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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PISSAMAI THAN,

Plaintiff and Appellant,

v.

QUALITY LOAN SERVICE  
CORPORATION,

Defendant and Respondent.

B280737

(Los Angeles County  
Super. Ct. No. BC608048)

APPEAL from a judgment of the Superior Court of Los Angeles County, Deirdre Hill, Judge. Reversed and remanded.

Christopher J. Koorstad for Plaintiff and Appellant.

McCarthy & Holthus and Melissa Robbins Coutts for  
Defendant and Respondent.

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Plaintiff Pissamai Than appeals from a judgment entered after the trial court sustained the demurrer of defendant Quality Loan Service Corporation (“QLS”) to the first amended complaint without leave to amend. Because Than, on appeal, has demonstrated that she can plead facts sufficient to state a cause of action, we reverse the judgment and remand the matter to the trial court with instructions to allow her leave to amend.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Than sued QLS and others in March of 2016 for damages relating to the misappropriation of surplus funds after the foreclosure and sale of her home. Than alleged that her niece, Jariyaporn Kunkaew, and an attorney, Jeffrey Cancilla, conspired to deprive her of the funds, and that QLS, acting as foreclosure trustee, was negligent when it accepted a legally insufficient power of attorney and disbursed the funds to the attorney instead of to Than personally.

According to the first amended complaint, following the trustee’s sale, Cancilla and Kunkaew prepared and delivered to QLS three documents: a power of attorney; a “Statement to Claim of Surplus Funds – Prior Owner Interest Holder”; and an authorization to release financial credit information. Kunkaew allegedly forged Than’s signature on each of the three documents. Upon receipt of the documents, QLS issued a check for the funds payable to Than and delivered the check to Cancilla’s office. Than alleged that Cancilla subsequently deducted a substantial sum as his fee, issued a second check payable to her, and then delivered it to Kunkaew. Than alleged that she never received the funds and that Kunkaew and her husband spent them without her knowledge.

QLS demurred, arguing (1) it had no liability for common law negligence; (2) its duties were strictly limited by the comprehensive statutory scheme governing nonjudicial foreclosure; and (3) it fulfilled its duties by delivering the surplus funds to Cancilla. The trial court sustained QLS's demurrer without leave to amend, finding that QLS's duties were strictly prescribed by Civil Code section 2924 through 2924k,<sup>1</sup> and that Than had not alleged a breach of any duty owed under the statutory scheme. Than appeals.

## DISCUSSION

### I. Standard of Review

On an appeal of a trial court order sustaining a demurrer, we review the complaint de novo and determine whether the appellant has alleged facts sufficient to state a cause of action. (*Montclair Parkowners Assn. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) We accept as true all properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken, and we liberally construe all factual allegations with a view to substantial justice between the parties. (*Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.* (2012) 203 Cal.App.4th 913, 919.) We do not review the validity of the trial court's reasoning, but only the propriety of the ruling itself. (*Popescu v. Apple, Inc.* (2016) 1 Cal.App.5th 39, 50.)

When a demurrer is sustained without leave to amend, we review that portion of the ruling for an abuse of discretion. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th

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<sup>1</sup> All further statutory references are to the Civil Code.

1149, 1153.) We decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The appellant carries the burden of showing that amendment would cure the defect. (*Ibid.*)

## II. Than failed to state a claim for negligence

The elements of any negligence cause of action are duty, breach of duty, proximate cause and damages. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614.) The trial court found that Than failed to state a claim for negligence because she did not allege facts sufficient to satisfy the element of duty. While Than challenges this ruling on appeal, she has failed to allege facts sufficient to state a claim for negligence.

A trustee in a nonjudicial foreclosure is not a true trustee with fiduciary duties, but rather a common agent for the parties. (*Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 102.) The scope and nature of a trustee's duties are exclusively defined by the deed of trust and the statutes, and no other common law duties exist.<sup>2</sup> (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 819; *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 287 [“The rights and powers of trustees in

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<sup>2</sup> Because the statutory scheme was intended to be exhaustive, California courts have declined to expand trustees' duties beyond the scope of the statutes. (See, e.g. *Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 827; *Heritage Oaks Partners v. First American Title Ins. Co.* (2007) 155 Cal.App.4th 339, 345.)

nonjudicial foreclosure proceedings have long been regarded as strictly limited and defined by the contract of the parties and the statutes”].)

Section 2924, et seq. provide the comprehensive framework for the procedure and regulation of nonjudicial foreclosure. (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830). Sections 2924j and 2924k set forth the trustee’s duties concerning surplus funds. (*Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090, 1102). Under section 2924k, the trustee has a duty to distribute surplus proceeds of a trustee’s sale “to the trustor or the trustor’s successor in interest” (§ 2924k, subd. (a)(4)), subject to the procedural requirements for submitting and disbursing surplus funds set forth in section 2924j. Parties seeking surplus funds must submit a written claim to the trustee. (§ 2924j, subd. (a)(4).) The claim must be executed under penalty of perjury and contain two elements: (A) the amount of the claim, and (B) an itemized statement of the principal, interest, and other charges. (§ 2924j, subds. (a)(4) (A) & (B).) If the trustee chooses, the claimant “may be required to present proof that the person holds the beneficial interest in the obligation and the security interest therefor.” (§ 2924j, subd. (a)(4).)

Than alleged that QLS had a duty to “take reasonable and necessary steps to ensure that she actually received” the surplus funds, and that QLS breached this duty when it delivered the surplus funds to Cancilla, rather than Than, based on a legally insufficient power of attorney. This claimed duty would be an expansion of those required under the statutory scheme. However, “[t]he comprehensive statutory framework established [in sections 2924 to 2924k] to govern nonjudicial foreclosure sales

is intended to be exhaustive.” (*Moeller v. Lien*, *supra*, 25 Cal.App.4th at p. 834.) “Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.’ [Citation.]” (*Gomes v. Countrywide Home Loans, Inc.*, *supra*, 192 Cal.App.4th at p. 1154.) The trial court did not err in sustaining QLS’s demurrer to the negligence cause of action.

### **III. Than should be granted leave to amend**

On appeal, Than seeks leave to amend her first amended complaint, arguing that even if QLS is not liable under a negligence theory, she should be permitted to amend the complaint to state a cause of action for breach of statutory duties, “consistent with the *Barrett* [*Business Services, Inc. v. Workers’ Comp. Appeals Bd.* (2012) 204 Cal.App.4th 597] holding.” At oral argument, Than stated that she could allege facts sufficient to state a cause of action against QLS for breach of its duty to distribute the proceeds of the trustee’s sale to her or to her successor in interest. (§ 2924k.) While it is the appellant’s burden to show that the trial court abused its discretion and show in what manner she can amend her complaint and how that amendment will change the legal effect of her pleading, an appellant may make such a showing for the first time to the reviewing court. (*Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064, 1072.) Because Than has demonstrated a reasonable possibility that she can state a claim for breach of statutory duty, the trial court abused its discretion in sustaining the demurrer without leave to amend.

## **DISPOSITION**

The judgment is reversed. On remand, the trial court shall permit Than to amend her pleadings consistent with this opinion. Than shall recover her costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

BENSINGER, J.\*

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