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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

JENNITA FOSTER, Plaintiff and Appellant, v. OLD REPUBLIC DEFAULT MANAGEMENT SERVICES, Defendant and Respondent.	B255615 (Los Angeles County Super. Ct. No. BC422057)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning and Ernest M. Hiroshige, Judges. Affirmed.

Jennita Foster, in pro. per., for Plaintiff and Appellant.

Shulman Bunn, and Richard A. Bunn, for Defendant and Respondent.

Plaintiff and Appellant Jennita Foster and her limited liability company filed an action for damages and injunctive relief against a lender, Banco Popular North America (not a party to the current appeal), and a trustee under a first deed of trust, Defendant and Respondent Old Republic Default Management Services. Foster alleged various causes of action claiming wrongs associated with a loan foreclosure sale pursuant to a first deed of trust. Banco Popular prevailed on a motion summary judgment (MSJ); in granting the lender's MSJ, the trial court found there was no disputed issue of fact that Foster defaulted on the loan secured by the first deed of trust. As to Old Republic, the court sustained the trustee's demurrer to certain of Foster's causes of action, and thereafter granted a MSJ as to Foster's remaining causes of action. Foster is now self-represented and has filed an appeal challenging the final judgment in favor of Old Republic.[1] We affirm the judgment.

FACTS

Background

In May 2003, Foster borrowed $675,000 from Quaker City Bank to purchase an apartment building on Olive Street in Inglewood (the "Olive Street Property"). Foster paid a total of $900,000 to purchase the Olive Street Property. Foster executed and delivered a variable interest rate promissory note to Quaker City, along with a first deed of trust in favor of Quaker City.

In late August 2004, Foster executed a quitclaim deed conveying the Olive Street Property to GHM007, LLC (hereafter GHM). The grant deed was recorded the same month. In the operative pleadings, it is alleged that Foster is the sole member of GHM. Further, it is alleged that Quaker City "approved the transfer of the title and assumption of the [$675,000] loan to [GHM]."

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[1] Foster also filed an appeal as a self-represented litigant to challenge the judgment in favor of Banco Popular. (Case No. B246257.) On May 19, 2014, we dismissed the appeal after Foster failed to file an opening brief. (Cal. Rules of Court, rule 8.220(a)(1).)

In August 2004, Banco Popular North America acquired Quaker City Bank. It is alleged that Quaker City and Banco Popular both treated the Olive Property and loan "as standing in the name of [GHM]" after the transfer noted above.

The Loan History

In April 2008, Banco Popular sent a letter to GHM stating that the variable interest rate on the May 2003 loan "ha[d] not been changing correctly," and that there was unpaid accrued interest in the amount of $6,512.91. Foster, as GHM's manager, thereon began a series of exchanges with Banco Popular regarding the bank's claim for unpaid accrued interest. While this was going on, payments (whether by GHM or Foster) were not made according to the terms of the note.

In November 2008, Banco Popular sent a letter to Foster, stating that the bank considered the May 2003 loan in default, and that it had elected "to initiate the default rate of interest equal to 5% over the contract interest rate as provided in the promissory note." During the same month, Old Republic, acting as trustee under the May 2003 deed of trust, recorded a Notice of Default and Election to Sell Under Deed of Trust.

In April 2009, Old Republic recorded a Notice of Trustee's Sale which stated that a trustee's sale of the Olive Street Property would take place on May 13, 2009.

In early May 2009, Foster sent an email to Old Republic, asking for a reinstatement amount. Old Republic forwarded the request to Banco Popular. On May 7, 2009, Banco Popular delivered a letter with a reinstatement figure to Old Republic indicating that the amount needed to reinstate the May 2003 loan totaled $74,499.10. Old Republic forwarded the reinstatement figure to Foster.

Foster, in turn, questioned Old Republic regarding certain of Banco Popular's numbers. On May 7, 2009, Banco Popular advised Old Republic that it "[did] not believe [that Foster's questions] warrant[ed] any response." Banco Popular requested that Old Republic "proceed as planned with [the] foreclosure sale . . . " on May 13, 2009, as scheduled.

The day before the foreclosure sale, Foster went to her bank to wire the reinstatement amount, and phoned Old Republic to confirm the final figure. At that time, Old Republic informed Foster that the reinstatement notice had "expired" the previous day, May 11, 2009. Old Republic would not provide a new reinstatement amount. Foster then contacted Banco Popular and was told that the time to reinstate "expired yesterday," that it was "too late" to reinstate, and to "never call [the bank] again."

