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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SHERRY HERNANDEZ, Plaintiff and Appellant, v. PNMAC MORTGAGE OPPORTUNITY INVESTORS, LLC et al., Defendants and Respondents.	B287048 (Los Angeles County Super. Ct. No. YC068794)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed.

Hernandez Law Group, Rhonda Hernandez; Imperiale Law Group, James T. Imperiale, for Plaintiff and Appellant.

Blank Rome, Cheryl S. Chang and Jessica A. McElroy, for Defendants and Respondents.

Plaintiff and appellant Sherry Hernandez (plaintiff) sued the parties who foreclosed on her residence, including defendants and respondents PNMAC Opportunity Fund Investors, LLC (PNMAC) and PennyMac Loan Services. In a prior appeal, we held the trial court was right to sustain a demurrer to all of plaintiff's causes of action as alleged in a second amended complaint, but wrong not to give plaintiff further leave to amend her wrongful foreclosure claim so as to try to state a valid cause of action following the change in law worked by *Yvanova v. New Century Mortgage Corporation* (2016) 62 Cal.4th 919 (*Yvanova*). Plaintiff later filed a third amended complaint presenting a restyled wrongful foreclosure claim and, at the same time, proposed to add various other causes of action and additional defendants. Defendants again demurred, and the trial court found plaintiff still had not sufficiently alleged a viable wrongful foreclosure theory and could not allege additional causes of action or add defendants when we remanded solely to permit amendment of the wrongful foreclosure claim. We now consider whether the court was correct to sustain defendants' most recent demurrer without further leave to amend.

I. BACKGROUND

A. The Pertinent Transactions, As Described by the Operative Complaint and Shown in Documents Subject to Judicial Notice

Plaintiff's husband, Alfredo Hernandez, borrowed $752,500 from Your-Best-Rate Financial, LLC (Your-Best-Rate), evidenced by his promissory note in that amount (the Note). The Note was secured by a deed of trust on the family's Rancho Palos Verdes home (the Property). Plaintiff, her husband, and her daughter

Elizabeth all signed the deed of trust, which includes a provision authorizing sale of the Property in the event of a default on the payments due under the Note. The trust deed also includes a provision by which the deed's signatories acknowledge Mortgage Electronic Registration Systems, Inc.[1] (MERS)—the named beneficiary under the trust deed and the holder of legal title to the interests granted by the deed's signatories—had the right, as nominee for the lender and its successors and assigns, to exercise any or all of the interests granted by the signatories, including "the right to foreclose and sell the Property."

The original lender, Your-Best-Rate, assigned the Note to CitiMortgage, Inc. on the same day it was executed via a first allonge to the Note. A second allonge to the Note indicates "CitiMortgage, Inc. [b]y and through its Attorney in Fact PNMAC Capital Management LLC" endorsed the note in blank, which would operate to assign its interest to whoever actually holds the Note.

On January 18, 2012, PennyMac Loan Services recorded an assignment of the deed of trust on the Property (the Assignment).

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[1] "MERS was formed by a consortium of residential mortgage lenders and investors to streamline the transfer of mortgage loans and thereby facilitate their securitization. A member lender may name MERS as mortgagee on a loan the member originates or owns; MERS acts solely as the lender's 'nominee,' having legal title but no beneficial interest in the loan. When a loan is assigned to another MERS member, MERS can execute the transfer by amending its electronic database. When the loan is assigned to a nonmember, MERS executes the assignment and ends its involvement." (*Yvanova*, *supra*, 62 Cal.4th at p. 931, fn. 7.)

By its terms, the Assignment indicates MERS assigned "all beneficial interest" under the trust deed to PNMAC. On its face, the Assignment states it was executed on January 5, 2012, by Todd Graves (Graves), acting in his capacity as an assistant secretary of MERS. The Assignment also bears an attestation by Corina Castillo, a Los Angeles County Notary Public, that Graves personally appeared before her and proved by satisfactory evidence that he executed the Assignment in his "authorized capacity."

