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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

SHARON DE EDWARDS et al., Plaintiffs and Appellants, v. FIRST AMERICAN TITLE INSURANCE COMPANY, Defendant and Respondent.	B264490 (Los Angeles County Super. Ct. No. BC501920)

APPEAL from a judgment of the Superior Court of Los Angeles County, John L. Segal, Judge. Affirmed.

Law Offices of Santiago & Jones, David G. Jones, Trevor R. Witt and Alex Vo for Plaintiffs and Appellants.

Steyer Lowenthal Boodrookas Alvarez & Smith, Jeffrey H. Lowenthal, Edward Egan Smith, Bryan M. Kreft and Carlos A. Alvarez for Defendant and Respondent.

Appellants Sharon De Edwards and her husband Fernando Edwards brought suit against respondent First American Title Insurance Company based on actions of its purported agent, Alliance Title Company (Alliance) in connection with appellants 2006 refinance of their home. The preliminary title report prepared by Alliance did not include all of the liens recorded at the time of the refinance. Accordingly, not all liens were paid through escrow. Appellants claim that this information was concealed from them and that had they known, they would not have gone through with the refinance but would have undertaken other steps to ensure all liens were paid. Claims pursued by appellants against other defendants involved in the refinance resulted in a 2013 judgment, in which the trial court made multiple specific findings unfavorable to appellants, including the finding that appellants knew of the existence of all the liens and intentionally sought to have as few as possible paid with loan funds prior to the close of escrow. The judgment was appealed and this court affirmed. (*De Edwards v. Escrow of the West* (Aug. 19, 2014, B249503) [nonpub. opn.].) After the appeal was final, the trial court sustained a demurrer to appellants' second amended complaint against respondent on the ground of res judicata.

Appellants contend the trial court erred in applying res judicata as the prior litigation involved different parties, different causes of action and a different primary right. We find that appellant forfeited these contentions by failing to raise them below, and that in any event, application of

collateral estoppel, which does not require that the parties and claims be identical, would lead to the same result. We further reject appellants claim that they should be permitted to further amend the complaint. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Prior Litigation*

In the prior litigation, initiated in 2010, appellants brought suit against Escrow of the West (EOTW), its agent Clif Young (jointly, the escrow defendants), and Alliance.[1] The escrow defendants handled the escrow for the couple's 2006 refinance of their home. Alliance prepared the preliminary title report and issued the lender's title insurance policy.[2] At the time of the refinance, appellants

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[1] Alliance filed for bankruptcy. By stipulation, appellants obtained relief from the automatic stay, permitting them to pursue their claim against Alliance to judgment as long as they sought recovery solely from any insurance proceeds that might be available to cover their losses. It does not appear from our record whether a judgment was entered pursuant to that stipulation.

[2] As will be further discussed, the title policy issued by Alliance was underwritten by respondent. (See 3 Miller & Starr, Cal. Real Estate (4th ed. 2016) Participants in the Business of Title Insurance, § 7:3 ["[O]nly a title insurance company is authorized to write policies of title insurance. An underwritten title company is not authorized to write its own policies of title insurance but contracts with one or more title insurance companies to issue policies for that insurer as

(Fn. continued on next page.)

owed a substantial amount in back taxes to the Internal Revenue Service (IRS), and the IRS had recorded multiple liens against their home. Not all the liens were paid when escrow closed and the loan funded. The IRS subsequently imposed levies on appellants' income, their mortgage went into default, and they lost the home through foreclosure.

Appellants' complaint in the prior litigation alleged that the escrow defendants breached their fiduciary duty and failed to follow escrow instructions by failing to pay all IRS liens or ensure that the lender's deed of trust was recorded in the first lien position. Appellants further contended that the defendants as a whole conspired to "conceal, suppress, misrepresent and exclude" IRS liens that had not appeared on the preliminary title report prepared by Alliance, and that the defendants "orchestrated" the exclusion of the liens in order to "deceive [appellants] into believing that the total amount of the recorded federal tax liens on [the] home was [less than the true amount] . . . to induce [appellants] to accept the loan." Appellants claimed that had they been aware that recorded tax liens were not being paid, they would have not accepted the loan and

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its limited agent. . . .[¶] . . . . The underwritten title company conducts the title search and prepares the preliminary report. The underwritten title company also issues the policy as a limited agent of the title insurer pursuant to the terms of the underwriting or agency agreement with the title insurer" (fns. omitted)].)