In July 2009, following intervening bankruptcy proceedings, Old Republic sold the Olive Street Property at a trustee sale to defendants Gerry Kabala and Alan Kapilow as trustee of the A.W.K Trust ("Kapilow") for $1,001,000.[2] Shortly thereafter, Old Republic executed a trustee's deed conveying the Olive Street Property to Kapala and Kapilow.

The Litigation

In September 2009, Foster and GHM filed an action for damages and injunctive relief against Banco Popular and Old Republic. In June 2013, Foster and GHM filed their operative Second Amended Complaint (the complaint). It alleged five causes of action as to Banco Popular and Old Republic, listed respectively, as follows: "To Set Aside Trustee's Sale" by GHM alone against Banco Popular and Old Republic; "Violation of Statute" (to set aside trustee's sale) by GHM alone against Banco Popular and Old Republic; Violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) — based on underlying statutory wrongs in the foreclosure process — by both Foster and GHM against Banco Popular and Old Republic; Intentional Infliction of Emotional Distress by Foster against Banco Popular and Old Republic; and Negligent Infliction of Emotional Distress by Foster against Banco Popular and Old Republic.[3]

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[2] According to Foster's operative pleading, the sale price was "significantly below the fair market value of the [Olive Property]," and the purchaser, Kabala, had earlier offered to purchase the Olive Property from GHM for $1.5 million.

[3] A fourth cause of action for constructive fraud by Foster and GHM was alleged only against defendant Kabala, and a fifth cause of action for quiet title by GHM was

In early 2012, the trial court sustained Old Republic's demurrer to the complaint's third, sixth and seventh causes of action without leave to amend, leaving only the first and second causes of action concerning the validity of the trustee's sale and trustee's deed alleged by GHM as to Old Republic remaining.

The trial court entered an order granting Banco Popular's MSJ as to all causes of action alleged against the bank. The order includes findings that Foster failed to make payments on the $675,000 loan from Banco Popular in "August 2008 and every payment thereafter[];" that a foreclosure sale of the Olive Street Property eventually took place on July 9, 2009, and that defendants Gerry Kabala and Alan Kapilow as Trustee of the A.W.K Trust[4] purchased the property at the foreclosure sale. The court entered judgment in favor of Banco Popular. An appeal followed. As noted above (see footnote 3, *ante*), we dismissed the appeal.

Old Republic filed a MSJ as to the remaining causes of action in which it was a named defendant. Foster and GHM filed an opposition. The opposition conceded that the first cause of action labeled "Set Aside Trustee's Sale" and the second cause of action labeled "Violation of Statute" could be treated "as a single cause of action to set aside the trustee's sale" based on the statutory violations alleged. Further, the opposition conceded that the trial court could assume that certain allegations in the complaint were false. For example, the court was invited to assume that the loan was in fact "in default" and that Foster and GHM "never made a tender to reinstate the loan by the [May 5, 2009] deadline imposed by . . . section 2924c." The theory argued in the opposition to Old Republic's MSJ was that Banco Popular (and thus its agent, Old Republic) "waived the May 5 reinstatement deadline imposed by . . . section 2924c, [and] agreed to allow reinstatement on May 7, . . . , then wrongfully refused plaintiff's offer to pay on May 12 which prevented the payment from being made." Further, that pursuant to Civil Code

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alleged only against defendants Kabala and Kapilow. Those causes of action are not involved in the current appeal.

[4] Hereafter Kabala and Kapilow, who are not involved in the current appeal.

sections 1511, subdivision (a) and 1512, Banco Popular's "wrongful refusal of [the] offer to pay excused the payment," and pursuant to Civil Code section 1504, "[the] offer to pay extinguished the lien of the trust deed, rendering the trustee's sale void."

The trial court granted Old Republic's MSJ. In February of 2014, Foster was representing herself. Purportedly acting on behalf of GHM as well, she filed a notice of intent to move for new trial. The motion was filed before Foster's and GHM's attorney of record had substituted out of the case.

Foster, for herself and apparently as the general manager of GHM, filed a substitution of attorney form indicating that "plaintiffs" would thereafter be representing themselves. Foster filed papers in support of the motion for new trial on her on behalf and purportedly on behalf of GHM.