The same day the Assignment was recorded, MTC Financial, Inc. dba Trustee Corps (Trustee Corps) recorded a Notice of Default and Election to Sell, stating the Note was in default in the amount of $55,059.76. Trustee Corps served and recorded a notice of trustee's sale on July 10, 2012, and on April 16, 2013, Trustee Corps conducted the foreclosure sale of the Property. PNMAC purchased the Property for $695,000, and a Trustee's Deed Upon Sale to that effect was subsequently recorded in the County Recorder's Office.

B. Plaintiff's Lawsuit, the Successful Demurrer, and Our Prior Decision Reversing and Remanding

After the completed foreclosure sale, plaintiff sued PNMAC in Los Angeles Superior Court. Not long thereafter, she filed a first amended complaint, and then a second amended complaint. The second amended complaint asserted four causes of action: (1) "Violation of California Commercial Code–Fraudulent Assignment," (2) Quiet Title, (3) Wrongful Foreclosure, and (4) "cancellation of instrument," specifically attacking the deed of trust, notice of default, and notice of trustee's sale. The gist of the pleading was that defendants had no interest in the trust

deed, and thus no right to foreclose on the Property, because MERS never validly assigned the trust deed to PNMAC. Plaintiff alleged no facts, however, that established whether she believed the Assignment was void or merely voidable.

The trial court sustained PNMAC's demurrer to the second amended complaint without leave to amend. In an opinion filed in December 2015, we affirmed. We rested our holding largely on a conclusion that a foreclosure plaintiff does not have standing to challenge an entity's authority to initiate foreclosure proceedings, but we noted this standing issue was then pending before our Supreme Court in *Yvanova*. Plaintiff sought review in the Supreme Court on that basis, and the Supreme Court issued an order remanding the matter to us for reconsideration in light of its newly issued *Yvanova* opinion, which holds "borrowers have standing to challenge [deed of trust] assignments as void, but not as voidable." (*Yvanova*, *supra*, 62 Cal.4th at p. 939.)

We vacated our original December 2015 opinion and issued a new opinion reversing the trial court's judgment of dismissal as to PNMAC. (*Hernandez v. PNMAC Mortg. Opportunity Fund Inv'rs, LLC* (June 27, 2016, No. B258583) [nonpub. opn.].) We held plaintiff's second amended complaint did not then state a valid cause of action as to any of the four claims it asserted, including the wrongful foreclosure claim. We also adhered to the prior conclusion, in our December 2015 opinion, that PNMAC's demurrer was properly sustained without leave to amend as to plaintiff's causes of action for violation of the Commercial Code, quiet title, and cancellation of instruments. But we held there was a reasonable probability plaintiff could amend her wrongful foreclosure claim to state a valid cause of action consistent with the parameters established in *Yvanova*, and we "remand[ed] the

matter to the trial court to give her that opportunity, which if again contested via demurrer by PNMAC, the trial court will decide on the record before it." Specifically, we explained plaintiff might be able to plead a valid wrongful foreclosure theory because her briefs indicated "she intends to allege PNMAC was not the true beneficiary because the Assignment was absolutely void—not simply voidable," which conceivably could also excuse her from the general requirement that a plaintiff seeking to invalidate a foreclosure sale must allege tender (i.e., actual or offered payment) of the amount due and owing under a promissory note.[2]

C. The Operative Third Amended Complaint

Back in the trial court, plaintiff filed a third amended complaint in December 2016, which is the operative pleading for purposes of this appeal. The operative complaint alleges a single "Cause of Action for Wrongful Foreclosure based on Void Assignment." The various paragraphs comprising this cause of

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[2] We elaborated: "[O]ur reading of the operative complaint along with the additional facts plaintiff now represents she can plead establishes a reasonable possibility plaintiff can go beyond mere allegations and present a specific wrongful foreclosure theory on which she intends to rely, namely, that the person who ostensibly executed the Assignment, Graves, in fact had no authority to act on MERS's behalf; or if he did, he did not in fact execute the Assignment because the notary, Castillo, who has since apparently been convicted (not just indicted) for misuse of her notary seal falsely verified his signature; and that just months before the Assignment was ostensibly executed there were competing claimants on the beneficial interest in the Note."

action read more like a memorandum of points and authorities than a typical complaint, but as best we can follow, the wrongful foreclosure cause of action alleges the Assignment was "void ab initio" for four reasons.

