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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

JAMES ORTIZ et al., Plaintiffs and Appellants, v. CITIBANK, N.A. et al., Defendants and Respondents.	B291026 (Los Angeles County Super. Ct. No. VC066577)

APPEAL from an order of the Superior Court of Los Angeles County, Lori Ann Fournier, Judge. Affirmed.

Law Offices of Ronald H. Freshman and Ronald H. Freshman for Plaintiffs and Appellants.

Wright, Finlay & Zak, Jonathan D. Fink, and Kristina M. Pelletier for Defendants and Respondents.

INTRODUCTION

James and Yolanda Ortiz appeal from an order dismissing their wrongful foreclosure action after the trial court sustained a demurrer to their first amended complaint without leave to amend. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Prior Action*

In 2006 the Ortizes obtained a loan from Lexington Capital Corporation evidenced by a promissory note and secured by a deed of trust on their home. Lexington subsequently assigned the deed of trust to Citibank, N.A., as Trustee for American Home Assets Trust 2006-3, and Citibank substituted Power Default Services, Inc. as the new trustee of the deed of trust. At some point prior to June 2013 Ocwen Loan Servicing, LLC began servicing the loan.

In June 2013 Power Default recorded a notice of default on the Ortizes' loan and noticed a trustee's sale.[1] To prevent the foreclosure, the Ortizes filed an action against Citibank and

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[1] A prior notice of default and notice of trustee's sale were recorded in November 2011 and March 2012, respectively. The Ortizes filed a complaint in federal district court to enjoin the sale. Power Default rescinded the notice of trustee's sale while the federal action was pending. The district court ultimately dismissed the action.

Wells Fargo Bank, N.A.,[2] in state court, asserting causes of action for wrongful foreclosure, declaratory relief, quiet title, slander of title, and violation of the California Homeowner Bill of Rights (HBOR). The Ortizes alleged that, because the relevant parties did not legally obtain or assign their various interests in the promissory note and deed of trust, Citibank and Wells Fargo did not have authority to enforce those instruments or collect payments on the Ortizes' loan. In addition to seeking declaratory relief and to set aside the foreclosure, the Ortizes sought to recover the loss in equity in their home caused by the allegedly wrongful attempts by Citibank and Wells Fargo to enforce the promissory note and deed of trust.

The trial court sustained a demurrer by Citibank and Wells Fargo to most of the causes of action in the complaint without leave to amend, partially on the ground the Ortizes' allegations did not state causes of action and partially on the ground the Ortizes did not have standing to object to assignments to which they were not parties. The trial court gave the Ortizes leave to amend their HBOR cause of action, but ultimately dismissed the action in its entirety after the court sustained a renewed demurrer by Citibank and Wells Fargo without leave to amend. The Ortizes appealed, and another division of this court affirmed.

In February 2017 Power Default noticed a new trustee's sale. The sale occurred in August 2017.

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[2] The Ortizes alleged Wells Fargo serviced the loan at the time.

B. *This Action*

The Ortizes filed this action in September 2017 against Citibank, Power Default, and Ocwen. In October 2017 the Ortizes filed a first amended complaint adding Lexington and American Home Mortgage Holdings, Inc. as defendants.[3] The Ortizes asserted causes of action for wrongful foreclosure against Lexington, Ocwen, and Citibank; declaratory relief and quiet title against all the defendants; slander of title against Lexington, American Home Mortgage, and Citibank; violation of HBOR against Ocwen, Power Default, and Citibank; "invalidity of contracts" against all defendants; cancellation of instruments;[4] violation of the unfair competition law (UCL) against all the defendants; breach of contract against Citibank and Ocwen; and an accounting against all defendants. The Ortizes' causes of action again arose primarily from their allegations that, because the defendants did not legally obtain or assign their interests in the promissory note and deed of trust, they did not have authority to enforce those instruments.

Citibank and Ocwen demurred to the first amended complaint, and the trial court sustained the demurrer without leave to amend, ruling "[t]he doctrine of res judicata bars all causes of action." The trial court entered a signed order

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[3] The Ortizes allege American Home Mortgage Holdings funded and underwrote the loan as part of the securitization process.