Old Republic filed an objection to the substitution of attorney as to GHM, arguing that Foster could not represent the limited liability company, and that it could only appear in the action through an attorney. The next day the trial court sustained Old Republic's objection. Foster, for herself and again purportedly on behalf of GHM, thereafter filed a new notice of intent to move for new trial, with a memorandum of points and authorities and her own personal declaration. Foster also filed a "Notice of Assignment" which indicated that GHM has assigned its interests in the case to Foster personally.
Old Republic objected to these filings, again asserting that Foster could not represent GHM because she was not an attorney.

The trial court entered judgment in Old Republic's favor. Thereafter, the trial court denied the motion for new trial. By the same order, the court sustained Old Republic's objection to the Notice of Assignment and ordered it stricken.

Foster filed a timely notice of appeal. The notice of appeal states that "Jennita Foster, and GHM [by] Jennita Foster as Assignee of [GHM]," are appealing the judgment entered in favor of Old Republic.

DISCUSSION

I. GHM May Not Participate in the Current Appeal

As a preliminary matter, we address Old Republic's contention that GHM may not participate in the current appeal because it is not represented by an attorney in our court. Old Republic argues that any attempt to appeal by GHM must be dismissed because the notice of appeal filed by Foster, insofar as she purports to represent GHM on appeal, is void. We agree.

Old Republic is correct that a corporation may not be represented in any state court, other than small claims court, by a non-attorney, and that the restriction against lay representation means that no officer or agent "who is not an attorney" may represent a corporation in court. (See *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd*. (2002) 99 Cal.App.4th 1094, 1101-1102 (*Caressa*), discussing cases such as *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 727, 729-732 (*Merco*) and *Paradise v. Nowlin* (1948) 86 Cal.App.2d 897, 898 (*Paradise*).) Old Republic argues that a restriction against lay representation in court should apply with equal force to a limited liability company, which, like a corporation, is a legal entity separate and apart from its members.[5]

We agree with Old Republic that GHM, as a limited liability company, may not appear in court without an attorney. The cases barring representation of a corporation by a non-attorney are based on the reasoning that a corporation is not a natural person and may only act by and through agents and representatives, and that the judicial system may insist that a corporation be represented by a person qualified to practice law to assure the orderly administration of cases in the judicial system. (*Caressa*, *supra*, 99 Cal.App.4th at pp. 1101-1102, citing *Paradise, supra,* 86 Cal.App.2d at p. 898; and see *Merco, supra*, 21 Cal.3d at pp. 730, 732.) We agree with Old Republic that such reasoning applies

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[5] The cases cited by Old Republic do not directly support its argument. *PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 963, and *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108, support the proposition that a limited liability company is a recognized legal entity separate and apart from its members, but do not deal directly with the in-court representation issue.

equally to a limited liability company, which, like a corporation, is legal entity separate and apart from its members.

To avoid this result, Foster argues that she is the "assignee" of GHM's appellate rights. Foster argues that, once the assignment of appellate rights was made, GHM — as an assignor and nothing more — "lacked standing" to appeal in its own right, having transferred away its rights to Foster. As she correctly notes, an action or proceeding does not abate by the transfer of an interest in the action or proceeding. (Citing Code Civ. Proc., § 368.5.)

In another case, we might find Foster's legal argument persuasive. For example, assuming a hypothetical in which GHM validly discounted, sold and assigned $100 of unpaid accounts receivables to Foster, it would follow that Foster could file a collection action in her own right, as the assignee of GHM's formerly possessed collection rights. That Foster would have to show GHM's right to collect the unpaid receivables when proving up her case, would not mean that Foster was actually representing GHM's interests. On the contrary, she would be suing for herself to benefit her own interests. If successful, she would be entitled to a money judgment in her favor, payable personally to her.

The problem in the current case is that Foster is trying to vindicate rights, and to obtain judicial remedies, that will inure to GHM's benefit, not Foster's. Specifically, the complaint predominantly seeks to set aside the trustee's sale by which title was divested away from GHM and conveyed to Kabala and Kapilow. If Foster were successful on appeal, then we would remand with directions to the trial court to enter an order denying Old Republic's MSJ, and to put the case back on track for trial. In such a circumstance, Foster would be litigating to vindicate GHM's claim to regain title to the Olive Street Property. Because it is GHM's rights that are at issue, Foster may not represent it in court. GHM must be represented by an attorney.