"would have sold their home to pay the IRS recorded tax liens."

The case was tried to the court. The evidence established that while the loan was in escrow, title reports were prepared by Alliance and another company, Commonwealth Land Title Company (Commonwealth), both of which were provided to the escrow defendants. Alliance's report listed two IRS liens totaling approximately $20,000. The Commonwealth report listed three additional liens totaling more than $200,000. At the recommendation of appellants' loan broker, Maurice Charley, Alliance issued the title insurance policy.

Appellants testified that they were unaware of any IRS liens other than those listed in the Alliance title report, and would have insisted on all liens being paid before loan proceeds were disbursed to them.[3] However, the defense introduced Edwards's own admission that he had received copies of the liens appearing on the Commonwealth report from his agent, Charley, and that Charley had thereafter insisted in written communications with the escrow defendants that the loan close without those liens being paid. The defense also presented evidence that Edwards had

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[3] The loan was in the amount of $1.519 million. After payment of the debt owed the prior lender, the two IRS liens appearing in the Alliance title report and other less significant liens, appellants received a cash payout of approximately $200,000.

sought a loan from a different lender prior to entering into the subject loan, and had objected in writing to payment of an IRS lien appearing on that lender's good faith estimate of closing costs. Evidence further established that in 2007, when the IRS informed appellants that approximately $450,000 was still owed, they did not attempt to sell the house, but undertook to resolve their IRS issues through bankruptcy.

The escrow instructions introduced into evidence required the escrow agent to obtain "an ALTA Lender's Policy of title insurance, per Lender's requirement covering [the subject] real property," which was to be "free of encumbrances," and "to pay any encumbrance necessary to place the title in the condition called for . . . ." Specific closing instructions called for the agent to pay the existing loan, the IRS liens described in Alliance's title report, and some other minor non-IRS liens uncovered by Alliance.[4] A defense expert testified that the escrow defendants complied with the escrow instructions by obtaining an ALTA lender's policy of title insurance, and by paying the liens required to

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[4] The specific instructions also stated that the loan "must record in 1st lien position." Edwards testified that when he received a copy of the escrow instructions for his and his wife's signatures, he typed in the word "1st" and sent them back without informing any other party he had made the change. When the matter was before us on appeal, we concluded his "undisclosed, unilateral change could not bind [the escrow defendants]."

place the title in the condition necessary for Alliance to issue the title insurance policy.

After hearing the evidence, the trial court found that appellants "not only knew that not all of the tax liens would be satisfied by the funds in escrow but intentionally sought to close escrow with the satisfaction of as few tax liens as possible, leaving more cash available for distribution to [appellants], and leaving [appellants] to continue fighting with the IRS over the validity and amounts of the remaining tax liens." The court expressly found that the escrow defendants "complied with all of the terms of the escrow instructions," including "the amendment to the escrow instructions, and the closing instructions," stating that the defense expert's testimony -- that the escrow defendants complied with all obligations imposed by the escrow instructions -- was "credible and unrebutted." Finally, the court found that appellants failed to meet their burden of proof on causation: "[Appellants] damages arising out of the loss of their home, if any, were caused by [appellants'] failure to pay their mortgage and their failure to pay their taxes, not by anything [defendants] did or failed to do. At no time did [appellants] ever sell their home to pay off the tax liens, even after they admit they knew that certain tax liens remained after the . . . refinancing. The evidence showed that [appellants] are not really the type of people who pay their taxes, let alone sell their home to do so." In any event, "they never sold their home, or even seriously considered it, because Mr. Edwards always believed that he would prevail

over the IRS and would not have to pay the tax liens. The evidence shows that [appellants] would not have sold their house . . . to pay voluntarily any tax liens. [¶] In sum, [appellants] were gambling that Mr. Edwards could prevail in [their] tax disputes with the IRS and invalidate the tax liens [appellants] admittedly knew about, chose to receive more cash [out of] the refinance by not paying off those liens he thought he could invalidate or perhaps reduce, lost that gamble, and is now trying to cover his loss by blaming third parties who did nothing wrong." The court found Edwards's testimony "not credible" in many respects, and stated that it showed he was "still, . . . in his mind, fighting with [the] IRS over liens he now claims he did not know would not be paid from the . . . escrow."