First, the operative complaint alleges the Assignment is void because the trust deed itself is "void ab initio." Plaintiff presents a convoluted theory for why the trust deed is purportedly void that she does not reprise in her briefs seeking reversal in this appeal. Second, the complaint alleges the Assignment was executed at the request of the lender, Your-Best-Rate, and Your-Best-Rate "could not have exercised authority with respect to the Assignment inasmuch as [Your-]Best-Rate was dissolved by its state of incorporation" years before the Assignment was made. Third, the complaint "challenges the capacity and authority in which Todd Graves executed the assignment." The sole basis of this challenge, as alleged, is that "Todd Graves has executed voluminous documents with numerous different titles on behalf of multiple entities," including PNMAC and MERS. Fourth, and finally, the complaint alleges "[m]any of the instruments Todd Graves executed, including the Assignment of which [p]laintiff complains, were notarized by the notary . . . Corina Castillo," who was under criminal investigation and allegedly pled guilty to "a few felony counts" of notary fraud in an unrelated state court case.

Plaintiff's operative complaint also includes other assertions and information (allegations would not be the right word) apart from the Assignment-related averments. The complaint asserts the trustee's sale of the property was "void ab initio" because the authority exercised by the trustee was "derived from void instruments." The complaint includes a series

of paragraphs with the goal of establishing "[p]laintiff was ready and willing to establish a positive relationship with the defendants." The complaint "brings to the court's attention other acts of the [d]efendants, named and unnamed, in furtherance of their pursuit to prevail in this matter." And in perhaps its oddest feature, the complaint itself states plaintiff requires leave to amend it to "allege and substantiate" a "litany of additional causes of action" and "to identify by name several of the unnamed DOES in the interest of justice."

D. Subsequent Trial Court Proceedings and the Ruling Sustaining a Demurrer Without Further Leave to Amend

Not long after plaintiff filed the operative complaint, plaintiff filed a motion for leave to amend the operative complaint. Plaintiff asked to make certain minor revisions, to add six new causes of action that had not been alleged in any of her four prior complaints, and to name nine new defendants in place of unspecified Does. Defendants opposed giving plaintiff leave to further amend and the trial court denied the motion, finding it moot because the "request for amendment is not within the scope of the Court of Appeal['s] ruling which allowed for amendment solely as to the cause of action for Wrongful Foreclosure and solely against [PNMAC]."[3] The court ordered defendants to file a responsive pleading to plaintiff's operative complaint within 30 days.

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[3] The court also struck the lines of text in the operative complaint that requested leave to amend.

Defendants[4] demurred to the operative complaint on the grounds that plaintiff's wrongful foreclosure claim, even as again amended, did not "state facts sufficient to constitute a cause of action, and is uncertain, unintelligible, and ambiguous." Defendants argued the wrongful foreclosure cause of action failed because plaintiff had not alleged she tendered the amount due under the Note, nor had she sufficiently alleged a valid basis to excuse her from tendering that amount. Defendants further argued (1) plaintiff had not alleged sufficient facts to support her "bald allegation" that the Assignment is void because Graves lacked capacity or authority to sign the document, and (2) plaintiff's allegations concerning asserted impropriety by notary Castillo did not establish any link to what occurred in her case. Defendants additionally asked the court to deny any request for further leave to amend, explaining "[p]laintiff's theory of the case—that the individual [i.e., Graves] who signed the [A]ssignment . . . signed documents on behalf of other entities—does not support any basis for liability against [PNMAC]."

