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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BELL HOSPITAL CORPORATION, et al., Plaintiffs and Appellants, v. NEW AID MEDICAL SUPPLY, INC., et al., Defendants and Respondents.	B268177 (Los Angeles County Super. Ct. No. BC502267)

APPEAL from an order of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Affirmed in part, reversed in part, and remanded.

Law Offices of Cheryl C. Turner and Cheryl C. Turner for Plaintiffs and Appellants.

The Dreyfuss Firm, Lawrence J. Dreyfuss, for Defendants and Respondents T.D. Service Company and Fran DePalma.

Fidelity National Law Group, J. Walter Gussner, for Defendants and Respondents New Aid Medical Supply, Inc., Earl Collins, and Rita Collins.

Plaintiffs and appellants Bell Hospital Corporation (Bell Hospital) and American Cardiocare Medical Center, Inc. (American Cardiocare)[1] sued two sets of defendants: a corporation and related individuals that instituted nonjudicial foreclosure proceedings on real property located in Long Beach; and the trustee company that processed the foreclosure, plus one of its employees. After plaintiffs failed to obtain a preliminary injunction to stop the foreclosure, they filed a First Amended Complaint to which all defendants demurred. Counsel for plaintiffs failed to timely oppose the demurrer filed by the first set of defendants and then failed to appear at the hearing on that demurrer. The trial court struck plaintiffs' untimely opposition, sustained the demurrer without leave to amend, advanced the hearing date on the demurrer filed by the second set of defendants, and dismissed the action in its entirety. We consider whether dismissal of the suit was proper, which requires us to assess whether the First Amended Complaint states facts sufficient to properly allege any of the twelve causes of action it includes.

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[1] Based on the appellate record and the submissions from plaintiffs' counsel in this court, it initially appeared American Cardiocare may not be a proper party on appeal. We grant plaintiffs' request to take judicial notice of a Notice of Association of Counsel filed on May 19, 2015, in the trial court and conclude on that basis that the notice of appeal was effective as to both plaintiffs.

I. BACKGROUND

A. The Relevant Transfers and Encumbrance of the Subject Property

The real property that is the subject of this lawsuit and that serves as the site of a medical clinic is located at 1125 Cherry Avenue in Long Beach, California (the Property). During the relevant time period, Harvard Healthcare Medical Associates, Inc. (Harvard Healthcare) initially held title to the Property. In August 2003, Harvard Healthcare transferred the property by grant deed to Bell Hospital.

Later in 2005, records of two transactions involving the property were recorded with the Los Angeles County recorder's office on the same day. First, Cal Vista Mortgage Company recorded a grant deed that transferred the Property from Harvard Healthcare to "Bell Hospital Corporation, a Delaware Corporation." As noted on the document itself, a prior deed had been recorded on August 7, 2003, and this new deed between the same parties was being recorded again "to confirm title in the grantee." Second, Cal Vista Mortgage Company recorded a "Deed of Trust and Assignment of Rents" (the Trust Deed) to designate the Property as security for a $355,000 loan evidenced by a separate promissory note.[2] The Trust Deed stated "Bell Hospital Corporation, a Delaware Corporation" was the borrower; Cal Vista Home Loans, Inc. (Cal Vista) was the lender and the trustee. Both recorded instruments were executed by Jerry Aguolu: he executed the grant deed from Harvard Healthcare to

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[2] The appellate record does not include a copy of the promissory note; no copy of the note itself was attached as an exhibit to the operative complaint.

"Bell Hospital Corporation, a Delaware Corporation" as president of Harvard Healthcare and he executed the Trust Deed as president of "Bell Hospital Corporation, a Delaware Corporation."

In 2006, Cal Vista assigned the Trust Deed, and thus, the beneficial interest in the $355,000 promissory note, to New Aid Medical Supply, Inc. (New Aid). At the time, there was ongoing litigation between Bell Hospital and Earl Collins, who, with his wife Rita Collins, controlled New Aid. That litigation arose from a deed dispute between Earl Collins and Bell Hospital, one in which Earl Collins "used self-help and fraudulently, illegally and forcibly locked-out [Bell Hospital] from the [Property] without any due process or court order beginning in December 2005 and continuing through June 2012."[3]

Sometime in June 2012, the dispute between Earl Collins and Bell Hospital settled and Earl Collins "execut[ed] a Grant Deed and Reconveyance of the [Property] back to [Bell Hospital] and return[ed] possession of [the Property] back to [Bell Hospital]." On July 20, 2012, "Bell Hospital Corporation, a *California* Corporation" (emphasis ours) recorded a grant deed transferring the Property to American Cardiocare. The grant deed was again signed by Jerry Aguolu, this time in his capacity as "President of Bell Hospital Corporation, [a] California Corporation."

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[3] The appellate record in this case does not include documents filed in this separate litigation. The description of that litigation we include in this opinion is taken from plaintiffs' First Amended Complaint in this case.

B. Foreclosure, and This Lawsuit

1. Foreclosure

New Aid first instituted nonjudicial foreclosure proceedings on the Property at about the same time Bell Hospital transferred the Property to American Cardiocare. The notice of trustee's sale, which asserted the overdue balance on the note secured by the Trust Deed was in excess of $600,000, scheduled a foreclosure auction to take place on March 7, 2013. Two days before the scheduled auction, Bell Hospital and American Cardiocare filed this lawsuit to enjoin the foreclosure and obtain other relief related to their interests in the Property.

The foreclosure sale did not go forward as noticed. Instead, defendants New Aid, Earl Collins, and Rita Collins substituted a new trustee, defendant T.D. Service Company (T.D. Service), to begin the foreclosure process anew. T.D. Service recorded a new notice of default in January 2015, and four months later, in April 2015, T.D. Service recorded a notice of trustee's sale scheduling the Property for auction on May 7, 2015. Although the record on appeal as designated by Bell Hospital does not include the relevant trial court filings during this period, the parties agree the trial court denied plaintiffs' request to preliminarily enjoin the foreclosure sale. Plaintiffs did not appeal the trial court's refusal to enjoin the sale and it accordingly proceeded as scheduled. Defendant New Aid was the highest qualified bidder and purchased the Property via credit bid for the amount assertedly due and owing: $750,299.35.