[4] It is not clear from the complaint against which defendants the Ortizes asserted this cause of action.

dismissing the action against Citibank and Ocwen with prejudice, and the Ortizes timely appealed.

DISCUSSION

A. *Standard of Review*

"In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory." (*T.H. v. Novartis Pharmaceuticals Corp*. (2017) 4 Cal.5th 145, 162.) "[W]e ask only whether the plaintiff has alleged—or could allege—sufficient facts to state a cause of action against the defendant." (*Id*. at pp. 155-156.) In addition to the allegations of the complaint, we also may consider matters subject to judicial notice. (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777.) Where, as here, "the demurrer was sustained without leave to amend, we consider whether there is a 'reasonable possibility' that the defect in the complaint could be cured by amendment." (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1050.) "The burden is on the plaintiffs to prove that amendment could cure the defect." (*Ibid*.) "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 demurrer, whether or not the court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; see *Summers v. Colette* (2019) 34 Cal.App.5th 361, 367 [""We may affirm on any basis stated in the demurrer, regardless of the ground on which the trial court based its ruling."""].)

B. *Claim Preclusion Bars the Ortizes' Causes of Action for Wrongful Foreclosure, Declaratory Relief, Quiet Title, Slander of Title, "Invalidity of Contracts," Cancellation of Instruments, and Violation of the UCL*

Claim preclusion bars a subsequent action involving "(1) the same cause of action (2) between the same parties [or their privies] (3) after a final judgment on the merits in the first suit." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.)[5] "[I]f all of the facts necessary to establish that an action is barred on [claim preclusion] grounds appear on the face of the complaint, the complaint is subject to demurrer." (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 324; see *Boyd v. Freeman* (2017) 18 Cal.App.5th 847, 855 (*Boyd*) [claim preclusion "is properly raised as a defense on demurrer when all relevant facts 'are within the complaint or subject to judicial notice'"]; *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 231 ["a demurrer based on res judicata is properly sustained only if the pleadings and judicially noticed facts conclusively establish the elements of the doctrine"]; see also *Key v. Tyler* (2019) 34 Cal.App.5th 505, 532 ["court may take judicial notice of court records in ruling on an issue of res judicata"].)

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[5] "[California courts] now refer to 'claim preclusion' rather than 'res judicata'" and "'issue preclusion' in place of 'direct or collateral estoppel.'" (*Samara v. Matar* (2018) 5 Cal.5th 322, 326.)

The parties do not dispute that this action and the prior action involve the same parties or their privies. The Ortizes only argued in the trial court, and only argue on appeal, that the prior action did not involve the same causes of action and that the prior action did not result in a final judgment on the merits. Both arguments fail.

1. *The Prior Action Involved the Same Causes of Action*

"Although 'the phrase "causes of action" is often used indiscriminately . . . to mean *counts*'" that state different legal theories (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 631) (*Hayes*)), for purposes of claim preclusion "the phrase 'cause of action' has a more precise meaning . . . ." (*Boeken v. Philip Morris, USA, Inc.* (2010) 48 Cal.4th 788, 798 (*Boeken*).) "To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have 'consistently applied the "primary rights" theory.'" (*Id.* at p. 797.) Under the primary rights theory, "'[a] "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty.'" (*Hayes*, at p. 630.)

"The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced." (*Boeken*, *supra*, 48 Cal.4th at p. 798.) "Thus, under the primary rights theory, the determinative factor is the harm suffered." (*Ibid.*) """Even where there are multiple legal theories upon which recovery might be predicated, *one injury gives rise to only one claim for relief*."'" (*Hayes*, *supra*, 57 Cal.4th at p. 631; see

Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 904.) "Examples of primary rights include the right to be free from personal injury [citation], the right to possession of real property [citation], the right to possession of personal property [citation] and the right to performance of a contractual obligation [citation]." (*Olsen v. Breeze*, *Inc.* (1996) 48 Cal.App.4th 608, 625.)

Several of the Ortizes' causes of action in this action are the same as those in the prior action: wrongful foreclosure, quiet title, declaratory relief, and slander of title. The Ortizes seek redress in this action for the same harms for which they sought redress in the prior action: economic losses consisting of allegedly misapplied loan payments and loss of home equity caused by the enforcement of the promissory note and deed of trust, and the resulting foreclosure of the home, by parties the Ortizes claim did not have legal authority to do so.[6] These injuries correspond to the same legal duty of Citibank and Ocwen: the duty not to enforce the promissory note and deed of trust and not to foreclose on a property without appropriate legal authority.

