignment of Deed of Trust" dated July 1, 2008 (and recorded on August 15, 2008), WaMu assigned the Deed of Trust to "DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR WAMU 05-AR6 G2." *Id.* Ex. E ("DoT Assignment") at 1. By a "Substitution of Trustee" dated July 1, 2008 (and recorded on August 27, 2008), Deutsche then designated Defendant Quality Loan Services [*4] Corporation ("Quality") as the trustee. *Id.* Ex. F ("Substitution of Trustee") at 5-6. On the following day, July 2, 2008, Quality filed a Notice of Default and Election to Sell Under Deed of Trust ("Notice of Default") with the recorder for the County of Santa Clara. *Id.* P 30, Ex. D.

Plaintiff claims that Defendant JPMorgan assumed WaMu's assets and liability when WaMu went bankrupt in September of 2008. *Id.* P 33. In October of 2008, Zivanic and her husband contracted with Amerivest "to assist in negotiating a forbearance plan with WAMU," and on November 19, 2008, she was informed by Gwendolyn Smith "of WAMU's Loss Mitigation Department" that they had been approved for a "Special Forbearance Agreement" ("SFA"). *Id.* P 37, Ex. H. Zivanic and her husband signed the SFA, which required a program entrance fee as well as three debt-reduction payments scheduled to take place in late 2008 and early 2009. *Id.* PP 37-38. Zivanic made these payments. *Id.* P 39.

Zivanic and her husband received a letter from WaMu on December 18, 2008, which informed them that their payments would be set at $ 3938.64 per month starting in February of 2009. *Id.* P 41. However, "[w]hen Mr. Zivanic attempted to make the [*5] first payment, he was advised that the letter was sent in error," and after calling his contact at WaMu, he "was told not to pay anything because they had not determined the final loan modification payment." *Id.* PP 41-42. Zivanic and her husband continued to work with WaMu to modify their loan, and continued to provide information as requested. *Id.* PP 43-44. Nevertheless, on August 6, 2009, Quality sold Zivanic's residence to Deutsche at public auction. *Id.* P 45, Ex. J. Deutsche then filed an unlawful detainer action against Zivanic and her husband on September 21, 2009. *Id.* P 48. Zivanic apparently still possesses the property, and filed this action in an attempt to retain possession. *See id.* P 51.

Zivanic's Complaint was removed to federal court on February 19, 2010. On May 7, 2010, the Court denied Plaintiff's motion to remand this case back to state court. Docket No. 17. Now the Court addresses Defendants' Motion to Dismiss.

III. *LEGAL STANDARD*

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based on the lack of a cognizable legal theory or the absence [*6] of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Although well-pleaded factual allegations are taken as true, a motion to dismiss should be granted if the plaintiff fails to proffer "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The court need not accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949.

IV. *DISCUSSION*

A. *JPMorgan's Limited Assumption of Liability*

JPMorgan contends that it is not subject to "any alleged liability for WAMU's purported acts related to the Subject Loan prior to JPMorgan's entering into the Agreement with the FDIC on September 25, 2008." MTD at 4. Plaintiff alleges that WaMu was the original lender and beneficiary under the Deed [*7] of Trust, and that JPMorgan later succeeded Washington Mutual in its role. Compl. PP 3, 20-21, 33. However, JPMorgan did not acquire these loans in full, directly from WaMu. According to JPMorgan, the Office of Thrift Supervision appointed the Federal Deposit Insurance Corporation ("FDIC") as the receiver for WaMu, and the FDIC thereby "took over the assets of" WaMu and assumed the power to transfer its assets and liabilities. 12 U.S.C. §§ 1821(d)(2)(A)(i), 1821(d)(2)(B)(i), 1821(d)(2)(G)(i). The FDIC then entered into a Purchase and Assumption Agreement ("PAA") with JPMorgan, wherein JPMorgan assumed assets, but not associated liabilities, that had belonged to WaMu. Request for Judicial Notice ("RJN") Ex. 1 ("PAA"). [2]

> 2 Plaintiff submitted a Request for Judicial Notice in support of her Motion to Dismiss. Docket No. 5. The PAA is a public document and this Court may consider it without converting the Motion to Dismiss into a motion for summary judgment. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

Part of the PAA states:

> [A]ny liability associated with borrower claims for payment of or liability to any borrower for monetary relief, or that provide for any form [*8] of relief to any borrower . . . related in any way to . . . any loan made by a third party in connection with a loan which is or was held by the Failed Bank, or otherwise arising in connection with the Failed Bank's lending or loan purchase activities are specifically not assumed by the Assuming Bank.