2. The operative complaint

Just over a month after the completed foreclosure sale, plaintiffs Bell Hospital and American Cardiocare filed the

operative First Amended Complaint (the operative complaint). It added T.D. Service and one of its employees as defendants (the Trustee Defendants) and revised and added to the previously alleged causes of action to account for the fact that the Property had been sold at foreclosure auction. The operative complaint also added Rita Collins and Earl Collins as defendants in addition to New Aid, the company that plaintiffs alleged was their alter ego. (New Aid, Rita Collins, and Earl Collins are referred to collectively as the New Aid Defendants.)

The operative complaint comprised twelve causes of action: (1) wrongful foreclosure, (2) set aside of the foreclosure sale, (3) negligent misrepresentation, (4) and (5) intentional misrepresentation (two causes of action), (6) concealment, (7) "breach of fiduciary duty/negligence", (8) negligence, (9) slander of title, (10) cancellation of trustee deed, (11) quiet title, and (12) accounting. In contravention of rule 2.112 of the California Rules of Court, the operative complaint fails to identify the specific defendant(s) against which each cause of action is pled. It appears, however, that the first, second, ninth, and tenth causes of action are asserted against all defendants; the fifth, sixth, eighth, eleventh, and twelfth causes of action are asserted solely against the New Aid Defendants; and the third, fourth, and seventh causes of action are alleged solely against the Trustee Defendants.

As described by the operative complaint's general allegations, one or more of three theories of liability underlie each of the causes of action. Paragraph 21 of the operative complaint summarizes those theories as follows: "[The New Aid Defendants] knowingly refused to account for and deduct the rents and profits collected by them from the amount they claimed

was due which resulted in a grossly inflated and false statement of the amount due in the Notice of Default and Notice of Trustee Sale issued by them before the trustee sale of the subject property. They also defrauded the Plaintiffs by conducting a trustee sale of the subject property knowing that defendant [New Aid] was not the beneficiary of any deed of trust on the subject property. They also defrauded the Plaintiffs by conducting a trustee sale of the subject property knowing that none of the defendants held a valid lien to foreclose on the subject property." In other words, and as unpacked elsewhere in the operative complaint, plaintiffs contended (1) the amount due on the promissory note should have been reduced by the "rents and profits" the New Aid defendants allegedly received during the time when they were in exclusive possession of the Property (2005-2012), (2) New Aid was not the beneficiary on the Trust Deed because Earl Collins had represented he was the actual beneficiary of the Trust Deed, and (3) the Trust Deed did not create a valid lien because it described Bell Hospital as a Delaware corporation when in fact Bell Hospital "is and at all times has been" a California corporation.

3. Demurrers

Both the New Aid Defendants and the Trustee Defendants demurred to the operative complaint, arguing it failed to state facts sufficient to constitute any of the twelve alleged causes of action. The New Aid Defendants' demurrer argued, among other things, that Bell Hospital lacked standing to sue because it possessed no interest in the Property at the time of the foreclosure, having granted American Cardiocare title to the property in 2012. The Trustee Defendants arguments in support

of their demurrer paralleled, in many ways, the arguments made by the New Aid Defendants, but the Trustee Defendants also emphasized the limited role they played in effecting the foreclosure and the statutory protections accorded to foreclosure trustees generally.

The New Aid Defendants' demurrer was filed two weeks before the Trustee Defendants' demurrer. This meant the New Aid Defendants' demurrer was set for hearing on September 2, 2015—almost a month before the September 30, 2015, hearing scheduled for the Trustee Defendants' demurrer.

Cheryl Turner, who served as counsel for both plaintiffs (as of shortly after filing of the operative complaint), did not timely oppose the New Aid Defendants' demurrer; her opposition was filed six days late, and it was served by mail in contravention of the statute that requires a faster means of delivery for opposition papers (Code Civ. Proc., § 1005, subd. (c)). Ms. Turner also failed to appear at the hearing on the New Aid Defendants' demurrer.

4. The trial court's ruling

The trial court issued a minute order sustaining the New Aid Defendants' demurrer without leave to amend. In the minute order, the trial court explained it was striking Ms. Turner's opposition to the New Aid Defendants' demurrer as untimely, and the court noted "[p]laintiffs' failure to appear to oppose today's motions also suggests plaintiffs had no meritorious opposition." The court further reasoned "plaintiffs have not presented any cogent argument, whether in a timely opposition or orally today[,] nor have plaintiffs stated how they would amend to state any valid cause of action." The trial court accordingly ordered the operative complaint dismissed in its

entirety, advanced the Trustee Defendants' demurrer to the date of its order, and placed the Trustee Defendants' demurrer off calendar in light of the court's dismissal of the suit in its entirety.[4]

Ms. Turner later filed a motion for reconsideration of the trial court's dismissal of the lawsuit. The motion conceded the opposition papers were "a few days late," but argued Ms. Turner's "inability to appear at the required time was not because [plaintiffs] had no meritorious opposition, but was because of the notice of a medical emergency of a close elderly family member." Ms. Turner's declaration accompanying the motion provided additional detail: "I was late in appearing due to receiving a life alert notification that a close 95 year old relative that I am partially responsible for had fallen and was not responding. Due to the trauma and commotion that occurred that morning, as I was headed to the court, and I realized I was going to be late, I then realized that I had forgotten the phone there. By the time I was able to call the court, the matter had already been heard." The motion for reconsideration maintained the operative complaint had merit but simultaneously offered to "amend the complaint as necessary to properly allege all causes of action."

The trial court denied the motion for reconsideration. No transcript of the hearing on the motion is included in the appellate record, but the trial court's minute order indicates Ms. Turner was present at the hearing. As stated in the minute order, the trial court concluded plaintiffs had presented no new

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[4] Plaintiffs' deadline to file opposition papers to the Trustee Defendants' demurrer had not yet expired at the time the trial court dismissed the case.

facts, circumstances, or law to justify reconsideration.[5] In particular, the court found Ms. Turner had still been unable to explain "how the complaint could be amended to state a cause of action as to each or any of the defectively pled claims," noting her "statement today that she is 'a creative writer' is not a statement of how any of the defective claims can in actuality be amended to overcome the defects previously articulated in the moving papers on the Demurrers."