The trial court issued its statement of decision on April 16, 2013. On August 19, 2014, this court issued its opinion affirming the trial court's judgment.

B. *Underlying Litigation*

1. *Original Complaint and FAC*

On February 27, 2013, appellants filed the underlying complaint against respondent First American Title Insurance Company.[5] Appellants' original complaint in the underlying litigation alleged, as had the complaint in the

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[5] First American had been named in the prior litigation as a defendant in EOTW's cross-complaint, which was later dismissed.

prior litigation, that the escrow instructions required the lender's deed of trust to be recorded in the first lien position.[6] It alleged that Alliance, acting as sub-escrow, had failed to comply with such escrow instructions.[7] It further alleged that the escrow instructions required Alliance to "supplement [its] title report to include[] the additional liens" which Alliance failed to do, and that Alliance had "concealed [tax liens] from [appellants]" by "exclud[ing] [them] from the title report that it . . . submitted to escrow" and "untruthfully confirming . . . that all liens were included in escrow . . . ."[8] The complaint alleged essentially the same damages as in the prior litigation: that "[appellants] lost their home due to the lienholder (IRS) levying their

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[6] Appellants did not attach the complete escrow instructions as an exhibit to the complaint. They attached only the instruction unilaterally altered by Edwards.

[7] (See *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1194 [a sub-escrow agent is a party engaged to perform rudimentary escrow functions, such as recordation of documents].)

[8] These allegations were similar to the complaint in the prior litigation, where appellants contended that the defendants conspired to "conceal, suppress, misrepresent and exclude" IRS liens that had not appeared on Alliance's preliminary title report prepared, and that the defendants excluded the liens in order to deceive appellants and induce them to accept the loan.

businesses 100% to collect for the liens that had been excluded from escrow by Alliance . . . ."

The primary difference between the underlying complaint and the complaint in the prior litigation was the allegation that respondent was liable for Alliance's actions because Alliance acted as respondent's agent both in issuing the title policy and in performing its functions as sub-escrow agent.[9] Appellants asserted that in January 2013, they obtained the underwriting agreement (sometimes referred to as the "UA") between respondent and Alliance. They claimed to have been unaware of the possibility that respondent was potentially liable for Alliance's actions until receiving and reviewing it.

The underwriting agreement, attached as an exhibit to the complaint, was entered into between Alliance and respondent in April 1998. It described Alliance as "a title insurance agent authorized to do business in the State of California and engaged in the business of examining titles to real property and issuing commitments for and policies of title insurance on behalf of underwriters." It empowered

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[9] The only action directly attributed to respondent in the complaint was that "in coordination with Alliance," it issued "a title policy on the recorded deed of trust." Appellants attached a "true and correct copy of the . . . Title Policy" as an exhibit to the complaint. The named insured was the lender for the 2006 refinance, Bridgelock Capital. The first page stated that it was "issued by First American Title Insurance Company." (Capitalization omitted.)

Alliance to issue title reports on respondent's behalf and "to provide related services economically and expeditiously based upon examinations of title performed by Alliance in the regular course of its business." The UA contained a provision requiring respondent to pay all costs, expenses, and reasonable attorneys' fees incurred in the defense of any claim by or against any insured, and for any judgment or award paid in compromise or settlement of any claim asserted by or on behalf of any insured, but provided that Alliance would be liable "for any loss resulting from the intentional elimination from a policy of title insurance of any exception relating to any defect of title reflected in the title search file, or from the issuance of an endorsement or other affirmative coverage eliminating an exception to coverage for any defect," unless the said elimination, endorsement or other affirmative coverage was provided in connection with a policy in the amount of $2 Million Dollars or less or approved by respondent or certain other parties.

The original complaint contained a single cause of action for declaratory relief, seeking a declaration establishing that "[Alliance's] sub-escrow activities were not excluded by the UA." Respondent demurred to the complaint on the grounds that (1) appellants lacked standing to seek a declaration of rights under a contract to which they were not a party and (2) respondent owned no duty to appellants because they were not the insureds under the title policy. Before the demurrer could be heard, appellants filed a first amended complaint (FAC). The FAC added a

claim for "damages based on agency," contending that appellants "justifiably relied" on the alleged representations that all tax liens were included in and paid from escrow and that the deed of trust was to be recorded in the first position.