To the extent that the complaint, and the current appeal seek to recover damages, our conclusions are the same. The case against Old Republic is not akin to the simple circumstances of collecting an award as we set forth in the hypothetical discussed above.

Here, whatever damages were ultimately determined to belong to GHM, they would be the result of the loss by GHM of its title to the Olive Street Property. Here, were Foster allowed to seek to recover damages that were ostensibly assigned to Foster by GHM, Foster would necessarily be attempting to vindicate GHM's rights through title to the Olive Street Property. Such claims must be prosecuted by an attorney representing GHM.

For all of the reasons explained above, we dismiss the current appeal insofar as Foster attempts to prosecute the appeal on behalf of GHM.

II. The Trial Court Properly Sustained the Demurrer to the UCL Cause of Action

Foster contends the trial court erred in sustaining Old Republic's demurrer to Foster's third cause of action for violation of the UCL.[6] We disagree.

A plaintiff alleging a violation of the UCL must allege that a business practice is " 'unlawful, unfair or fraudulent.' " (*Walker v. Countrywide Home Loans, Inc*. (2002) 98 Cal.App.4th 1158, 1169-1170.) In her opening brief on appeal, Foster hitches her UCL claim to the unlawful element, noting that it "borrows violations of other laws and makes them independently actionable" under the UCL.[7] Foster argues Old Republic's Notice of Default violated the federal Fair Debt Collection Practices Ace (FDCPA; 15 U.S.C. § 1692 et seq.), specifically 15 U.S.C. Section 1692g.

Foster's argument fails to acknowledge the cases which have held that in order to establish a claim under the FDCPA, a plaintiff must show that the defendant was a "debt collector" as defined by the Act, that the defendant's conduct constituted "debt collection activity" as defined by the Act, and that the debt collection activity violated a provision

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[6] We have deliberately referred to the third cause of action "by Foster" in this section of the opinion. The SAC alleged the third cause of action by Foster and GHM, but, as we have explained, any claims by GHM on appeal must be dismissed because it is not represented by counsel.

[7] She cites *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company* (1999) 20 Cal.4th 163, 180.

of the FDCPA. She also ignores that foreclosing on a property pursuant to a deed of trust is not debt collection activity within the meaning of FDCPA. (See, e.g., *Rosal v. First Federal Bank of California* (N.D.Cal. 2009) 671 F.Supp.2d 1111, 1135.) Finally, Foster also overlooks that a "debt collector" under the FDCPA does not include the actual creditors, nor mortgage beneficiaries and servicers. (See, e.g., *Wise v. Wells Fargo Bank, N.A.* (C.D.Cal. 2012) 850 F.Supp.2d 1047, 1053; and see also *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1261-1264 [lender that sent notice of pending foreclosure sale to borrowers was not "debt collector" under the FDCPA]; *Fonteno v. Wells Fargo Bank, N.A.* (2014) 228 Cal.App.4th 1358, 1375 [trustee of deed of trust conducting acts leading up to and including non-judicial foreclosure sale was not a debt collector under the FDCPA when conducting trustee sale of residential property, notwithstanding that trustee's statements in notice of default to borrowers indicated that trustee may be acting as debt collector].) Basically, the FDCPA was intended to address the societal problem of "debt collectors" who use harassing tactics against debtors, but not foreclosure practices. If Foster wished to allege a cause of action for unlawful conduct forbidden by statutory law, then she needed to borrow not from the FDCPA, but some other appropriately governing statutory law.

Apart from the FDCPA, Foster argues in her opening brief that the operative complaint alleged facts showing "violations of statute wherein [Old Republic] conducted an illegal, fraudulent and willfully oppressive foreclosure sale." Her brief cites paragraphs 45 and 53 of the complaint. This is where we start our examination.

Paragraph 45 is in Foster's first cause of action, which is entitled "To Set Aside Trustee's Sale," and alleges statutory violations of Civil Code sections 2924b, 2934a, and 2943. Paragraph 45 is incorporated into Foster's third cause of action for violation of the UCL. Paragraph 45 alleges:

> "The Trustee's Sale on July 6, 2009 should be set aside for the following reasons:

(a) There was no actual default because the default amount was based on alleged past due interest that was improperly charged by Banco Popular.