The trial court sustained defendants' demurrer without leave to amend. The court believed our opinion remanding the matter "provided clear guidance regarding what facts were required to state a claim for wrongful foreclosure," namely, factual allegations that Graves had no authority to act on MERS's behalf or, even if he did, he did not actually sign the Assignment and Castillo falsely notarized a signature as his. The trial court concluded the operative complaint failed to plead such facts, explaining the operative complaint's allegation that Graves

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[4] Plaintiff's operative complaint named "PennyMac Loan Services, LLC" as one of the named defendants.

had executed documents for other entities did not establish he had no authority to execute the Assignment for MERS and there was no allegation in the operative complaint that Castillo falsely verified Graves's signature on the Assignment. The trial court further found the operative complaint continued to seek to unwind the foreclosure sale of the Property, which meant "the tender rule" was applicable and plaintiff had not sufficiently alleged a void assignment that would excuse her from tendering the amount due under the Note.

The trial court thereafter entered a judgment of dismissal, from which plaintiff now appeals.

II. DISCUSSION

We confront two questions in this appeal, one old and one new. First, the old: we decide, now for the third time, whether plaintiff has alleged facts to state a proper wrongful foreclosure claim and, if not, whether she has identified facts that she should be given further leave to allege. The short answer is a double no—the operative complaint presents no valid theory that the Assignment is void and plaintiff has not presented sufficient justification for getting a fifth bite at the apple. Second, the new: plaintiff argues she should be permitted to assert seven heretofore unpled causes of action and to name two additional defendants. It is too late for all that. We previously affirmed the sustained demurrer as to all causes of action and remanded solely to give plaintiff an opportunity to amend the wrongful foreclosure cause of action in light of *Yvanova*. Plaintiff had that opportunity, it was unsuccessful, and she is entitled to nothing more now.

A. Standard of Review

"For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6[ ].) To determine whether the trial court should, in sustaining the demurrer, have granted plaintiff leave to amend, we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint's legal defect or defects. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081[ ].)" (*Yvanova*, *supra*, 62 Cal.4th at p. 924, fn. omitted.) Sustaining a demurrer without leave to amend is proper "if either (a) the facts and the nature of the claims are clear and no liability exists, or (b) it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a claim." (*Cantu v. Resolution Tr. Corp.* (1992) 4 Cal.App.4th 857, 889-890 (*Cantu*).)

B. Plaintiff Has Not Stated a Cause of Action for Wrongful Foreclosure, nor Has She Shown She Can Fix the Problem

A claim for wrongful foreclosure lies where "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale . . . was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from

tendering." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104.)

In this case, the first and third of these elements coincide: plaintiff's wrongful foreclosure claim is predicated on the theory that the foreclosure was illegal because the Assignment is void (meaning PNMAC lacked valid authority to institute foreclosure proceedings), and prior cases have held a foreclosure arising from a void instrument provides an excuse for the ordinarily applicable rule that a wrongful foreclosure plaintiff must allege tender, i.e., that she has paid or offered to pay the amount in arrears (see, e.g., *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1100 (*Glaski*); see also *Yvanova*, *supra*, 62 Cal.4th at p. 929, fn. 4). So the key issue is whether the operative complaint alleges facts that, if true, would establish the Assignment is void (not merely voidable). It does not—as to any of the alleged theories the operative complaint proffers.