Respondent demurred to the FAC, continuing to assert that appellants had no right to declaratory relief, that the declaratory relief cause of action was not adequately pled, and that respondent owed no duty to appellants, who were not its insureds.[10] The trial court sustained the demurrer with leave to amend.

2. *SAC*

On March 9, 2015, appellants filed a second amended complaint (SAC). The SAC continued to seek a declaration that Alliance's actions as sub-escrow were not excluded by the underwriting agreement. There were five new claims asserted: breach of contract, breach of third party beneficiary contract, fraud, breach of the implied covenant of good faith and fair dealing, and unfair business practices in violation of Business and Professions Code section 17200 et seq.

All claims except the fraud and unfair business practices causes of action were based on the allegations that appellants had justifiably relied on Alliance's false

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[10] The demurrer was not filed until 2015 because the court had stayed the underlying proceedings until the appeal in the prior litigation was resolved.

representation that all tax liens were included in and would be paid from escrow, and that the lender's deed of trust would be recorded in the first position. In addition, the breach of contract and breach of third party beneficiary contract causes of action included allegations that appellants paid funds to Alliance "with the express understanding that Alliance would purchase title insurance from [respondent] for the benefit of [appellants]," and that Alliance "made [false] representations to [appellants] that [they] would be covered by title insurance for issues arising out of the refinancing transaction . . . ."[11]

The claim for breach of third party beneficiary contract added allegations that respondent and Alliance had entered into the 1998 underwriting agreement "to provide [appellants with] the benefit of the promised performance and protect [appellants'] assets and rights," and that the UA "was expressly entered into for the benefit of [appellants], specifically for [appellants' 2006] refinancing."

The breach of implied covenant claim began by indicating it, too, was based on the underwriting agreement,

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[11] Despite the SAC's allegation that Alliance "purchased title insurance for the benefit of [appellants], from [respondent]," it is undisputed that appellants were not the named insured under the title insurance policy. In their reply brief, appellants contend that they were insured "as third party beneficiaries under [the] underwriting agreement" and "per Alliance's explicit representations while acting as Respondent's agent."

quoting the provisions discussed above, and claiming the 1998 UA was "entered into for the benefit of [appellants], specifically for [appellants' 2006] refinancing." Several paragraphs later it changed course, alleging that "there is a potential for coverage in this instance[,] and [respondent] has a duty to provide a defense for [appellants]," and that respondent breached the implied covenant by "failing to . . . investigate and evaluate claims made under the Policy," without identifying the policy that provided such coverage or any of its terms, or indicating when, if ever, appellants submitted a claim under it.

The allegation that Alliance "made representations to [appellants] that [they] would be covered by title insurance for issues arising out of the refinancing transaction" was the sole basis for the fraud claim. The SAC failed to specify the individuals making such representations, or when or under what circumstances the alleged representations were made. The cause of action for unfair business practices was based on respondent's having "refus[ed] coverage when there [was] a potential for coverage," again without identifying any policy providing such coverage and without asserting that any claim had been made under it.

Respondent demurred to the SAC, contending it was barred by res judicata and collateral estoppel. Respondent further contended that appellants were not third party beneficiaries of the underwriting agreement as a matter of law, that the third party beneficiary claim was inadequately pled, that appellants were not insured under any title

insurance policy underwritten by respondent, and that the fraud and unfair business practices claims failed for lack of specificity. Respondent asked the trial court to take judicial notice of its statement of decision filed in April 2013 in the prior litigation and of this court's 2014 opinion on appeal.

In response to respondent's res judicata/collateral estoppel argument, appellants contended the demurrer was improperly based on extrinsic evidence and not on pleadings or facts of which the court could properly take judicial notice. Appellants did not contest respondent's contention that res judicata and/or collateral estoppel otherwise barred their claims.

The court granted the request for judicial notice and sustained the demurrer to the SAC without leave to amend. In its written order, the court preliminarily observed that appellants had not contested respondent's argument that appellant's claims were barred by res judicata, but merely asserted that the court could not take judicial notice of the truth of the findings made in the judgment in the prior litigation. The court explained that it was permitted to "take judicial notice of court records in considering [a] demurrer based on res judicata" (quoting *Estate of Dito* (2011) 198 Cal.App.4th 791, 795), noting that "'[w]hether a factual finding is true is a different question than whether the truth of that factual finding may or may not be subsequently litigated a second time.'" (Quoting *Steed v. Dep't of Consumer Affairs* (2012) 204 Cal.App.4th 112, 121, fn. 5.)