(b) The Notice of Default . . . was not served on the Trustor and owner of the property ([GHM]) pursuant to Civil Code § 2924b(b)(1).

(c) The Notice of Default . . . was not served within ten days after recordation of the Notice pursuant to the *Civil Code* § 2924b(b)(1).

(d) The Notice of Trustee's Sale . . . was not served on the Trustor and owner of the property ([GHM]) pursuant to Civil Code § 2924b(c)(3), which requires that the Notice must be sent "to each person to whom a copy of the Notice of Default is to be mailed as provided in paragraphs (1) and (2) . . . .

(e) A statement of the payoff amount was not provided to the Trustor [GHM] within twenty-one (21) days after receiving demand for such amount pursuant to Civil Code §2943(c)(1).

(f) A Beneficiary Statement was not provided to the Trustor [GHM] within twenty-one days after receiving demand pursuant to Civil Code 2943(b)(1).

(g) Notice of the substitution of Trustee was not mailed prior to or concurrently with the recording of the Notice of Default pursuant to Civil Code § 2934a(b).

(h) There was a gross disparity between the purchase price [at the trustee's sale] and the fair market value of the property.

(i) The foreclosure sale was illegal, fraudulent and/or willfully oppressive."

Paragraph 53 is found in the second cause of action entitled "violation of statute." Paragraph 53, too, is incorporated into Foster's third cause of action for violation of the UCL. Paragraph 53 alleges in total:

> "In addition, as set forth above, the foreclosure sale of the property was illegal, fraudulent and/or willfully oppressive."

In sustaining Old Republic's demurrer to Foster's cause of action for violation of the UCL, the trial court ruled that "the purpose of the [UCL] is the preservation of fair business competition . . . [and] to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." Further, the court ruled that Foster failed to allege facts showing the UCL was "applicable to the facts of [her] action." We understand the court's stated reasons to mean that Foster had failed to allege that Old Republic engaged in a "business practice" (see, e.g., *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619) constituting unfair competition, instead of only violations of statutory law individually directed at Foster. We agree.

The entirety of Foster's UCL cause of action consists of two paragraphs which read as follows:

> "57. Plaintiffs incorporate the allegations contained in paragraphs 1 through 56 as though fully set forth herein.
>
> "58. The Defendants acts hereinabove alleged are acts of unfair competition within the meaning of [the UCL]. As a result of such acts, Plaintiffs have been damaged and are entitled to restitution and all sums unlawfully collected by Defendants."

The allegations in the UCL cause of action, even when looking at all of the incorporated prior allegations, do not include any facts stating that Old Republic had engaged in an unfair business practice. In the event Foster proved that Old Republic violated the statutes governing foreclosures, she has a remedy in her allegations for violation of statutory law as alleged in her cause of action to set aside the specific trustee sale in her case. But Foster did not allege facts showing a potential basis for any remedy

under the UCL. She did not show restitution of revenues wrongfully obtained from an ongoing business practice against consumers at large.

We agree with the characterization in Foster's opening brief stating that the UCL is a "sweeping" law, and we further agree with Foster that "a private party has standing to bring a UCL action [when] he or she 'has suffered injury in-fact and has lost money or property as a result of unfair competition.'"[8] The problem with Foster's argument is that she is too narrowly focused on the "injury in-fact" element of her UCL cause of action, and seemingly fails to appreciate the "unfair competition" element of such a claim. Foster's complaint fails not because she has did not allege that she suffered an injury as a result of Old Republic's acts directed toward her, but also because she failed to allege that what Old Republic did to her it has also done, and or is doing, as a business practice in furtherance of unfairly competing in the marketplace.

III. The Trial Court Properly Sustained the Demurrer to Cause of Action for Intentional Infliction of Emotional Distress

Foster contends the court's ruling on Old Republic's demurrer to Foster's sixth cause of action for intentional infliction of emotional distress must be reversed because she pleaded sufficient facts to state the cause of action. We disagree.

To state a cause of action for intentional infliction of emotional distress, a plaintiff must plead the following elements: (1) outrageous conduct by the defendant; (2) the intent to cause, or reckless disregard of the probability of causing, emotional distress; (3) the plaintiff's severe or extreme emotional distress; and, (4) actual or proximate causation of the emotional distress by the defendant's outrageous conduct. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 300.) " 'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496.)

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[8] She cites *Troyk v. Farmers Group, Inc*. (2009) 171 Cal.App.4th 1305, 1335.