II. DISCUSSION

Although plaintiffs failed to mount any timely opposition to the New Aid Defendants' demurrer in the trial court, we conclude we are obligated to review the merits of the operative complaint. We therefore parse each of the twelve causes of action and assess the viability of the three theories on which all are predicated: that the Trust Deed is invalid because it describes Bell Hospital as a Delaware corporation, that New Aid was not the true beneficiary of the Trust Deed, and that the amount alleged to be in default on the promissory note associated with the Trust Deed was "grossly overstated" because it should have been reduced by profits the New Aid defendants allegedly received while occupying the Property.

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[5] The court also expressed some skepticism concerning Ms. Turner's excuse for failing to appear at the demurrer hearing. The court noted it had received no explanation for Ms. Turner's "total failure to communicate with the court at any time on [the day of the demurrer hearing], or at any other time, to obtain permission for the late filing of plaintiffs' opposition documents or to explain her absence on that date."

The first two of these theories are easily dismissed as inconsistent with judicially noticeable documents, and the third fails almost entirely, mainly for lack of sufficient allegations to establish prejudice attributable to the completed foreclosure sale or detrimental reliance on misrepresentations or concealment by defendants. But we conclude there is a reasonable possibility plaintiff American Cardiocare could amend the eleventh cause of action for quiet title to state a valid claim for relief against the New Aid Defendants. We therefore reverse solely as to that cause of action to give plaintiff American Cardiocare an opportunity to state a valid quiet title claim against the New Aid Defendants.

A. A Review of the Merits of the Operative Complaint Is Required

Bell Hospital believes the trial court's minute order sustaining the demurrer without leave to amend and dismissing the case indicates the court "did not evaluate whether or not the [operative complaint] and each of its causes of action actually adequately alleged facts sufficient to state causes of action." As Bell Hospital reads the order, the court effectively ordered the dismissal solely because its demurrer opposition was untimely and its attorney failed to appear at the scheduled demurrer hearing. That is not how we read the minute order. In our view, the order's language indicates the touchstone for the court's ruling was its belief that the complaint was substantively without merit, albeit for reasons the order does not discuss or explain.

But regardless of how one reads the court's order, we must examine the sufficiency of the operative complaint's allegations.

Although we can envision circumstances in which a plaintiff's total or near total abandonment of the defense of a complaint would operate as a forfeiture of the ability to challenge on appeal the sustaining of a demurrer (cf. *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1), those circumstances are not present here. A late-filed opposition (albeit one stricken by the trial court) and a failure to appear at a demurrer hearing (followed by a motion to reconsider) do not constitute a forfeiture that dispenses with the need for an assessment of the viability of the operative complaint's allegations. (*Dobbins v. Hardister* (1966) 242 Cal.App.2d 787, 797 ["It is well established that the failure of a party to appear and argue against a demurrer to his pleading is not per se a waiver of the cause of action stated in the complaint or the defense stated in the answer, but that it is the duty of the court to rule on the sufficiency of the pleading"]; *Greninger v. Fischer* (1947) 81 Cal.App.2d 549, 554-555 ["[T]he failure of a plaintiff to appear to argue against the demurrer cannot and should not, *per se*, be interpreted as a waiver of the cause of action. It is the duty of the court to rule on the sufficiency of the pleading . . ."]; see also Code Civ. Proc., § 472c, subd. (a) [question of whether trial court abused its discretion in sustaining a demurrer without leave to amend is open on appeal even if no request to amend the pleading was made].)

We therefore proceed to evaluate the sufficiency of the complaint, which as we next explain, requires our independent review. For these same reasons, the record on appeal is adequate

despite the absence of a reporter's transcript of the demurrer hearing (or the hearing on the motion for reconsideration).[6]

B. Standard of Review on Appeal from a Sustained Demurrer

We review de novo an order sustaining a demurrer without leave to amend. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010; *Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 537.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 [*Evans*].) To determine whether the trial court should, in sustaining the demurrer, have granted [the] plaintiff leave to amend, we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint's legal defect or defects. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [*Schifando*].)" (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. omitted (*Yvanova*).) "A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the

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[6] Bell Hospital argues the trial court erred in advancing the Trustee Defendant's demurrer and taking it off calendar, which prevented Bell Hospital from opposing the demurrer. Because we consider Bell Hospital's arguments on the merits as to both groups of defendants, we need not further discuss the propriety of the trial court's action.

demurrer, whether or not the [trial] court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; accord, *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504, fn. 2 [validity of the trial courts *action*, not the *reason* for its action, is what is reviewable].)

C. The First and Second Causes of Action for Wrongful Foreclosure and to Set Aside the Foreclosure Sale

The first cause of action for wrongful foreclosure and the second cause of action to set aside the foreclosure sale are alleged against all defendants. The elements the operative complaint must properly plead are the same for both causes of action: "'(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.'" (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408, quoting *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104.)

Both causes of action allege the foreclosure was fraudulent based on the three theories of liability we have already described: the Trust Deed was not security for the $355,000 loan because it described Bell Hospital as a Delaware corporation (not a California corporation), New Aid was not the true beneficiary of the Trust Deed and therefore had no authority to institute the foreclosure process, and defendants' failure "to deduct set-offs from the loan balance from the monies they had

collected from 2005 through 2012 while they were in exclusive possession of the property" resulted in a "grossly overstated" loan balance "which [p]laintiffs were unable to cure." The pertinent paragraphs of the operative complaint, however, fail to state sufficient facts to properly allege all the elements of a cause of action for wrongful foreclosure or to set aside a trustee sale.

Take first the Delaware/California state of incorporation allegations plaintiffs present to attack the validity of the Trust Deed. We can and do take judicial notice of the documents in the record that reflect (at least in part) the chain of title to the Property. (*Yvanova*, *supra*, 62 Cal.4th at p. 924 [request for judicial notice of recorded deed of trust, specifically, to its existence and contents but not disputable facts therein, properly granted in connection with considering the merits of a demurrer].) A grant deed from Harvard Healthcare, signed by Jerry Aguolu and recorded on February 7, 2005, confirmed title to the Property in "Bell Hospital Corporation, a Delaware Corporation." The Trust Deed, recorded on the same date likewise described Bell Hospital as a Delaware corporation, and it was signed by Jerry Aguolu as "President" of "Bell Hospital Corporation, a Delaware Corporation." Then later in 2012, Jerry Aguolu executed a grant deed transferring the Property from Bell Hospital—this time described as a "California corporation"—to American Cardiocare. These judicially noticed documents contradict and negate the operative complaint's allegation that "BELL HOSPITAL CORPORATION is and at all times has been a California corporation."[7] (*Evans*, *supra*, 38 Cal.4th at p. 20;

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[7] The operative complaint was verified by "Jeremiah Aguolu."