Turning to the "unopposed" merits, the court found that the underlying claims were barred by res judicata: "A review of the [SAC], . . . and the Court of Appeal's decision affirming this court's judgment in . . . [the prior litigation], establishe[d] that this action is based on the same causes of action that were or could have been litigated in the prior action. The causes of action are premised on the same 'primary right,' which is the plaintiff's right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based. [Citation.] The injury in the prior case was the loss of [appellants'] home in a foreclosure sale, based on [defendants'] failure to pay certain IRS liens . . . . [Citations.] [¶] The primary right in this action is the same as in the prior action: the foreclosure of [appellants'] home in a 'distressed sale' to satisfy the IRS liens after the same refinancing transaction at issue in the prior action. [Citation.] [Appellants] allege a different theory in this action; namely, that [respondent] should pay for [appellants'] injury either under a title insurance policy [appellants] purchased from [respondent] through Alliance or under an underwriting agreement between Alliance and [respondent]. [Citation.] But the injury is the same, and the primary right is the same. The fact that [appellants] based this action on a different legal theory or seek different relief for the same injury does not change the result."

Judgment was entered and this appeal followed.

DISCUSSION

A. *Standard of Review*

We review an order sustaining a demurrer de novo, "exercising our independent judgment about whether the complaint states a cause of action as a matter of law. [Citations.]" (*Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1134.) ""We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment . . . . The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) "'Leave to amend is properly denied if the facts and nature of plaintiff's claim are clear and under the substantive law, no liability exists [citation,] or where it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiffs cannot state a cause of action [citation].'" (*Titus v. Canyon Lake Property Owners Assn.* (2004) 118 Cal.App.4th 906,

917, quoting *Haskins v. San Diego County Dept. of Public Welfare* (1980) 100 Cal.App.3d 961, 965.)

A judgment based on an order sustaining a demurrer may be affirmed on appeal if any one of multiple grounds for the demurrer is well taken, regardless of whether it was the ground on which the trial court relied. (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1144.)

B. *Deficiencies of the SAC*

Before we turn to the issues discussed in the parties' briefs, we discuss a ground for demurrer raised by respondent but not addressed by the trial court: the general incoherency of the SAC and the inadequacy of its allegations to support the causes of action asserted. For example, "[t]o state a cause of action for breach of contract," as the SAC purported to do, "a party must plead the existence of a contract, his or her performance of the contract or excuse for nonperformance, the defendant's breach and resulting damage. [Citation.] If the action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.) Appellant's claim for breach of contract did not include any of the necessary elements, relying solely on vague allegations that Alliance misrepresented certain facts concerning whether all tax liens would be paid through escrow so that the lender's deed of trust could be recorded in

first position and whether a title insurance policy for the benefit of appellants existed.[12]

The claim for breach of contract to which appellants were allegedly third party beneficiaries was similarly deficient. It identified a contract -- the underwriting agreement -- and included it as an exhibit, but did not explain how the contract was breached by respondent or how any breach caused damage to appellants. Moreover, the allegation that a 1998 agreement between a title company and its underwriter was made "for the benefit of [appellants], specifically for [appellants' 2006] refinance" is not self-evident and might properly have been disregarded by the trial court had it undertaken to interpret the UA and determine appellants' status as a matter of law. (See *Goonewardene v. ADP, LLC* (2016) 5 Cal.App.5th 154, 172.)

The claim for breach of implied covenant was simply incoherent. It began with a reference to the underwriting agreement and switched midway to a discussion of "potential for coverage" and "fail[ure] to . . . investigate and evaluate claims" without ever describing the policy requiring action by respondent or any claims made by appellant under it. The claim for the unfair business practices, alleging that

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[12] As previously stated, the SAC contained an allegation that Alliance had procured title insurance from respondent for the benefit of appellants, but that allegation was not included as a basis for the breach of contract claim.

respondent "refus[ed] coverage when there is a potential for coverage" was similarly devoid of factual support.