The supporting factual allegations in the prior action are also similar to the supporting factual allegations in this action. (See *Boeken*, *supra*, 48 Cal.4th at pp. 798-799 ["the relevant point for our purposes is what plaintiff [in the prior action] *alleged,* because that allegation indicates what primary right was adjudicated as a consequence of the dismissal with prejudice"].)

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[6] Arguably, the Ortizes' claims for economic damages seek redress for a different set of injuries than their claims to set aside the foreclosure and therefore arise from a different cause of action. We need not decide this issue because the Ortizes sought redress for both sets of injuries in both the prior action and this action.

For example, the Ortizes alleged in the prior action that Lexington was no longer in business when it attempted to transfer the promissory note; the relevant parties failed to properly perfect or record the purported transfers of the promissory note and deed of trust; Mortgage Electronic Registration Systems, Inc. (MERS), the designated beneficiary of the deed of trust, did not have authority to take any action with respect to the relevant instruments; and the relevant parties' efforts to securitize the Ortizes' loan breached the terms of the relevant trust's pooling service agreement. In this action, the Ortizes make the same or similar factual allegations regarding the attempts by Citibank, Ocwen, and the other defendants to obtain and transfer their various interests in the promissory note and deed of trust.

The Ortizes did assert some causes of action in this action that they did not assert in the prior one: to cancel instruments, for "invalidity of contracts," and for violation of the UCL. These "new" causes of action, however, arise from the same set of factual allegations and seek redress for the same injuries as the Ortizes' causes of action (in both actions) for wrongful foreclosure, declaratory relief, quiet title, and slander of title. Therefore, the causes of action to cancel instruments, for "invalidity of contracts," and for violation of the UCL are just alternative theories of recovery involving the same primary rights as the Ortizes' other causes of action. (See *Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 675 ["'if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, [or] seeks different forms of relief'"]; see also *Boyd*,

supra, 18 Cal.App.5th at pp. 851, 857, fn. 4 [UCL claim based on alleged violations of nonjudicial foreclosure provisions involved same primary right as causes of action in prior action arising from allegedly unlawful foreclosure].)

Emphasizing the trial court issued its order in the prior action before the trustee's sale occurred, the Ortizes argue: "It is well settled that, post foreclosure, a borrower has a 'new harm' which gives that borrower standing to challenge the harm from what the borrower has alleged is a wrongful foreclosure." For this "well settled" position, the Ortizes cite *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 (*Yvanova*). The Ortizes' argument, however, is neither "well settled" nor correct.

That the trustee's sale did not occur until after resolution of the prior action does not affect the primary right at issue. *Duffy v. City of Long Beach* (1988) 201 Cal.App.3d 1352 is instructive. In *Duffy* a property owner began construction of a house, but did not complete the construction for several years. (*Id.* at p. 1356.) The city sought to demolish the partially finished structure as a nuisance, and the property owner brought an action for injunctive relief in United States District Court. (*Id.* at pp. 1356-1357). After the district court entered judgment in favor of the city, the city demolished the structure. (*Id.* at p. 1357.) The property owner subsequently filed a new action in state court, this time for damages caused by the demolition, and the trial court sustained the city's demurrer without leave to amend, ruling claim preclusion barred the new action. (*Ibid.*) On appeal the property owner argued res judicata (claim preclusion) did not prevent him from bringing the second action because in the first action he sought to enjoin the demolition of the structure while in the second action he sought compensation for the actual

demolition. (*Id.* at p. 1358.) The court in *Duffy* rejected the property owner's argument, holding that the "form of relief requested does not avoid the res judicata bar." (*Ibid.*)

The same reasoning applies here. In both the prior action and this action, the Ortizes sought relief for the same legal injury—the loss of their home through foreclosure. That the foreclosure was not complete and that the Ortizes sought injunctive relief in the prior action do not change the fact that both actions involved the same primary right. The Ortizes seek in this action a different form of relief for a violation of the same primary right. (See *Crowley v. Katleman* (1994) 8 Cal.4th 666, 682 ["numerous cases hold that when there is only one primary right an adverse judgment in the first suit is a bar even though the second suit . . . seeks a different remedy"]; *Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1247 [""""The 'cause of action' is to be distinguished from the 'remedy' and the 'relief' sought, for a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right."""]; see also *Mycogen Corp. v. Monsanto Co.*, *supra*, 28 Cal.4th at pp. 907-909 [action seeking damages for breach of contract involved the same primary right as a prior action seeking specific performance for the same breach].)