West v. JPMorgan Chase Bank, N.A. (2013) 214 Cal.App.4th 780, 801; *Alfaro v. Community Housing Imp. System & Planning Assn, Inc.* (2009) 171 Cal.App.4th 1356, 1382 ["In addition, '[a] court may take judicial notice of something that cannot reasonably be controverted [such as a recorded deed], even if it negates an express allegation of the pleading'"] (*Alfaro*).) Under the circumstances, the state of incorporation listed on the Trust Deed is at most a "mere inadvertence or typographical error that was not material and did not affect the validity of" the Trust Deed. (See *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 37 [omission of "Inc." from signature block of mortgage company was a mere inadvertence or typographical error that did not affect the validity of a substitution of trustee document].)

Next is the operative complaint's theory that Earl Collins, not New Aid, is the true beneficiary of the Trust Deed, which would mean that New Aid had no actual authority to institute foreclosure proceedings. Specifically, paragraph 27 of the operative complaint alleges: "Defendant[ ] EARL COLLINS, ASSIGNEE OF NEW AID MEDICAL SUPPLY alleges that he is the beneficiary under the [Trust Deed] and not defendant NEW AID MEDICAL SUPPLY, INC. Notwithstanding these facts, Defendants EARL COLLINS, RITA COLLINS, NEW AID MEDICAL SUPPLY, T.D. SERVICE COMPANY and FRAN DEPALMA wrongfully foreclosed on [p]laintiffs' property with a different beneficiary who apparently had no interest to foreclose on the subject property."

This allegation does not provide a valid basis for a cause of action for wrongful foreclosure or to set aside the trustee's sale because it is also contradicted by judicially noticeable documents.

We take judicial notice of the recorded instruments in the record on appeal that effected an assignment of Cal Vista's original beneficial interest in the Trust Deed. These instruments unambiguously name New Aid as the new beneficiary and defeat the operative complaint's allegation to the contrary.[8] (*Evans*, *supra*, 38 Cal.4th at p. 20 ["As explained earlier, a demurrer assumes the truth of the complaint's properly pleaded allegations, but not of mere contentions or assertions contradicted by judicially noticeable facts"]; *Alfaro*, *supra*, 171 Cal.App.4th at p. 1382; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-1118

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[8] The operative complaint's factual allegations on this point are also internally inconsistent. While paragraph 27 alleges Earl Collins represented he is the beneficiary under the Trust Deed and New Aid therefore had no authority to foreclose, paragraph 20 alleges that "Defendants EARL COLLINS and RITA COLLINS began to initiate the foreclosure process in the name of Defendant NEW AID MEDICAL SUPPLY." While plaintiffs may of course plead inconsistent legal theories, they are not entitled to plead inconsistent facts in a verified pleading. (*Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 328; accord, *Alfaro*, *supra*, 171 Cal.App.4th at p. 1381 ["A plaintiff may plead inconsistent counts or causes of action in a verified complaint, but this rule does not entitle a party to describe the same transaction as including contradictory or antagonistic facts"].) Plaintiffs do point in their reply brief to the answer to the *original* complaint in this action that was filed by Earl Collins in propria persona and as "Assignee of [New Aid]," and they argue this means New Aid had no authority to foreclose on the Property. The answer, however, contains no admission as to when Earl Collins purportedly became an assignee of New Aid.

[proper to judicially notice legal effect of recorded instrument to contradict complaint].)

The third theory of liability upon which the wrongful foreclosure and trustee-sale-set-aside causes of action rest requires a more extensive discussion. The gist of this theory is that the New Aid Defendants' failure to reduce the balance due under the promissory note by the amount of money they allegedly collected from 2005 through 2012 while in possession of the Property resulted in a "grossly overstated" loan balance that could not be cured. As we explain, the allegations in support of this theory fail to allege facts establishing the element of prejudice or harm that is indispensible to both causes of action.

Initially, we register our doubt that the operative complaint properly pleads facts to adequately allege Bell Hospital was entitled to any (or some share) of the profits made by New Aid during the period of its occupancy of the Property. The complaint alleges Earl Collins personally and as assignee of New Aid had a "deed dispute" with Bell Hospital and "fraudulently, illegally and forcibly locked-out BELL HOSPITAL from the subject property without any due process or court order beginning in December 2005 and continuing through June 2012." The operative complaint goes on to allege "the original deed dispute" was resolved after seven years of litigation "by court ordered settlement with EARL COLLINS executing a Grant Deed and Reconveyance of the [Property] back to [Bell Hospital]." These allegations, when stripped of mere contentions and legal conclusions that may be disregarded when reviewing a demurrer (e.g., "fraudulently," "illegally," et cetera), provide no details about the nature of the dispute or the associated litigation, and virtually no details about the resolution by settlement. The

properly pled facts, few as they are, do allege Bell Hospital did not occupy the Property for a period of time and the New Aid Defendants conducted business at the property during that time, but it is unclear why that is sufficient to allege Bell Hospital was entitled to credit for any profits made by the New Aid Defendants during the period of non-occupancy after the dispute was later resolved by settlement.[9]

We assume for purposes of argument, however, that plaintiffs have adequately alleged they were entitled to at least some credit for profits the New Aid Defendants received during the period when Bell Hospital did not occupy the Property. Even on that understanding, neither plaintiff can demonstrate prejudice or harm attributable to the foreclosure sale of the Property.

We discuss Bell Hospital first. Bell Hospital cannot demonstrate prejudice because it did not hold title to the Property at the time of the foreclosure sale. Years before the foreclosure auction (and the operative notice of default and notice of trustee sale), Bell Hospital had transferred the Property by grant deed to American Cardiocare. Because Bell Hospital was no longer the owner of the Property at the time of the trustee's sale, Bell Hospital cannot have been harmed by the transfer of the Property from its then owner (American Cardiocare) to another (New Aid).