Id. § 2.5. Other courts that have interpreted this provision have concluded that "JPMorgan Chase expressly disclaimed assumption of liability arising from borrower claims," thereby leaving "the FDIC as the responsible party with respect to those claims." *Hilton v. Wash. Mut. Bank*, No. 09-1191, 2009 U.S. Dist. LEXIS 100441, *6-9 (N.D. Cal. Oct. 28, 2009) (quoting *Cassese v. Wash. Mut. Bank*, 05-2724, 2008 U.S. Dist. LEXIS 111709, *7 (E.D.N.Y. Dec. 22, 2008)); *see also Payne v. Security Sav. & Loan Ass'n*, 924 F.2d 109, 111 (7th Cir. 1991) ("Absent an express transfer of liability by the [Receiver] and an express assumption of liability by Security Federal, FIRREA directs that [the Receiver] is the proper successor to the liability at issue here."); *Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir. 1987) (discussing purchase and assumption process and explaining rationale for limitations on liability). Based [*9] on the above, the Court concludes that JPMorgan is not a proper defendant to those aspects of Plaintiff's Complaint that can be characterized as "borrower claims."

The PAA explicitly does not relieve JPMorgan from any liability that it has incurred in its role as a loan servicer. PAA § 2.1; *see also Punzalan v. Fed. Deposit Ins. Co.*, No. 09-0087, 633 F. Supp. 2d 406, 2009 U.S. Dist. LEXIS 57829, *3 (W.D. Tex. July 9, 2009) ("Chase Bank purchased Washington Mutual on the condition that FDIC remain responsible for any Borrower Claims . . . in connection with Washington Mutual's lending or loan purchase activities. In exchange . . . Chase Bank promised to assume responsibility for all other liabilities, specifically including all mortgage servicing rights and obligations of Washington Mutual." (citations and internal quotation marks omitted)). JPMorgan therefore may still be held liable for misbehavior or fraudulent representations made in the course of its provision of loan services to Plaintiff. In addition, JPMorgan explicitly qualifies its immunity by asserting it only as to acts that occurred prior to September 25, 2008, when JPMorgan assumed its interest in Plaintiff's loan. *See* MTD at 4. The Court will [*10] address each of the causes of action that Defendants' challenge with these limitations in mind.

B. *Plaintiff's First and Second Causes of Action for Fraud and Misrepresentation*

Plaintiff's claims for fraud and misrepresentation against JPMorgan are based solely on WaMu's involvement in the initial loan origination process. *See* Compl. PP 52-68. As explained in the previous section, JPMorgan is not liable for this conduct. Therefore, the Court dismisses Plaintiff's first and second causes of action as to JPMorgan to the extent that they are based on WaMu's loan origination activities.

In Plaintiff's Opposition, Plaintiff contends that Deutsche assumed WaMu's liabilities. Opp'n at 5. However, the Complaint does not assert these causes of action against Deutsche. Compl. PP 52-68. Plaintiff also argues that it is asserting these causes of action against JPMorgan for activities related to their loan modification efforts. Opp'n at 5. There is nothing in the first or second causes of action to indicate that Plaintiff is attempting to raise loan-modification issues through these claims. The Opposition therefore describes broader claims than those

indicated by the Complaint. The Complaint fails [*11] to put either JPMorgan or Deutsche on notice of how her claims for fraud and misrepresentation relate to conduct that occurred during the loan-modification process. Plaintiff will be granted leave to amend to address these deficiencies.

C. Plaintiff's Fifth Cause of Action for Breach of Covenant of Good Faith and Fair Dealing

This cause of action focuses on the conduct of the various Defendants that took place while Plaintiff and her husband were attempting to work with WaMu and/or JPMorgan to modify their loan, including the actions by Deutsche and Quality to proceed with the foreclosure of their residence. Compl. PP 81-86. Although Plaintiff asserts this claim against JPMorgan and Deutsche (as well as WaMu and Quality), Defendants only seek to dismiss this cause of action as to Deutsche. [3]

> 3 Defendants did not raise arguments in defense of JPMorgan until their Reply. MTD Reply at 9. Defendants' Reply may not include arguments that were not already raised in their Motion to Dismiss, except to respond to Plaintiff's Opposition, so the Court will not consider the arguments in defense of JPMorgan.