Here, Foster's cause of action for intentional infliction of emotional distress incorporated her claims regarding the foreclosure process. Thus, the conduct alleged is Old Republic's failure to serve the Notice of Default and Notice of Sale on GHM, rather than on Foster; serving the Notice of Default 12 days rather than 10 days after recording the Notice of Default; and failing to record the Substitution of Trustee prior to or concurrently with the Notice of Default.

Under no perspective may the alleged acts on the part of Old Republic be viewed as so outrageous and extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. (*Cochran v. Cochran*, *supra*, 65 Cal.App.4th at p. 496.) We have little doubt that borrowers are severely emotionally distressed by the foreclosure process, but in the absence of outrageous acts, as opposed to what may be reasonably viewed as statutory violations of the specific requirements of foreclosure, there is no cause of action for the tort of intentional infliction of emotional distress.

In addition, it cannot be ignored that the complaint alleged that GHM owned the Olive Street Property, meaning that it was GHM's property rights that were adversely affected, not Foster's. Because it was her limited liability company, not her, who was allegedly victimized, the relationship to emotional distress is even more attenuated.

Finally, Old Republic, which was acting as a trustee under a deed of trust at all relevant times, is afforded tort immunity under Civil Code section 2924, subdivisions (b) and (d), when acting on information provided by Banco Popular. It has previously been established that Banco Popular was not repaid for its loan. Ultimately, as we have stated previously in this opinion, Old Republic's liability, if any, may only be based on violation of the statutory requirements for the foreclosure sale.

IV. The Trial Court Properly Sustained the Demurrer to Cause of Action for Negligent Infliction of Emotional Distress

Foster next contends the sustention of Old Republic's demurrer to Foster's seventh cause of action for negligent infliction of emotional distress must be reversed because she pleaded sufficient facts to state the cause of action. We disagree.

Negligent infliction of emotional is not an independent tort; it is the tort of negligence. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.) Damages for emotional distress are recoverable only if the defendant has breached a duty to the plaintiff. This independent "duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship" between the parties. (*Potter v. Firestone Tire & Rubber Co*. (1993) 6 Cal.4th 965, 984–985.)

Foster's cause of action for negligent infliction of emotional distress fails because it does not allege facts to show a duty under negligence principles. The operative complaint does not allege facts showing that Old Republic, which was acting as a trustee under a deed of trust at all relevant times, owed a duty of care to Foster recognized under common law negligence principles. Old Republic's liability, if any, rested on the alleged violation of statutory law governing foreclosure sales.

V. Summary Judgment Was Properly Granted

Foster claims the grant of summary judgment as to her first and second causes of action based on a wrongful foreclosure must be reversed because the record discloses factual disputes about whether Banco Popular waived the statutory deadline for reinstatement. We find no error.

" 'A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail.' [Citation.] The pleadings define the issues to be considered on a motion for summary judgment. [Citation.] As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) If the defendant makes the requisite prima facie showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064-1065.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.)

We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Co*urt (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.) We make "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

Foster argues a forfeiture theory of liability based on the "claim[] that Banco by way of [Old Republic] delivered . . . a reinstatement letter dated May 7, 2009, which was after the May 5, 2009 statutory deadline." She contends the May 5, 2009 deadline for reinstatement melted away in the legal sense, leaving an open-ended deadline for perfecting reinstatement. This means, concludes Foster, that Banco Popular was obligated to accept her attempted tender of the reinstatement amount on May 12, 2009, and that Old Republic is liable for conducting the trustee foreclosure sale in July 2009.

Foster bolsters her theory by pointing to the deposition testimony of Brian Burke, Banco's loan officer, who testified that the letter was sent to Old Republic "[s]o that [Old Republic] knew how much was owed to reinstate the loan in the event that the borrower intended to tender payment to reinstate." She also relies on the following exchange, which took place during Burke's deposition testimony: "Q: So if the borrower wanted to reinstate the loan on May 7, 2009 for the price of $74,499.10, the borrower would be allowed to do that; correct? A: Yes." As noted above, Foster presented evidence in opposition to the MSJ to show that she went to Banco Popular on May 12, 2009, ready to effect a wire transfer, but, when she asked for an exact figure, was told that it was "too late" to tender.