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[9] Plaintiffs include in their opening brief's "Statement of Facts" a variety of additional factual assertions. These facts are not supported by the operative complaint's allegations nor a citation to the appellate record.

Bell Hospital appears to offer a counterargument (albeit one phrased in terms of "standing" to sue): that the operative complaint can be read to allege prejudice because Bell Hospital "was still the obligor under the Cal Vista [promissory] note at the time of the wrongful foreclosure of that note." That is, even though Bell Hospital had transferred the Property to American Cardiocare by grant deed long before the foreclosure, the allegation is that American Cardiocare took only the Property and did not assume the note for which the Property served as security. Instead, the note remained the obligation of Bell Hospital, which gives Bell Hospital "the right to dispute the wrongful foreclosure . . . since the amount claimed in default included the amounts which Bell did not owe because of the failure of the defendants to deduct monies they collected from the [Property] . . . ."

This prejudice argument fails because Bell Hospital, as the borrower that remained obligated to repay the original Cal Vista loan, could only have benefitted—not been harmed—by the trustee sale of the Property. When a lender proceeds by way of nonjudicial foreclosure proceedings, the trustee sale ordinarily operates to extinguish the borrower's liability to repay the debt for which the foreclosed property served as the security. (Code Civ. Proc., § 580d; *Yvanova*, *supra*, 62 Cal.4th at p. 927 ["Generally speaking, the foreclosure sale extinguishes the borrower's debt; the lender may recover no deficiency"]; *Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 516 ["'No liability, direct or indirect, should be imposed upon the debtor following a nonjudicial sale of the security'"]; see also *CADC/RAD Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775, 783-784 [anti-deficiency statutes

prohibit lenders from obtaining judgments against borrowers when the foreclosure sale proceeds are insufficient to cover the amount of the debt].) Because the only effect of the nonjudicial foreclosure here was to wipe out the entirety of Bell Hospital's existing debt regardless of the actual amount, Bell Hospital cannot assert prejudice from the sale on the ground that it was the holder of the promissory note associated with the Trust Deed.

That leaves American Cardiocare. It was the legal owner of the Property at the time of the foreclosure, but it necessarily took the Property subject to New Aid's right to foreclose if Bell Hospital defaulted on its loan repayment obligations. (The Trust Deed was recorded years before the grant deed transferring the property from Bell Hospital to American Cardiocare.) American Cardiocare therefore cannot claim prejudice or harm from foreclosure if Bell Hospital was in default in *any* amount on the promissory note associated with the Trust Deed—foreclosure in such a circumstance was a power conferred by the Trust Deed and was the risk American Cardiocare assumed in taking title to the Property.

The operative complaint can be read to allege, however, that American Cardiocare was prejudiced because the amount alleged to be in default was "grossly overstated," which prevented American Cardiocare from acting to "cure" Bell Hospital's default. Assuming American Cardiocare would have the right to cure on behalf of a third party (Bell Hospital), the paragraphs that comprise the wrongful foreclosure and trustee-sale-set-aside causes of action allege only that the default amount was grossly overstated, not that there was no amount due at all—a position which would be inconsistent with Bell Hospital's argument on appeal that it was prejudiced because it remained the obligor on

the promissory note. (Appellant's Op. Br. at pp. 32-33 [operative complaint can and should be amended to allege "that [Bell Hospital] was still liable on the deed of trust and note irrespective of whether title was transferred by Bell Hospital to American Cardiocare, since no one else including American Cardiocare assumed the Bell Hospital obligation for payment on the Cal Vista note . . . .") Just as important, the complaint includes no allegation that American Cardiocare (or Bell Hospital for that matter) could and would have cured the "correct" default amount before the Property was auctioned off at the trustee sale.[10] The operative complaint does allege that if a "court should determine that the lien [on the Property] is valid or may be corrected and that [New Aid] is the beneficiary, and that [p]laintiffs owe any money subject to an accounting, [p]laintiffs are able [to] offer to tender all amounts due and owing, if any, so that the property may be redeemed." But this is insufficient to allege prejudice from foreclosure (even if it would perhaps be sufficient to allege the element of tender that must accompany a demand for equitable relief). What matters is whether American Cardiocare could and would have cured a non-overstated default amount on Bell Hospital's behalf before the trustee sale—and the complaint alleges neither.

Plaintiffs made no showing at the demurrer hearing (obviously) or in their subsequent motion for reconsideration regarding how they could amend the wrongful foreclosure and trustee-sale-set-aside causes of action to state a valid claim, but

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[10] We find it significant in this regard that plaintiffs did not seek appellate review of the trial court's order denying their request to enjoin the trustee sale from going forward.

plaintiffs include a short discussion in their opening brief of how they might amend. Their suggestions include the amendment concerning liability on the promissory note we have already quoted *ante*, as well as an amendment to allege Bell Hospital was operating a medical practice on the property at the time of foreclosure and that Bell Hospital "suffered damage to credit" because it was listed as the trustor.

We readily acknowledge "'the showing as to how [a] complaint may be amended need not be made to the trial court and can be made for the first time to the reviewing court [citation] . . . .' [Citation.]" (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1185-1186.) Plaintiffs bear the burden to prove an amendment would cure any defects (*Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1044), and to discharge that burden, plaintiffs "'must show in what manner [they] can amend [their] complaint and how that amendment will change the legal effect of [their] pleading.' [Citation.]" (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44 [a plaintiff must clearly and specifically set forth the applicable substantive law, the legal basis for amendment, and factual allegations that sufficiently state all required elements of that cause of action].) Plaintiffs have not adequately discharged their burden to demonstrate a viable amendment, and the possible amendments they identify do nothing to remedy the defects in the two causes of action at issue, including as to the indispensible element of prejudice. There is accordingly no basis to reverse the ruling sustaining the demurrer without leave to amend as to the operative complaint's first and second causes of action.

D. The Third, Fourth, Fifth, and Sixth Causes of Action for Negligent Misrepresentation, Intentional Misrepresentation, and Concealment

Plaintiffs allege three causes of action for misrepresentation and one for concealment, which is a species of fraud. (Civ. Code, § 1710, subd. (c).) The third cause of action for negligent misrepresentation and the fourth cause of action for intentional misrepresentation are alleged against only the Trustee Defendants. The fifth cause of action for intentional misrepresentation and the sixth cause of action for concealment are alleged solely against the New Aid Defendants. We will summarize the allegations plaintiffs make in connection with each of these causes of action and highlight the defect common to all: the failure to adequately allege detrimental reliance on the alleged misrepresentation or fact concealed.