A claim for breach of the covenant of good faith and fair dealing must be based on a contract [*12] between the plaintiff and the defendant. *Smith v. San Francisco*, 225 Cal. App. 3d 38, 49, 275 Cal. Rptr. 17 (Ct. App. 1990). Deutsche's only argument against this cause of action is that Plaintiff must be basing it on the loan modification agreement between Plaintiff and either JPMorgan or WaMu, and Deutsche claims to have had no involvement in this agreement. MTD at 11.

However, the Complaint can be fairly read to indicate that the Deed of Trust was the underlying contract that allegedly gave rise to the covenant of good faith and fair dealing. Compl. P 84. Deutsche was the assignee of WaMu as to the Deed of Trust. *See* DoT Assignment at 1. It may or may not have been a breach of the covenant of good faith and fair dealing to proceed with foreclosure while Plaintiff was negotiating loan modification with the apparent loan servicer, and while Plaintiff was following instructions to withhold payments until modification was complete. The Court is not willing to determine, in the absence of competent briefing, whether the Deed of Trust establishes a contractual relationship sufficient to give rise to an obligation of good faith and fair dealing. However, this possibility requires the Court to deny Defendants' [*13] request to dismiss Plaintiff's fifth cause of action.

D. Plaintiff's Sixth Cause of Action for Violation of California Civil Code Section 2923.5(a)(2)

California Civil Code section 2923.5(a) (2) provides, in part, that "[a] mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." Plaintiff contends that this code section placed an obligation on WaMu, JPMorgan, Deutsche, and Quality to modify the loan terms rather than foreclose on her property. Compl. PP 87-90.

Defendants first argue that section 2923.5(a)(2) is inapplicable because it came into effect on September 1, 2008, and the Notice of Default in this case was filed several months before that date. MTD at 11-12. However, section 2923.5 (c) clearly extends a similar obligation where "a mortgagee, trustee, beneficiary, or authorized agent had already filed the notice of default prior to the enactment of this section," by requiring them to file a declaration certifying that "the borrower was contacted to assess the borrower's financial situation and to explore options for the borrower [*14] to avoid foreclosure." Cal. Civ. Code § 2923.5(c). Based on the allegations in the Complaint, Defendants may not have been in compliance with this statute.

Defendants next argue that section 2923.5(a)(2) creates no private right of action. MTD at 12-13. Plaintiff effectively concedes this point by arguing that she may still raise this argument to support her claim under California's Unfair Competition Law ("UCL") by using Defendants' violation to establish that their conduct was "unlawful." Opp'n at 10-11. Plaintiff presents no argument that the section 2923.5(a)(2) claim can be maintained as an independent claim. Plaintiff's sixth cause of action is therefore DISMISSED WITH PREJUDICE.

Nevertheless, the Court sees no reason why Plaintiff cannot support her UCL claim by alleging that Defendants violated section 2923.5 (a) (2). Defendants only response to this proposition is to argue that Plaintiff must seek to certify a class, and meet the requirements of section 382 of the California Code of Civil Procedure, before she can use section 2923.5(a)(2) as a predicate for her UCL claim. Reply at 11. This argument is wholly without merit. Plaintiff is not seeking to represent a class, and she [*15] need only meet the requirements of section 382 if she is seeking to "pursue representative claims or relief on behalf of others . . . ." Cal. Bus. & Prof. Code § 17203. The UCL's standing requirement for a private party is established by section 17204 of the California Business and Professions Code, and this section explicitly authorizes suit "by a person who has suffered injury in fact and has lost money or property as a result of" unlawful conduct. *Id.* at § 17204. Plaintiff is clearly alleging she has lost money or property as a result of unlawful conduct.

E. *Plaintiff's Seventh Cause of Action for Violation of UCL*

As noted in the previous section, Plaintiff has stated at least one basis upon which Defendants' conduct might be deemed "unlawful" under the UCL. The Court therefore declines to dismiss Plaintiff's seventh cause of action.

F. *Plaintiff's Eighth Cause of Action for Unconscionability*

Plaintiff alleges that the promissory note related to the Deed of Trust was unconscionable because "Plaintiff was made to pay several unearned and excessive fees, which caused the Plaintiff's loan to contain an interest rate and monthly mortgage payment greater than those promised by WaMu." Compl. [*16] P 100. Plaintiff also claims that "WAMU operated from a position of superior bargaining power . . . and took advantage of the Plaintiff . . . ." *Id.* at 101. According to Plaintiff, JPMorgan is liable because it "masked WAMU's unlawful conduct by continuing to act as if they were processing Plaintiff's loan modification agreement" and Deutsche and Quality are liable because they were working towards "a procedurally flawed nonjudicial foreclosure." *Id.* P 102.