The inadequacy of the SAC was particularly apparent in the claim of fraudulent misrepresentation. The elements of a claim for fraud -- (1) that the defendant represented that a material fact was true; (2) that the representation was false; (3) that the defendant knew that the representation was false when made, or the defendant made the representation recklessly and without regard for its truth; (4) that the defendant intended that the plaintiff rely on the representation; (5) that the plaintiff reasonably relied on the representation; (6) that the plaintiff was harmed; and (7) that the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff (*Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434) -- "must be pleaded with specificity . . . ." (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248.) "[T]he specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793.) The SAC contained allegations that "Alliance" represented that appellants "would be covered by title insurance for issues arising out of the refinancing

transaction," that all tax liens would be paid from escrow, and that the lender's deed of trust would be recorded in first position. It did not state who made the representations, or when, or explain how appellants could justifiably have relied on them.

Appellants state the SAC was prepared by newly-hired counsel, and that the court's ruling "essentially allow[ed] new counsel only one opportunity to amend the complaint." Counsel's unfamiliarity with the case does not explain the general incoherence of the SAC, the disregard for basic rules of pleading and practice, or the failure to allege essential elements of the causes of action purportedly pled. Moreover, leave to amend is properly denied "'where it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiffs cannot state a cause of action [citation].'" (*Titus v. Canyon Lake Property Owners Assn.*, *supra*, 118 Cal.App.4th at p. 917.) In the underlying proceeding, appellants had three opportunities to state a viable claim. In addition, there were multiple amended pleadings in the prior litigation, in which Alliance was a defendant. Under these circumstances, it would not have been an abuse of discretion to sustain the demurrer to the SAC without leave to amend for its failure to adequately assert its claims.

C. *Res Judicata/Collateral Estoppel*

As the Supreme Court recently explained, res judicata in its primary aspect of claim preclusion "'prevents

relitigation of the same cause of action in a second suit between the same parties or parties in privity with them,'" and applies where "a second suit involves[:] (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) Issue preclusion, often known as collateral estoppel, "prohibits the relitigation of issues argued and decided in a previous case even if the second suit raises different causes of action." (*Ibid.*) "Issue preclusion differs from claim preclusion in two ways. First, issue preclusion does not bar entire causes of action. Instead, it prevents relitigation of previously decided issues. Second, unlike claim preclusion, issue preclusion can be raised by one who was not a party or privy in the first suit." (*Ibid.*)

The trial court found that appellants' claims were barred by res judicata/claim preclusion. Appellants contend the court improperly took judicial notice of the truth of the factual findings of its April 2013 statement of decision in the prior litigation. As explained in *Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, although a court may not take judicial notice of the truth of factual assertions in the records of a previous case, the court may rely on such records to "determine[] that a particular issue . . . had been previously adjudicated after a contested adversarial hearing" and that "in accordance with collateral estoppel doctrines [could not] . . . be litigated again." (*Id.* at p. 1485.) "'Whether a factual finding is true is a different question

than whether the truth of that factual finding may or may not be subsequently litigated a second time.'" (*Ibid*., quoting *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1569.) "The doctrines of res judicata and collateral estoppel will, when they apply, serve to bar relitigation of a factual dispute even in those instances where the factual dispute was erroneously decided [in the first instance] . . . ." (*Sosinsky, supra,* at p. 1569.) Here the court properly took judicial notice that certain claims had been adjudicated in the prior litigation and that certain findings had been made adverse to appellants. This was not an improper reliance on extrinsic facts.

Appellants alternatively contend that res judicata/claim preclusion could not apply because the judgment in the prior litigation involved different parties, different causes of action, and a different primary right. As respondent notes and appellants do not contest, they did not raise these arguments in opposing the demurrer, but simply contended that the court could not take judicial notice of its findings in the April 2013 statement of decision or the 2014 appellate decision. Accordingly, those arguments were forfeited. (See *Woodward Park Homeowners Assn. v. City of Fresno* (2007) 150 Cal.App.4th 683, 712 ["As a general rule, an appellate court will not review an issue that was not raised by some proper method by a party in the trial court"].)