The Ortizes' reliance on *Yvanova* is misplaced. In *Yvanova*, which the California Supreme Court decided after the trial court dismissed the prior action, the Court held that, at least post-foreclosure, a borrower who is neither a party nor a beneficiary to an assignment of a loan has standing to "challenge a nonjudicial foreclosure on the ground that the foreclosing party is not a valid assignee of the original lender." (*Yvanova*, *supra*, 62 Cal.4th at p. 928.) The Supreme Court disapproved *Jenkins v. JPMorgan*

Chase Bank, N.A. (2013) 216 Cal.App.4th 497 and other decisions that had reached the opposition conclusion. (*Yvanova*, at p. 939 & fn. 13.) The Supreme Court in *Yvanova*, however, never suggested that, once the foreclosure occurs, the borrower has suffered a new injury or violation of a different primary right for purposes of claim preclusion. *Yvanova* did not involve claim preclusion and did not discuss the primary rights doctrine.[7]

2. *The Prior Action Resulted in a Judgment on the Merits for Purposes of Claim Preclusion*

In sustaining the demurrer without leave to amend, the trial court in the prior action necessarily decided the Ortizes did not have standing to challenge the promissory note and deed of trust. Thus, under the doctrine of issue preclusion—which has a less stringent "final judgment" requirement than claim preclusion—the judgment in the prior action bars the Ortizes from relitigating the issue of their standing to object to the

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[7] As stated, the Supreme Court in *Yvanova* disapproved *Jenkins*, on which the trial court relied in the prior action. (See *Yvanova*, *supra*, 62 Cal.4th at p. 924.) To the extent the Supreme Court's disapproval of *Jenkins* may have undermined the trial court's reasoning in sustaining the demurrer in the prior action, claim preclusion would still apply. (See *Moffat v. Moffat* (1980) 27 Cal.3d 645, 654 ["it is well settled that erroneous final judgments serve as a bar to further litigation on the action"]; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 796 [claim preclusion applies "where, as here, the only possible basis for its implementation is founded on a change in law following the original judgment"].)

transfers of the promissory note and deed of trust.[8] (See *South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 665 ["There need not be a judgment on the merits of the complaint in order to apply [issue preclusion] in the second action. Only the issue being argued in the second action had to be fully and finally litigated in the first action."]; *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1564 ["for purposes of issue preclusion . . . '"final judgment" includes *any* prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect"'].) Citibank and Ocwen, however, did not argue issue preclusion in the trial court, and they do not argue it on appeal.

Whether there was a final judgment on the merits in the prior action for purposes of claim preclusion is a closer question. Whether an order sustaining a demurrer constitutes a judgment on the merits for purposes of claim preclusion depends on the basis of the ruling. (*Boyd, supra*, 18 Cal.App.5th at p. 855; *Kanarek v. Bugliosi* (1980) 108 Cal.App.3d 327, 334 (*Kanarek*).) Generally, an order sustaining a demurrer is "'a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action . . . .'" (*Kanarek,* at p. 334.) Therefore, "'[a] judgment on a general demurrer will have the effect of a bar in a new action in which the complaint states the same facts which were held not to constitute a cause of action . . .

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[8] Issue preclusion "applies only '(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.'" (*Samara v. Matar*, *supra*, 5 Cal.5th at p. 327.)

or, notwithstanding differences in the facts alleged, when the ground on which the demurrer in the former action was sustained is equally applicable to the second one.'" (*Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1428; see *Goddard v. Security Title Insurance & Guarantee Co.* (1939) 14 Cal.2d 47, 52 ["[a] judgment given after the sustaining of a general demurrer on a ground of substance . . . may be deemed a judgment on the merits, and conclusive in a subsequent suit," including "where the demurrer sets up the failure of the facts alleged to establish a cause of action, and the same facts are pleaded in the second action"]; *Boyd*, at p. 855 [claim preclusion "may be invoked even when the prior judgment resulted from the sustaining of a demurrer, provided that the judgment was 'on the merits'"].) On the other hand, "[a] judgment based upon the sustaining of a demurrer for technical or formal defects is not on the merits and thus is not a bar to the filing of the new action." (*Boyd*, at p. 855.)