Setting aside the question of whether a Plaintiff may be able to state a cause of action for "unconscionability," which is normally a defense to a contract claim, the Court finds that Plaintiff has failed to plead a basis for contractual unconscionability. "[U]nconscionability has both a 'procedural' and a 'substantive element,' the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000) (citation omitted). The Court cannot identify any aspect of procedural unconscionability in Plaintiff's allegations. Plaintiff complains that the "interest rate and monthly mortgage payments [were] [*17] greater than those promised by WaMu," but the Complaint and its exhibits indicate that Plaintiff signed a rider authorizing an adjustable interest rate and monthly payment changes, which notified Plaintiff that she could potentially face a larger debt that what she originally borrowed. *See* Compl. Ex. B ("Adjustable Rate Rider") at 1. Plaintiff has not suggested that any of the changes in her payments exceeded the scope of what she authorized by signing the Adjustable Rate Rider. This claim therefore lacks any element of "oppression" or "surprise," and is DISMISSED WITHOUT PREJUDICE as to all Defendants.

G. *Plaintiff's Ninth Cause of Action for Unjust Enrichment*

Plaintiff alleges that JPMorgan, WaMu, and Deutsche "were able to sell Plaintiff's mortgage to investors at an inflated value," and Quality "was able to earn fees from a Trustee's Sale that was procedurally flawed," and that Defendants were thereby unjustly enriched. Compl. P 105. To state a claim for unjust enrichment, Plaintiff must plead the "receipt of a benefit and the unjust retention of the benefit at the expense of another." *Lectrodryer v. Seoulbank*, 77 Cal. App. 4th 723, 726, 91 Cal. Rptr. 2d 881 (Ct. App. 2000). The Court does not find Plaintiff's [*18] theory of unjust enrichment to be legally plausible. This cause of action explicitly focuses on the profit that Defendants garnered from the "inflated value" of Plaintiff's mortgage when WaMu sold it to investors, but there is no indication that this "inflated value" was reaped at Plaintiff's expense.

In Plaintiff's Opposition, Plaintiff also suggests that this cause of action is based on Defendants' collection of "unearned fees." These fees are not clearly explained or identified in the Complaint, [4] although they are mentioned several times. *See, e.g.*, Compl. PP 22, 24, 56. This cause of action is therefore DISMISSED with regard to Defendants JPMorgan and Deutsche.

> 4 For example, it is not clear whether Plaintiff is referring to the fees associated with her monthly payments, with loan origination, or with the SFA. Clarity in this regard is necessary to allow Defendants to prepare their defense.

H. *Plaintiff's Tenth Cause of Action for Accounting*

Plaintiff alleges that "[t]he true lenders and owners of the loan are the individual investors of the securitized loan," and that Defendants have no right to receive any of the payments Plaintiff has made on the loan. Compl. P 107. The claim is [*19] not compelling. The Complaint does not indicate any legal basis for concluding that entities other than Defendants are entitled to her loan payments. Her assertion that her loan payments should be made to the purchasers of the security instrument backed by Plaintiff's mortgage is pure speculation. This Court need not accept the Complaint's legal conclusions are true. *Iqbal*, 129 S.Ct. at 1949-50.

In addition, Plaintiff seeks an accounting to determine the amount owed under the loan. Compl. P 108. "A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." *Hafiz v. Aurora Loan Servs.*, No. 09-1963, 2009 U.S. Dist. LEXIS 60003, 2009 WL 2029800, at *2 (N.D. Cal. July 14, 2009) (quoting *Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 179, 92 Cal. Rptr. 3d 696 (Ct. App.

2009)). Plaintiff does not allege that any balance is due to her. Instead, she seeks an accounting to determine how much money she owes under the loan. Compl. P 108. Plaintiff does not cite any authority that supports her right to seek an accounting under these circumstances. Accordingly, Plaintiff's [*20] claim for an accounting is DISMISSED WITH PREJUDICE as to all Defendants.