Moreover, even if appellants' objections had been timely raised, the demurrer would have properly been sustained by application of collateral estoppel/issue

preclusion, which does not require that the two proceedings involve the same parties, the same causes of action or the same primary right. (*DKN Holdings LLC v. Faerber*, *supra*, 61 Cal.4th at pp. 824-825 ["Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action" and "it can be asserted . . . against a party to the first lawsuit, or one in privity with a party"].) Appellants alleged in the prior litigation that the escrow instructions required the escrow defendants to pay all IRS liens and ensure that the lender's deed of trust was recorded in the first lien position. The court's finding in the prior litigation that the escrow instructions had been fully complied with when the escrow defendants obtained a lender's policy of title insurance and paid the liens required to place the title in the condition necessary for Alliance to issue the title insurance policy precluded any attempt to assert a claim against Alliance for failing to comply with escrow instructions. Thus, to the extent appellant seeks to assert a claim against respondent based on Alliance's alleged failure to comply with escrow instructions, the findings in the prior litigation bar such claim.

Appellants attempted to recast their claims against Alliance as fraud, alleging as support for nearly every cause of action in the SAC that Alliance made false representations to appellants that all IRS liens would be paid, that the lender's deed of trust would be in the first position, and/or that it would procure a title insurance policy for appellants. The court's prior findings that appellants

were well aware of the tax liens and made every effort to arrange the loan to maximize the cash proceeds paid to them at closing bar any claim based on these alleged misrepresentations. The court specifically found that at all relevant times, appellants "knew of the existence of all of the tax liens on their property," "knew that not all of the tax liens would be paid from escrow as part of the . . . refinance," and "intentionally sought to close escrow with the satisfaction of as few tax liens as possible, leaving more cash available for distribution to [appellants], and leaving [appellants] to continue fighting with the IRS over the validity and amounts of the remaining tax liens." Moreover, the court found that appellants failed to establish causation, finding not credible their claim that had they known the scope of the tax liens, they would have sold the house in 2007 to pay off the liens, rather than enter into the refinance agreement. That finding applies equally to appellants' current claims, precluding their effort to blame misrepresentations allegedly made by Alliance for the loss of their home or their decision to go through with the loan.

Appellants repeatedly refer to the 1998 UA, asserting that it and the relationship between Alliance and respondent was concealed from them. They claim that the UA "clearly stated that [respondent was] responsible for any and all harm, injury or damage caused by [its] agents while performing under the terms of the UA on behalf of [a]ppellants," pointing to the language that empowered Alliance "to provide[] related services . . . economically and

expeditiously based upon examinations of title performed by Alliance in the regular course of its business." Even were we to assume this language supports the contention that Alliance was respondent's agent for all purposes, it did not create a new claim, but merely provided another source of recovery for any claims appellants might have against Alliance. As discussed, due to the preclusive effects of collateral estoppel on the allegations of the SAC, appellants have no viable claims against Alliance on any ground asserted in the SAC.

Appellants contend that should they be given leave to amend, they would assert new claims for constructive fraud and fraudulent concealment. In this regard, they assert that had they known of the relationship between Alliance and respondent, they would have pursued a claim against respondent in the prior litigation and saved litigation expenses. In light of the fact that respondent had been the subject of a cross-complaint filed by EOTW in the prior litigation, and was the named insurer on the lender's title insurance policy, appellants' claim of ignorance rings hollow. Moreover, as we have concluded that appellants have no viable claim against Alliance, they have suffered no injury as the result of the alleged fraud.

Appellants also contend they could amend to re-state their claim for breach of contract as a third party beneficiary under the UA. Appellants contend that respondent "had specific duties to [a]ppellants based on the underwriting agreement" and "breached these duties," but nowhere in the

SAC or in its brief on appeal do appellants identify those duties or specify how they were breached. Appellants attempt to focus on the provision quoted above, requiring respondent to pay all costs, expenses, etc. incurred in the defense of a claim by or against an insured, with certain limited exceptions requiring Alliance to pay. They contend the UA "created a clear right of indemnity by [respondent] for the failings of Alliance," and that by triggering that obligation they would be entitled to collect insurance proceeds, but provide no argument or citation to authority to support that contention. "'The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract.'" (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1022.) We have reviewed the UA and see nothing in its terms to suggest it was intended to benefit appellants or any other homeowner seeking a refinance. Accordingly, appellants have failed to demonstrate that they could state a viable claim against respondent.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.