Analysis

As a preliminary matter, we dispatch with Old Republic's argument that Foster's current appeal is barred by res judicata. " 'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity

with them. Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.]" (*Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896, fn. omitted.)

Old Republic contends Foster's continued litigation of any claims against it are barred by the judgment that was entered in favor of Banco Popular, which is now final on appeal. Certainly, the judgment in favor of Banco Popular puts to rest as established fact that Foster defaulted on her loan. That said, we find there may be issues concerning the validity of the ensuing foreclosure sale conducted by Old Republic, an issue which may or may not have been necessarily decided and included within the judgment in favor of Banco Popular. For this reason, we will examine the merits of the trial court's decision to grant Old Republic's MSJ.

We agree with the trial court that there are no disputed issues of material fact as to the claim that Banco Popular waived the loan reinstatement deadline, and thus forfeited its right to reject the attempted tender of reinstatement on May 12, 2009. First and foremost, the May 7, 2009 letter contains no language signaling a waiver of any rights to go forward with the foreclosure. It does not indicate a binding commitment that reinstatement would be extended, and Foster testified at her deposition that no one ever told her that the May 7, 2009 reinstatement letter made the amounts stated in the letter good through May 12, 2009. At best, the evidence in the record shows an attempted accommodation to a customer, not a forfeiture of the bank's foreclosure rights.

Second, the evidence shows without dispute that Foster did not accept the May 7, 2009 letter as a reinstatement waiver. After she received the letter, Foster continued to dispute the amounts set forth in the letter. Her assertion she was "shocked" that Banco Popular was no longer interested in dealing with her on May 12, 2009 is self-serving at best, and irrelevant in any event to show the bank "waived" its rights. Had Foster truly understood the May 7, 2009 letter amounted to some form of a waiver of the bank's rights to foreclosure, she would have made payment immediately in accord with the bank's "agreement to waive" its rights, even if she had done so under protest. Again, what the evidence shows at best is continued negotiations, not a unilateral decision to

waive the right to foreclose on Banco Popular's part. Waiver is a relinquishment of one's rights. (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 211.) The evidence, even if credited in Foster's favor, does not support a finding of such a relinquishment.

Finally, the deed of trust signed by Foster itself negates the waiver theory she offered in opposition to Old Republic's MSJ. The deed of trust included the following language:

> "13. FORBEARANCE BY LENDER NOT A WAIVER. Any forbearance by Lender in exercising any right or remedy hereunder, or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of any such right or remedy. . . ." (Capitalization in original.)

All of this, of course, concerns the relationship between Banco Popular and its borrower, Foster. Acting as a trustee under the deed of trust, Old Republic did not have an obligation to be an umpire in the dispute and did not incur liability for failing to act as an umpire. Old Republic had no lawful power to command Banco Popular to accept Foster's attempted late tender of reinstatement. Foster's predominant claim was predicated on alleged wrongdoing by Banco Popular in refusing to accept her attempted tender of reinstatement one day before the schedule trustee's sale, and nothing in Foster's arguments on appeal persuade our court that Old Republic had liability for conducting the sale. Old Republic, as trustee under the deed of trust, was the limited agent of the Bank. (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 335.) "The trustee in nonjudicial foreclosure is not a true trustee with fiduciary duties, but rather a common agent for the trustor and beneficiary. [Citation.] The scope and nature of the trustee's duties are exclusively defined by the deed of trust and the governing statutes. . . . [Citations.]" (*Ibid.*) Foster has made no persuasive argument to show that the Banco Popular's wrongs, if any, may be visited on Old Republic.

Foster offers no reference to any evidence in the record tending to show that there was any irregularity in the foreclosure sale itself, or that she was damaged thereby. Also, Foster acknowledged during her deposition testimony that she made no effort to reinstate the loan after May 12, 2009, even though the sale did not actually occur until months later. Once the sale was postponed, the statutory right to tender the amount owed was revived. (Civil Code, § 2924c.) Having failed to tender reinstatement, Foster cannot show Old Republic incurred any liability to her.[9]

DISPOSITION

The attempted appeal by GHM is dismissed, and, thus, the judgment in favor of Old Republic as to GHM remains undisturbed. The judgment in favor of Old Republic as to Foster is affirmed. Respondent to recover costs on appeal.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.

[9] Within the ambit of "waiver," Foster argues that the trial court erred in rejecting her forfeiture arguments on the ground that waiver was not adequately pleaded in her operative SAC.