I. Plaintiff's Eleventh Cause of Action for Quiet Title

The Complaint's quiet title claim is based entirely on Plaintiff's baseless legal assertion that "Defendants' security interest in the SUBJECT PROPERTY has been rendered void and . . . the Defendants are not the holder in due course of the NOTE, and they are not the one entitled to the possession of the NOTE. Only the individual investors of the securitized loan are entitled to act on the loan." Compl. P 110. The Court rejects Plaintiff's conclusions as legally incorrect. Plaintiff alleges that the foreclosure procedures were initiated by Quality, which had been designated the trustee under the Deed of Trust. *See* Substitution of Trustee at 5-6. As the trustee, Quality was entitled to initiate foreclosure proceedings. *See* Cal. Civ. Code § 2924.

Case law addressing this issue is clear: "Under Civil Code section 2924, no party needs to physically possess the promissory note." *Sicairos v. NDEX West, LLC*, No. 08-2014, 2009 U.S. Dist. LEXIS 11223, at *7 (S.D. Cal. Feb. 11, 2009); *see also Coyotzi v. Countrywide Fin. Corp.*, No. 09-1036, 2009 U.S. Dist. LEXIS 91084, at *53-54 (E.D. Cal. Sept. 15, 2009) [*21] (same); *Lomboy v. SCME Mortgage Bankers*, No. 09-1160, 2009 U.S. Dist. LEXIS 44158, *12-13 (N.D. Cal. May 26, 2009) ("Under California law, a trustee need not possess a note in order to initiate foreclosure under a deed of trust."). Plaintiff's quiet title claim is DISMISSED WITH PREJUDICE as to all parties.

J. Plaintiff's Twelfth and Thirteenth Causes of Action for Declaratory and Injunctive Relief

Plaintiff's claims for declaratory and injunctive relief are also based on the same untenable theory that Defendants lost the power to foreclose on Plaintiff's property after they sold the promissory note and the note was securitized. Compl. PP 113-19, 123. The claims are therefore DISMISSED WITH PREJUDICE.

K. Plaintiff's Federal Claims

Plaintiff alleges that WaMu violated various federal statutes, including the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601 *et seq.*, the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*, and the Equal Credit Opportunity Act ("ECOA"), *id.* §§ 1691 *et seq.*, and that JPMorgan and Deutsche are liable as WaMu's successors in interest. Compl. PP 92, 94-96. Defendants respond by pointing out that JPMorgan is not liable for these claims, as [*22] they are all "borrower claims," as discussed in Part IV(A), *supra.*

An examination of the Complaint bears out JPMorgan's contention. Plaintiff claims that WaMu breached TILA because it used Plaintiffs' "improper, unverified, and stated income to verify the loan, and their fraudulent acts led to a failure to disclose the proper terms of the loan to Plaintiff." Compl. P 96. WaMu allegedly violated ECOA "by intentionally entering Plaintiff into a loan with an interest rate and monthly payment greater than what her and her husband were approved for." *Id.* P 95. WaMu's only alleged RESPA violation was failure "to properly underwrite Plaintiff's loan causing her to enter a mortgage with a higher interest rate and monthly payment than she and her husband were approved for, and resulting in a loan that they could not reasonably afford." *Id.* P 94. All of these alleged violations take place during the loan origination process, rather than during the provision of loan services.

Plaintiff's Opposition also indicates that JPMorgan should be liable for communications made to Plaintiff during the loan modification process, during which it was not clear whether Plaintiff was working with WaMu or JPMorgan. [*23] Opp'n at 5-6. However, neither the Opposition nor the Complaint indicates how this behavior implicates any of the federal statutes. Plaintiff has not alleged any violation of federal law for which JPMorgan may be held liable.

Plaintiff also asserts in her Opposition that "Deutsche assumed Defendant WAMU's position under the Promissory Note and the Deed of Trust through the" Assignment of Deed of Trust, and that "[a]s an assignee, DEUTSCHE stands in the shoes of the assignor, WAMU." *Id.* at 5. Plaintiff may bring an action against an assignee under TILA "only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement," 15 U.S.C. § 1641(a), and Plaintiff has not indicated that this was the case. A claim under ECOA can be brought against a creditor, including "any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." 15 U.S.C. § 1691a(e). Plaintiff has not indicated any such participation on the part of Deutsche. As for Plaintiff's RESPA claim, the Court cannot discern which provision of RESPA has allegedly been violated. The claims are therefore DISMISSED as to Deutsche. [5]

5 These [*24] claims are the only basis for federal jurisdiction, and the Court will sua sponte remand this case to state court if Plaintiff does not replead them in her amended complaint.