The operative complaint alleges the Assignment is void because it was "purportedly" executed at the request of Your-Best-Rate even though the company had been "dissolved by its state of incorporation in 2010." But the Assignment itself, which the trial court judicially noticed and which we do as well, does not indicate it was executed at the behest of Your-Best-Rate. Rather, it states the "undersigned" grants, assigns, and transfers the loan to PNMAC—where the "undersigned" is MERS, "acting solely as nominee for Lender, [Your-Best-Rate], its successors and/or assigns." By failing to acknowledge or grapple with the reference to the successors or assigns of Your-Best-Rate, the allegation in the complaint does not suffice to establish the trust deed was transferred without authority—especially when, as we have already explained, Your-Best-Rate assigned the Note to

CitiMortgage, Inc. on the same day it was executed via a first allonge to the Note and the trust deed necessarily accompanied that assignment. (See, e.g., *Yvanova*, *supra*, 62 Cal.4th at p. 927 ["The deed of trust . . . is inseparable from the note it secures, and follows it even without a separate assignment"].) Furthermore, even if plaintiff were right that Your-Best-Rate retained the Note and trust deed when Your-Best-Rate was allegedly dissolved, there is persuasive authority that MERS still would have the power to execute the Assignment in that circumstance. (See, e.g., *L'Amoreaux v. Wells Fargo Bank, N.A.* (5th Cir. 2014) 755 F.3d 748, 750 ["Although [the lender] had ceased to exist at the time of the assignment, the Deed of Trust explicitly contemplates MERS's continuing to act as nominee for [the lender's] 'successors and assigns'"]; *Ghuman v. Wells Fargo Bank, N.A.* (E.D. Cal. 2013) 989 F.Supp.2d 994, 1002-1003.) This alleged theory of voidness therefore fails.

Next, the operative complaint alleges the Assignment is void on its face because plaintiff "challenges the capacity and authority in which . . . Graves executed" it. This is merely a contention or conclusory allegation of law entitled to no weight in a demurrer analysis. (*Yvanova*, *supra*, 62 Cal.4th at p. 924.) What plaintiff needs are well-pleaded facts, and the operative complaint offers only this: "Graves has executed voluminous documents with numerous different titles on behalf of multiple entities, including but not limited to" documents as attorney-in-fact for PNMAC and as Assistant Secretary of MERS.

That is not enough. The allegation that Graves executed other documents in other capacities (largely similar to the capacity in which he executed the Assignment here) does not establish a factual predicate that he had no authority to execute

the Assignment. No facts are alleged that would suggest the capacities in which Graves signed the other documents are somehow inconsistent with his authority to simultaneously act for MERS in connection with the Assignment. (See generally *Cervantes v. Countrywide Home Loans, Inc.* (9th Cir. 2011) 656 F.3d 1034, 1040 ["MERS relies on its members to have someone on their own staff become a MERS officer with the authority to sign documents on behalf of MERS. [Citation.] As a result, most of the actions taken in MERS's own name are carried out by staff at the companies that sell and buy the beneficial interest in the loans"].) Moreover, of all the other documents bearing Graves's signature that plaintiff attaches to her complaint, none were executed on the same day as the Assignment. There is thus not even a factual predicate to conclude he acted in more than one capacity simultaneously.

Plaintiff's opening brief suggests she can cure her deficient factual allegations concerning Graves by adding a single sentence to the complaint: "'Graves was not authorized to execute the Assignment, PennyMac's permission notwithstanding; PennyMac did not have authority to so direct.'" This still does not fix the problem, for two reasons. First, this proposed addition is still just a contention or conclusion of law. (See, e.g., *Glaski*, *supra*, 218 Cal.App.4th at p. 1094; *Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 8 ["General and indefinite assertions of liability are not sufficient compliance with the rules of pleading . . . . Facts, not conclusions, must be pleaded"].) Second, the proposed addition—in tension with the existing allegations—concedes Graves did have authority to execute the Assignment but for some unspecified reason the authority conferred was insufficient. Still missing are alleged *facts* as to

why it was insufficient, and plaintiff has recited no facts she would add to the complaint if given further leave to amend that would remedy the deficiency. (*Cantu*, *supra*, 4 Cal.App.4th at p. 890 [to meet the burden to show a possibility of amendment "a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action"].)