The Ortizes argue a "dismissal based on a lack of standing is considered a technical dismissal" for purposes of claim preclusion. Although the Ortizes do not cite any authority for their argument, some courts have stated that "contentions based on lack of standing involve jurisdictional challenges" (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438) and that "'[a] dismissal for lack of jurisdiction does not involve the merits'" (*Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1592).

But the court's ruling in the prior action that the Ortizes lacked standing to challenge the transfers of the promissory note and deed of trust was not based on the type of "technical or formal" defect that normally prevents an order from having preclusive effect. Generally, such defects are curable in a

subsequent action and do not obviously bar the plaintiff from obtaining some relief. (See, e.g., *Association of Irritated Residents v. Department of Conservation* (2017) 11 Cal.App.5th 1202, 1220 [mootness and lack of ripeness]; *Hardy v. America's Best Home Loans* (2014) 232 Cal.App.4th 795, 802 [failure to prosecute]; *Nichols v. Canoga Industries* (1978) 83 Cal.App.3d 956, 966-967 [lack of subject matter jurisdiction in federal court is not a final judgment for purposes of subsequent state court action].) The trial court's ruling in the prior action the Ortizes could not object to third-party transfers of their promissory note and deed of trust was not the type of defect the Ortizes could potentially cure in a subsequent action. It was a substantive adjudication the Ortizes could not state a cause of action and obtain relief based on the allegedly wrongful acts on which they based their claims. (Cf. *Boccardo v. Safeway Stores, Inc.* (1982) 134 Cal.App.3d 1037, 1043 [prior court's determination the plaintiffs did not have direct dealings with alleged conspirators, as required under section 4 of the Clayton Act (15 U.S.C. § 15), was "a substantive determination that [the plaintiffs] had no cause of action" and therefore a final judgment for purposes of claim preclusion].) The trial court's ruling in the first action the Ortizes did not have standing to object to the transfers of the promissory note and deed of trust was a decision on the merits for purposes of claim preclusion.

C. *The Ortizes Did Not State a Cause of Action for Violation of HBOR*

The Ortizes base their cause of action for violation of HBOR in part on their allegations Citibank and Ocwen wrongfully foreclosed on their home without having legal authority to

enforce the promissory note and deed of trust. To the extent this cause of action arises from these allegations, it is barred by claim preclusion for the reasons discussed. But the Ortizes also based their HBOR cause of action on the alleged failure by Citibank and Ocwen, before commencing foreclosure proceedings, to comply with certain notice procedures prescribed by HBOR. And because the defendants recorded a new notice of default and conducted the trustee's sale after the judgment in the prior state court action, claim preclusion may not bar the HBOR cause of action. (See *Planning & Conservation League v. Castaic Lake Water Agency*, *supra*, 180 Cal.App.4th at p. 227 [because claim preclusion "'is not a bar to claims that arise after the initial complaint is filed,'" the "doctrine may not apply when 'there are changed conditions and new facts which were not in existence at the time the action was filed upon which the prior judgment is based'"].) But the Ortizes failed to state a cause of action for violation of HBOR.

The Ortizes did not allege any facts in support of their cause of action for violation of HBOR; they simply paraphrased certain provisions of the law. In particular, the Ortizes cite to Civil Code section 2923.55, subdivision (b)(1)(B), (which provides that, prior to recording a notice of default, a mortgage servicer must notify the borrower that the borrower may request a copy of the promissory note, the assignments of the note, and the borrower's payment history), Civil Code section 2924.9 (a mortgage servicer that offers foreclosure prevention alternatives must notify the borrower of alternatives), Civil Code section 2923.7 (a mortgage servicer must offer single point of contact when the borrower requests a foreclosure prevention alternative), and Civil Code section 2924.17, subdivision (b) (a