V. *CONCLUSION*

For the reasons stated above, Defendants' Motion to Dismiss is GRANTED IN PART and DENIED IN PART:

1. Plaintiff's first cause of action for fraud is DISMISSED WITHOUT PREJUDICE as to JPMorgan; Plaintiff may amend this claim against JPMorgan to focus only on the provision of loan services or JPMorgan's own conduct.

2. Plaintiff's second cause of action for misrepresentation is DISMISSED WITHOUT PREJUDICE as to JPMorgan; Plaintiff may amend this claim against JPMorgan to focus only on the provision of loan services or JPMorgan's own conduct.

3. Plaintiff's third cause of action for breach of contract is undisturbed.

4. Plaintiff's fourth cause of action for promissory estoppel is undisturbed.

5. Plaintiff's fifth cause of action for breach of covenant of good faith and fair dealing is undisturbed.

6. Plaintiff's sixth cause of action for violation of foreclosure procedures is DISMISSED WITH PREJUDICE as to all Defendants, but without prejudice to Plaintiff pursuing this theory as a predicate for her claim [*25] under California's Unfair Competition Law.

7. Plaintiff's seventh cause of action for violation of California's Unfair Competition Law is undisturbed.

8. Plaintiff's eighth cause of action for unconscionability is DISMISSED WITHOUT PREJUDICE as to all Defendants.

9. Plaintiff's ninth cause of action for unjust enrichment is DISMISSED WITHOUT PREJUDICE as to Defendants Deutsche and JPMorgan.

10. Plaintiff's tenth cause of action for accounting is DISMISSED WITH PREJUDICE as to all Defendants.

11. Plaintiff's eleventh cause of action for quiet title is DISMISSED WITH PREJUDICE as to all Defendants.

12. Plaintiff's twelfth cause of action for declaratory relief is DISMISSED WITH PREJUDICE as to all defendants.

13. Plaintiff's thirteenth cause of action for injunctive relief is DISMISSED WITH PREJUDICE as to all Defendants.

14. Plaintiff's federal claims are DISMISSED WITH PREJUDICE as to JPMorgan, and DISMISSED WITHOUT PREJUDICE as to Deutsche.

The Case Management Conference scheduled for June 16, 2010 is CONTINUED to August 13, 2010. The parties shall appear at 10:00 a.m. in Courtroom 1, on the 17th floor, U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102. A Joint Case Management [*26] Statement must be filed at least seven (7) days prior to the Case Management Conference.

Plaintiff Yvonne Zivanic shall submit an amended complaint within thirty (30) days from the date of this Order. Failure to do so will result in dismissal of her case in its entirety.

IT IS SO ORDERED.

Dated: June 9, 2010

/s/ Samuel Conti

UNITED STATES DISTRICT JUDGE

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I am employed in the County of Ventura, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 1860 Bridgegate Street, Westlake Village, California 91361-1409.

On August 9, 2012, I served the foregoing document described as **RESPONDENTS' BRIEF** on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

Roger S. Senders, Esq.
The Law Offices of Roger S. Senders
4264 Overland Avenue
Culver City, CA 90230
Telephone: (310) 815-9788
Facsimile: (310) 839-0518
Attorneys for Plaintiff Susan Lange

Douglas Gillies, Esq.
3756 Torino Drive
Santa Barbara, CA 92105
Telephone: (805) 682-7033
Attorneys for Plaintiff Susan Lange

S. Christopher Yoo, Esq.
Mariel A. Gerlt, Esq.
AlvaradoSmith
1 MacArthur Place, Suite 200
Santa Ana, CA 92707
Telephone: (714) 852-6800
Facsimile: (714) 852-6899
Attorneys for Defendant JP Morgan Chase Bank, N.A.

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797
(Four copies)

Ventura County Superior Court
800 South Victoria Avenue
Ventura, CA 93009

[X] **[VIA U.S. MAIL]** I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. It is deposited with the United States Postal Service on the same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] I caused such envelope to be deposited in the mail at Westlake Village, California. The envelope was mailed with postage thereon fully prepaid.

[ ] **[VIA FACSIMILE]** I transmitted a true copy of said document by facsimile machine, pursuant to Rule 2005. The facsimile machine I used complied with Rule 2003(3) and no error was
reported by the machine. Said facsimile transmission was directed as indicated on the fax number listed above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 9, 2012, at Westlake Village, California.

JENNIFER COSTIN