The negligent misrepresentation cause of action alleges the Trustee Defendants, by issuing and recording the notice of default and notice of sale, "represented to the public, including the [p]laintiffs by means of recording that [p]laintiffs were in default for the failure to pay installment, interest, and late charges from 2006 to on or about January 2015. . . . [and that New Aid] was a beneficiary with a valid deed of trust and was entitled to foreclose on the subject property." The operative complaint alleges the Trustee Defendants made these representations with no reasonable grounds for believing them to be true, and "with the intention of forcing [p]laintiffs to rely on those statements for the amount needed to cure the alleged default and save their property from being sold at the trustee sale." The negligent misrepresentation cause of action further alleges that "[f]rom January 2015 through May 7, 2015,

[p]laintiffs saw and were forced to rely on the defendants' representations, since [p]laintiffs had no control over stopping defendants from proceeding with the sale of their property based upon the false representations that defendants refused to change or retract."

The intentional misrepresentation cause of action alleged against the Trustee Defendants mostly mirrors the negligent misrepresentation cause of action. It adds an allegation that the Trustee Defendants knew at the time they made the representations in the notice of default and notice of trustee sale concerning the Property that the representations were false. The intentional misrepresentation claim against the Trustee Defendants also includes boilerplate allegations of oppression, fraud, and malice intended to serve as a basis for recovering punitive damages.

The intentional misrepresentation cause of action alleged against the New Aid Defendants essentially duplicates the allegations of the negligent and intentional misrepresentation causes of action alleged against the Trustee Defendants. It asserts the New Aid Defendants falsely represented plaintiffs owed principal, interest, and late charges on the loan during the period from 2006 to 2012 when Bell Hospital did not occupy the Property; it alleges the representations were made "with the intention of forcing [p]laintiffs to rely upon their representations for the amount needed to cure the alleged default and save their property from being sold to another at the trustee sale"; and it repeats the allegation that "[p]laintiffs saw and were forced to rely on the defendants' representations[ ] since [p]laintiffs had no

control over stopping defendants from proceeding with the sale of their property based upon the false representations . . . ."[11]

The concealment cause of action against the New Aid Defendants alleges they concealed the fact they had collected rents and profits from the Property from February 2006 through June 2012. The cause of action further asserts the New Aid Defendants had a duty to disclose this fact but suppressed it, thereby forcing plaintiffs "to rely upon a false, grossly misstated and inflated notice of default and notice of trustee sale and were unable to take action to cure the alleged default to avoid the foreclosure sale of their property."

Claims for negligent misrepresentation, intentional misrepresentation, and concealment all require a showing—or in the case of a complaint, a proper allegation of—reliance on the misrepresentation or concealed fact by the party alleged to have suffered harm. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239, fn. 4 [elements of negligent misrepresentation include justifiable reliance and resulting damage] (*Alliance Mortgage*); *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 413 [reliance indispensible to liability for negligent misrepresentation]; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 [elements of fraud include a misrepresentation (which

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[11] The intentional misrepresentation cause of action against the New Aid Defendants also adds an allegation they "submitted forged and fraudulent documents that were purporting to be the note secured by the deed of trust on the subject property." Because this is a mere conclusion unsupported by specific factual allegations, we disregard it. (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 551.)

can be a false representation or concealment) and justifiable reliance]; *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864 ["A plaintiff asserting fraud by misrepresentation is obliged to plead and prove actual reliance . . ."]; see also *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613 [listing elements of a claim for fraud and deceit based on concealment, including that "the plaintiff must have been unaware of the [concealed or suppressed] fact and would not have acted as he did if he had known of the . . . fact"].) "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction." (*Alliance Mortgage*, *supra*, at p. 1239.)

The operative complaint does not properly allege reliance on alleged misrepresentations or concealment of material facts. Stated again, the theory is that defendants represented an inflated default amount and concealed profits that should have reduced that amount. Of course, the most obvious means by which plaintiffs would have relied upon the alleged misrepresentations and concealment is by paying the ostensibly inflated loan amount the New Aid Defendants claimed they were due. As the operative complaint acknowledges, the promissory note secured by the Trust Deed required monthly installment payments. But nowhere in the operative complaint do plaintiffs allege they continued making these payments in reliance on the New Aid Defendants insistence that the full amount continued to be due. Rather, the entire gist of the complaint is that plaintiffs

apparently ceased making payments because they did *not* rely on the New Aid Defendant's representations; they believed they owed some lesser amount and accordingly opted not to make monthly payments during the time from 2005 to 2012 when New Aid is alleged to have occupied the Property.[12]

The operative complaint also fails to allege any other means by which plaintiffs altered their behavior in reliance on representations made or facts concealed by the New Aid Defendants. The complaint does assert plaintiffs "were forced to rely on the defendants' representations[ ] since [p]laintiffs had no control over stopping defendants from proceeding with the sale of their property," but insofar as this is an allegation that they were thereby prevented from curing an overstated default amount, it does not suffice for reasons we have already explained: glaringly absent is an allegation that American Cardiocare had the capacity to pay, and would have paid, even a lesser amount due on Bell Hospital's behalf to prevent the foreclosure sale from going forward. The absence of such an allegation, or any other allegation of a change in plaintiffs' behavior that would demonstrate reliance, is fatal.

In their opening brief, plaintiffs recognize the operative complaint's effort to allege detrimental reliance needs shoring up. They propose amending the negligent and intentional

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[12] Indeed, even with the sparse detail included in the complaint, it is apparent plaintiffs have been engaged in a dispute with the New Aid Defendants since 2005. The idea that plaintiffs where somehow duped into paying more than they should have is entirely inconsistent with this alleged history of disagreement.

misrepresentation causes of action to allege (1) "the demands for payment by defendants included payments that Plaintiff Bell Hospital Corporation was not obligated to make," (2) that Bell Hospital contacted the Trustee Defendants "to inquire about the amount stated and claimed to be due and owing" but the Trustee Defendants "continued to negligently and recklessly publish the incorrect amount," and (3) Bell Hospital is entitled to compensation for "damage to its credit." Plaintiffs' amendment proposals do not satisfy their burden to demonstrate the operative complaint can be amended to state a viable cause of action. In fact, the first two of plaintiffs' proposed amendments, and perhaps the third as well, are already fairly encompassed by the operative complaint's existing—yet defective—allegations. We therefore agree the demurrer was properly sustained without leave to amend as to the third, fourth, fifth, and sixth causes of action.