mortgage servicer must review competent and reliable evidence to substantiate a borrower's default and the right to foreclose before recording instruments related to foreclosure). Although the Ortizes alleged Citibank and Ocwen violated these statutes, they alleged no facts regarding how Citibank and Ocwen did so. The Ortizes' mere recitation of statutory provisions, absent any supporting factual allegations, are conclusions of law, not properly pleaded facts. (See *Hawkins v. TACA Internat. Airlines, S.A.* (2014) 223 Cal.App.4th 466, 478 ["simply parroting the language of [a statute] in the complaint is insufficient to state a cause of action under the statute"]; see also *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 ["general rule [is] that statutory causes of action must be pleaded with particularity"]; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 604 [generally, "facts in support of each of the requirements of a statute upon which a cause of action is based must be specifically pled"].)

The Ortizes have not identified any facts they could allege to cure these defects. (See *Casiopea Bovet, LLC v. Chiang* (2017) 12 Cal.App.5th 656, 664 ["'The plaintiff[s] must clearly and specifically state "the legal basis for amendment, i.e., the elements of the cause of action," as well as the "factual allegations that sufficiently state all required elements of that cause of action."'"]; *Balikov v. Southern Cal. Gas Co.* (2001) 94 Cal.App.4th 816, 819-820 ["'When the trial court sustains a demurrer without leave to amend . . . [t]he plaintiff bears the burden of demonstrating a reasonable possibility to cure any defect by amendment.'"].) Therefore, the trial court did not abuse its discretion in sustaining the demurrer to the Ortizes' cause of action for violation of HBOR without leave to amend.

D. *The Ortizes Did Not State a Cause of Action for Breach of Contract*

The Ortizes allege Citibank and Ocwen breached the deed of trust by failing to provide notice to the Ortizes of "their right to bring forth a legal challenge to their foreclosure." Again, because the defendants recorded a new notice of default and conducted the trustee's sale after the judgment in the prior state court action, it is not clear that claim preclusion bars the Ortizes' cause of action for breach of contract. But again, the Ortizes failed to state a cause of action for breach of contract.

"The essential elements of a breach of contract claim are: '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.'" (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614.) The Ortizes allege Citibank and Ocwen breached paragraph 22 of the deed of trust, which provides, in relevant part: "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale." The Ortizes allege that, as a result of the breach of the deed of trust by Citibank and Ocwen, they lost their home through the foreclosure. However, the Ortizes cannot allege the failure by Citibank and Ocwen to notify them of their right to bring a legal challenge to the foreclosure caused the foreclosure. The Ortizes were undeniably aware of their right to bring an action to challenge the foreclosure, regardless of the

alleged breach of paragraph 22, because they filed multiple such actions, including the prior action, to prevent the foreclosure before the trustee's sale occurred. Moreover, as discussed, claim preclusion bars the Ortizes cause of action for wrongful foreclosure. Therefore, even if the Ortizes were unaware of their right to challenge the foreclosure prior to the trustee's sale, they cannot allege facts suggesting the foreclosure would not have occurred had Citibank and Ocwen apprised them of this right.

The Ortizes have not shown how they could amend their complaint to cure the defects in their breach of contract cause of action. The Ortizes argue they could add allegations Citibank and Ocwen also breached a provision of the deed of trust requiring them to comply with all federal laws, but they do not explain how they could allege facts to show this alleged breach caused the foreclosure or any other injury. The trial court did not err in sustaining the demurrer to the breach of contract cause of action without leave to amend.

E. *The Ortizes Did Not State a Cause of Action for an Accounting*

An accounting is not an independent cause of action. "The right to an accounting is derivative and depends on the validity of a plaintiff's underlying claims." (*Duggal v. G.E. Capital Communications* Services, Inc. (2000) 81 Cal.App.4th 81, 95; accord, *Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 833.) Because the trial court did not err in sustaining the demurrer to the Ortizes' other causes of action without leave to amend, the trial court did not err in sustaining the demurrer to the accounting cause of action without leave to amend.

DISPOSITION

The order dismissing the Ortizes' action with prejudice is affirmed. The motions by Citibank and Ocwen for judicial notice are granted. Citibank and Ocwen are to recover their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.