Finally, the operative complaint alleges the Assignment is void because "[m]any of the instruments . . . Graves executed, including the Assignment of which [p]laintiff complains, were notarized by the notary now familiar in this case . . . Castillo," who was under criminal investigation at the time and, as alleged, later pled guilty in 2014 to fraudulently notarizing documents. Even assumed true, these allegations have no bearing on what happened here. Plaintiff still has not alleged facts that would suggest Castillo's criminal conduct extended to this case such that she falsely verified a document Graves did not in fact sign. Plaintiff makes no showing in her briefs on appeal that she could allege facts to remedy the deficiency—the most she is able to muster is a passing, conclusory assertion that the Assignment "was acknowledged by a notary public who knew or should have known it was false; they [i.e., Graves and Castillo] had been co-workers for some time." Again, that knew-or-should-have-known assertion is not a well-pleaded factual allegation on which liability may be had.

C. The Trial Court Correctly Denied Further Leave to Amend to Add New Causes of Action and Defendants, Which Would Be Beyond the Scope of Our Remand

Only a sliver of plaintiff's case remained after our last opinion remanding this case to the trial court. We held the trial court correctly sustained demurrers to all of plaintiff's causes of action and we affirmed denial of leave to amend as to all but the wrongful foreclosure cause of action. We remanded the case to the trial court solely because we believed there was a reasonable possibility plaintiff could plead a valid cause of action for wrongful foreclosure against PNMAC and we concluded she "should have an additional opportunity to amend her complaint to state a valid wrongful foreclosure claim."

Plaintiff got just what we ordered, but as we have just explained, she failed in her fourth attempt to state a valid cause of action. In the trial court, she asked for yet another opportunity to amend to add never-before-asserted causes of action and new defendants, which the trial court denied. She now makes the same request on appeal. Specifically, she argues she should be given leave to assert causes of action for (1) promissory estoppel, (2) a violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200), (3) intentional interference with prospective economic advantage, (4 and 5) negligent "and/or" intentional infliction of emotional distress, (6) "fraudulent deceit," (7) "vicarious responsibility of the willful torts committed by Graves and Castillo," and (8) "violating the statute governing out of state affidavits" (Civ. Code, § 2015.5). She also proposes to add CitiMortgage, Inc. and MERS in place of Doe defendants, claiming she was not previously aware of facts giving rise to a cause of action against them.

We will not order granting of leave to amend the operative complaint in any respect. Four times plaintiff failed to allege a valid cause of action, and these repeated failures are reason to conclude the trial court did not err in denying further leave to amend. (*Ruinello v. Murray* (1951) 36 Cal.2d 687, 690 ["Although the deficiencies in plaintiff's complaints were raised in defendant's demurrers, after three attempts he has not overcome them. The trial court could reasonably conclude that he was unable to do so, and accordingly, it did not abuse its discretion in sustaining the demurrer to the third amended complaint without leave to amend"]; see also *Johnson v. Ehrgott* (1934) 1 Cal.2d 136, 138 ["[T]here must be a limit to the number of amended complaints"]; *Titus v. Canyon Lake Property Owners Assn.* (2004) 118 Cal.App.4th 906, 918; *Cantu*, *supra*, 4 Cal.App.4th at p. 890 ["A trial court does not abuse its discretion when it sustains a demurrer without leave to amend if . . . it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a claim"]; *Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 967.)

Just as important, all of plaintiff's proposed amendments are beyond the scope of our remand order, which was limited to giving plaintiff a further chance to amend her wrongful foreclosure claim in light of *Yvanova*. (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 860 ["when an appellate court remands a matter with directions governing the proceedings on remand, 'those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void"].) The trial court correctly rejected—and we reject—plaintiff's proposal to essentially start this litigation again from scratch with an entirely new complaint and a new set

of defendants. Plaintiff has been given well more than a fair opportunity to correct any defect and it is time this lawsuit comes to an end.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

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BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.