E. The Seventh Cause of Action for Breach of Fiduciary Duty

In its seventh cause of action, brought only against the Trustee Defendants, the operative complaint alleges they breached a fiduciary duty owed to plaintiffs. Specifically, plaintiffs allege the Trustee Defendants "breached their fiduciary duties, and duties to use due diligence and duties to use due care that was owed to the [p]laintiffs by negligently, recklessly, and carelessly taking no action to verify the debt; by taking no action to verify the validity of the lien through public records; by taking no action to respect the lis pendens that was in place to protect the subject property, nor . . . tak[ing] any reasonable efforts to act on the fact that [p]laintiffs had disputed the debt before issuing

and publicly recording a notice of default, notice of trustee sale and conducting a trustee sale of the subject property."

The seventh cause of action fails to state a valid claim for the most fundamental of reasons: as a matter of law, the Trustee Defendants owe no fiduciary duty to plaintiffs by virtue of their role under the Trust Deed. (*Yvanova*, *supra*, 62 Cal.4th at p. 927 ["The trustee of a deed of trust is not a true trustee with fiduciary obligations, but acts merely as an agent for the borrower-trustor and lender-beneficiary"]; accord, *Hatch v. Collins* (1990) 225 Cal.App.3d 1104, 1112 ["A trustee . . . while an agent for both the beneficiary and the trustor, does not stand in a fiduciary relationship to either"].)

Moreover, insofar as the operative complaint can be read to allege the breach of some other duty arising from a non-statutory source, the allegation fails under established law. (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 819 [""The scope and nature of the trustee's duties are exclusively defined by the deed of trust and the governing statutes. No other common law duties exist""].) In *I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281 (*I.E. Associates*), for instance, a defaulting borrower sued a trustee that had processed the foreclosure on the borrower's property, alleging causes of action for negligence and breach of trust based on the trustee's failure to take reasonable steps to locate the most recent address for the borrower when serving the notices of default and trustee's sale. (*Id.* at p. 284.) Our Supreme Court affirmed summary judgment for the trustee, reasoning that the trustee could not be held liable because the nonjudicial foreclosure statutes impose no such duty. (*Id.* at pp. 287-289.) A similar result obtains here, where plaintiffs have not alleged any breach of a statutory duty owed to them by the

Trustee Defendants nor offered any theory of amendment to salvage the cause of action as defectively pled.

F. The Eighth Cause of Action for Negligence

The eighth cause of action for negligence is alleged against only the New Aid Defendants. In summary, it alleges they had a duty to account for "rents and profits collected from the [Property]" during the time they were in possession of it; they breached that duty "by negligently, recklessly, and carelessly failing to document rents and profits collected . . . [and] failing to report them so that [p]laintiffs would receive their rightful set-off from any mortgage balance that may have been due"; and as a proximate result, "[p]laintiffs were unable to act on the false and grossly overstated notice of default and notice of trustee sale, which resulted in the foreclosure sale of their property."

The familiar elements of a negligence cause of action are "a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.) Assuming for argument's sake the operative complaint states facts sufficient to allege a legal duty, the negligence cause of action—particularly as to the elements of proximate cause and damages—rises and falls on the same theories of liability we have already found insufficient as to each plaintiff in our discussion of the wrongful foreclosure cause of action. The negligence cause of action fails for the same reasons, and plaintiffs have made no showing of how they might amend to state a valid cause of action.

G. The Ninth Cause of Action for Slander of Title

The ninth cause of action for slander of title is alleged against all defendants. The elements of slander of title are a false publication, made without privilege or justification, which causes direct and immediate pecuniary loss. (*Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1051.)

Plaintiffs allege the publication and recording of the pertinent notice of default, notice of trustee's sale, and the trustee's deed upon sale constitute a slander on American Cardiocare's title to the Property. Plaintiffs additionally allege the statements contained in these documents "were disparaging in that [p]laintiffs did not owe any principal, interest and late payments to defendants from February 2006 through June 2012, and may not owe any principal, interest and late payments, at all." Plaintiffs further allege defendants "had no valid lien and no legal right to foreclose on the [Property]." Because the two groups of defendants are differently situated for purposes of the slander of title cause of action, we discuss them separately.

As alleged against the Trustee Defendants, plaintiffs fail to plead facts sufficient to state a slander of title cause of action because publication and recording of the notice of default, notice of sale, and trustee's deed upon sale are all privileged communications under Civil Code section 2924. (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 333-334 (*Kachlon*).) As relevant here, that statute provides: "All of 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. [¶] (3) Performance of the functions and procedures set forth in this article if those functions and procedures are

necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure." (Civ. Code, § 2924, subd. (d).)

To be sure, the privilege that extends to the mailing, publication, and delivery of notices necessary to conduct a nonjudicial foreclosure is only a qualified privilege under Civil Code section 47, subdivision (c). That means the allegedly slanderous communications here would not be privileged if made by a party acting with actual malice. (Civ. Code, § 47, subd. (c) [describing a privileged communication as one made "without malice, to a person interested therein"]; *Kachlon*, *supra*, 168 Cal.App.4th at p. 336 ["[M]alice is defined as actual malice, meaning "'that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights'"'].)

Plaintiffs, however, do not state facts sufficient to allege malice. The operative complaint does assert the allegedly slanderous statements by defendants "were not based on any good faith reliance" and it does include a boilerplate allegation that defendants "knew that such statements were false, or acted with reckless disregard as to the truth or falsity of the statements since defendants were notified that the statements were false." But these are conclusory contentions that do not state *facts* that would allow us to conclude plaintiffs had properly alleged the Trustee Defendants' recording of the foreclosure documents was unprivileged. (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1018 [boilerplate allegation the defendant acted maliciously and oppressively, and in conscious disregard of the plaintiffs' rights, insufficient to state cause of action requiring

actual malice]; see *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 453-454 [complaint in a malicious prosecution case that alleged malice "in only the most conclusory, boilerplate terms" did not provide a genuine factual basis]; *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 649 [conclusory allegations of corruption or malice are insufficient to bring a fraud action within the exception of Government Code section 822.2; "the pleader also must allege *facts* showing that the fraud was motivated by corruption or actual malice"]; see also *Kachlon*, *supra*, 168 Cal.App.4th at pp. 343-344 [mere inadvertence, forgetfulness, or careless blundering is not evidence of malice].)

As to the New Aid Defendants (and the Trustee Defendants, for that matter), the facts and theories of liability that underlie the slander of title cause of action are the same as those on which plaintiffs rely to support the wrongful foreclosure cause of action. The facts as pled are insufficient to survive a demurrer for the same reasons we have already given; the addition of an equivocal allegation that plaintiffs "may" not owe principal, interest or late charges does not change the analysis (and is inconsistent with other allegations in the operative complaint and plaintiffs' arguments on appeal).

Plaintiffs have not argued the slander of title cause of action could be amended to remedy its defects. There is accordingly no basis to reverse the ruling sustaining the demurrer to the ninth cause of action without leave to amend.

H. The Tenth Cause of Action for Cancellation of the Foreclosure Deed

The tenth cause of action for cancellation of the trustee's deed upon sale is alleged against all defendants. As pled, the

cause of action concedes the Trust Deed appears valid on its face but alleges "it is invalid and void and/or voidable, and of no force or effect regarding the [p]laintiffs' interest in the [Property] . . . for the reasons set forth hereinabove."

As the allegation above itself demonstrates, the viability of the tenth cause of action depends on the existence of a proper substantive basis for liability alleged in the preceding causes of action. (*Plastino v. Wells Fargo Bank* (N.D. Cal. 2012) 873 F.Supp.2d 1179, 1189 [claim seeking to cancel trustee deed "appears to be not an independent cause of action, but a request for a particular remedy"]; see also *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079, 1101 [concluding the viability of the cancellation of instruments cause of action presented turned on the viability of the wrongful foreclosure claim].) Thus, for the same reasons we have already given in connection with the wrongful foreclosure cause of action, the demurrer to the cause of action seeking cancellation of the Trust Deed was meritorious and plaintiffs have not carried their burden on appeal to put forward an amendment that would cure the defective allegations.

I. The Eleventh Cause of Action for Quiet Title

The quiet title cause of action against the New Aid Defendants alleges "BELL HOSPITAL CORPORATION, a California corporation was the predecessor and [American Cardiocare] is the successor that now holds an interest in the [Property] as a fee simple owner." The cause of action further alleges plaintiffs seek to quiet title "against the claims of defendant for the trustee deed held by [New Aid] . . . because nothing is owed because of setoffs that equal the balance

allegedly due, if any."

For reasons we have already explained, the cause of action fails as to plaintiff Bell Hospital. It was not the owner of the property at the time of the foreclosure, and the foreclosure extinguished the debt owed on the Trust Deed's promissory note in whatever amount.

As to plaintiff American Cardiocare, the quiet title cause of action is not viable as currently pled. We reach this conclusion for one of the reasons we have already described: without additional alleged facts, it is unclear the amount alleged to be in default on the Trust Deed's promissory note should have been reduced based on profits allegedly made by the New Aid Defendants during the period of the alleged "deed dispute" that ultimately resulted in a settlement.

But distinct from the other allegations in the operative complaint, the quiet title cause of action alleges the application of what it terms "setoffs" to the amount Bell Hospital owed in connection with the Trust Deed would mean "*nothing* is owed" (emphasis ours). Of course, if the amount owed were in fact zero, it would be irrelevant whether American Cardiocare could or would have cured the default amount prior to foreclosure. Thus, we believe there is a "reasonable possibility" (*Schifando*, *supra*, 31 Cal.4th at p. 1081) American Cardiocare could present sufficient factual allegations concerning what it calls the "deed dispute" and the settlement thereof so as to allege a legal entitlement to the benefit of "setoffs." If American Cardiocare were to do so, and were to allege these setoffs entirely eliminated any default amount owing at the time of the foreclosure sale (not that nothing is *now* owed, which is the legal truism the operative complaint presently alleges), we believe that would suffice to

state a claim for quieting title as against the New Aid Defendants. (See *Hauger v. Gates* (1954) 42 Cal.2d 752, 754-755.) We accordingly uphold the decision to sustain the demurrer to the quiet title cause of action as presently alleged, but we remand with directions to grant American Cardiocare leave to file a further amended complaint that states a viable quiet title cause of action, if American Cardiocare is able to do so.

J. The Twelfth Cause of Action for an Accounting

Plaintiffs allege they are entitled to an accounting from the New Aid Defendants. Set forth in just two paragraphs, the cause of action incorporates all prior allegations in the operative complaint and asserts "[t]he amount of money due and owing to Defendant [New Aid], if any, can be estimated by deducting either the reasonable rental value for the time period that [the New Aid Defendants] exclusively occupied the property, or based on the actual rents and profits they collected from the property, from the principal, interest and late charges that accrued from the time they were allegedly assigned the [Trust Deed], and note, if any." Plaintiffs further allege "[t]hese amounts are unknown . . . and cannot be determined without an accounting."

"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." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) Even assuming the requisite relationship exists here, plaintiffs' cause of action fails because the foreclosure sale wiped out the default balance on the promissory note associated with the Trust Deed in its entirety, regardless of how the amount was calculated. Thus, at

this stage, the facts pled in the operative complaint fail to allege any need for an accounting.

DISPOSITION

The order of dismissal is affirmed as to defendants T.D. Service Company and Fran DePalma. The trial court's ruling sustaining the demurrer without leave to amend is affirmed on all causes of action brought by plaintiff Bell Hospital Corporation, affirmed on the first through tenth and twelfth causes of action as brought by plaintiff American Cardiocare, but reversed on the eleventh cause of action for quiet title as brought by plaintiff American Cardiocare. The order of dismissal as to defendants New Aid Medical Supply, Inc., Earl Collins, and Rita Collins is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion. Defendants T.D. Service Company and Fran DePalma are to recover their costs on appeal; all other parties are to bear their own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, ACTING P.J. DUNNING, J.*

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* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.